

STEVENS v. NHS Bank et al LRSC 16 (17 August 2012)

Edna I. Stevens by and thru her Attorneys-In-Fact, **Rosemarie B. James** and **M. Wilkins Wright**, Monrovia, Liberia, MOVANT Versus **National Housing and Savings Bank**, Represented by and thru its President, **Charles E. Sirleaf** of the City of Monrovia, Liberia, FIRST RESPONDENT And **The Way of Grace Ministries** by and thru its Representative, **Rev. C. William Simmons** of the City of Monrovia, SECOND RESPONDENT

MOTION TO DISMISS APPEAL

HEARD: June 12, 2012 DECIDED: August 17, 2012

MR. JUSTICE KORKPOR DELIVERED THE OPINION OF THE COURT

On May 20, 2009, Edna I. Stevens, by and thru her attorneys-in-fact, Rosemarie B. James and M. Wilkins Wright, movant/appellee, filed this motion to dismiss the appeal announced by the Way of Grace Ministries, respondent/appellant. The appeal was taken from a ruling entered in favor of the movant/appellee in a petition for relief from judgment filed by the movant/appellee. In order to fully understand the case, we have deemed it necessary to give a brief synopsis of what transpired leading to the filing of this motion to dismiss appeal:

On February 16, 1981, Edna I. Stevens, movant/appellee, entered into a loan agreement with the National Housing and Savings Bank. Under the loan agreement she borrowed the amount of US\$46,475.64 to be paid in equal monthly installments of US\$531.90. The maturity date of the loan was set at October 31, 1998.

On February 16, 2001, the National Housing & Savings Bank filed a petition at the Sixth Judicial Circuit, Civil Law Court, Montserrado County, to foreclose the mortgage under the loan agreement, contending that the movant/appellee had defaulted in payment on the loan and that the movant/appellee, as at the time of filing the petition for foreclosure, was indebted to the National Housing & Savings Bank

in the total amount of US\$188,982.20, inclusive of interests and other charges.

At the call of the foreclosure proceedings, the movant/appellee was not present because she was not personally served with summons to appear. The subsequent resummons issued was also not served on the movant/appellee. Service by publication was carried out, but the movant/appellee still did not appear. Thereafter, default judgment was prayed for and entered against the movant/appellee and the proceedings heard ex-parte and a final judgment rendered against her on April 25, 2001.

Judge William B. Metzger, who presided over the Civil Law Court at the time, ordered the mortgage foreclosed and the mortgaged property exposed to public sale to be sold after 30 days as of the court's final judgment in the event the movant/appellee failed to satisfy the judgment amount of US\$188,982.20. The property was eventually sold to the Way of Grace Ministries.

On March 27, 2008, the movant/appellee filed a motion seeking relief from the judgment entered in the foreclosure proceedings. In her petition, the movant/appellee prayed the lower court to vacate the judgment and nullify the sale of the mortgaged property. The movant/appellee stated in her petition that the National Housing and Savings Bank did not fully comply with the law controlling service of process by publication because copy of the publication was never mailed to her last known address as required by law.

Section 3.40, 1LCL Revised, Civil Procedure Law, service by publication and mailing provides:

If the return on the writ of resummons shows that the defendant has not been served and if the plaintiff makes application not later than ten days after such return, the court shall order service of the summons to be made by publication. An order for service by publication shall direct that the summons be published together with a brief statement of the object of the action in a recognized newspaper for a specified time, at least once in each of four successive weeks. The first publication shall be made within twenty days after the order is granted. On the day of each publication, a copy

thereof together with a copy of the complaint shall be mailed by registered mail to the last known address of the defendant. [Emphasis supplied]

The movant/appellee contended that her address, as well as the address of one of her attorneys-in-fact, Counselor Rosemarie B. James was known to the National Housing & Savings Bank; that since no copy of the publication was mailed to her last known address, or to the last known address of her said attorney-in-fact in keeping with statute, the lower court did not acquire jurisdiction over her person in the foreclosure proceedings; hence she cannot be bound by the judgment growing out of the foreclosure proceedings.

The movant/appellee further contended in her petition seeking relief from judgment that the default judgment obtained by the National Housing & Savings Bank was based on misrepresentation, collusion, irregularities, and fraud, and that the entire foreclosure proceedings, including the sale and auction of the mortgaged property were irregular, illegal and in violation of the statute governing foreclosure. The movant/appellee maintained that the National Housing & Savings Bank sold the mortgaged property under the loan agreement to the Way of Grace Ministries long before the mortgage was foreclosed and the mortgaged property exposed to public sale by the court. This, according to the movant/appellee, was a glaring example of gross irregularities and fraud for which the foreclosure proceedings should be nullified.

We see in the records before us that service by publication was prayed for, granted and carried out in keeping with law to bring the National Housing & Savings Bank under the jurisdiction of the trial court in the matter of the petition for relief from judgment. The summons, together with a brief statement of the object of the petition for relief from judgment was published in the Daily Observer Newspaper once a week for four successive weeks and copy of each publication, together with a copy of the complaint, was mailed by registered mail to the National Housing & Savings Bank. The address used for the National Housing & Savings Bank was: National Housing & Savings Bank, P.O. Box 0818, Monrovia, Liberia. Although service by publication in our opinion, was done in keeping with law, the National Housing & Savings Bank still did not file any responsive pleading.

On April 7, 2008, the Way of Grace Ministries filed returns to the petition seeking relief from judgment contending inter alia: a) that Counselors Rosemarie B. James and M. Wilkins Wright lacked the legal capacity to sue as attorneys-in-fact for and on behalf of Edna I. Stevens; b) that the petition for relief from judgment was not timely filed; and c) that the petitioner's petition failed to establish any wrong doing or that the judgment in the foreclosure proceedings was obtained through material misrepresentation of fact or law.

On November 17, 2008, the case was ruled to trial by Judge Yussif D. Kaba, then presiding over the Civil Law Court by assignment.

On February 3, 2009, Judge S. Geevon Smith, also presiding by assignment over the Civil Law Court, heard movant/appellee's side of the case and reserved ruling. The records show that even though Counselor Jonathan Williams, representing the Way of Grace Ministries, the respondent/appellant, received and signed for the notice of assignment for the hearing of the petition for relief from judgment, he failed to attend upon the cause.

On February 13, 2009, Judge Smith entered final ruling in the case granting the petition for relief from judgment. We quote the concluding portion of the Judge's ruling:

WHEREFORE AND IN VIEW OF THE FOREGOING, this court hereby grants the petitioner's petition/motion for relief from judgment and hereby vacates the judgment of this Honorable Court handed down on the 25th day of April, A.D.2001, in an action of Foreclosure of mortgage. The Court further puts petitioner in possession of her property (status quo ante), the subject of the foreclosure proceedings, with all rights and privileges appertaining thereto. Costs are ruled against the respondents.

To the ruling granting the petition for relief from judgment, the respondent/appellant, through its counsel, noted exception and announced an appeal to this Court sitting in its March Term, A.D. 2009. The exception was noted and the appeal granted.

On May 20, 2009, the movant/appellee, through her counsels, The International Group of Legal Advocates and Consultants, filed a motion to

dismiss the appeal announced by the respondent/appellant. The motion to dismiss appeal states essentially that the respondent/appellant failed to fully comply with the statute on appeal in that even though the respondent/appellant filed its bill of exceptions in statutory time, the respondent/appellant failed to file an appeal bond and serve and file a notice of completion of appeal as required by law. The movant/appellee obtained a clerk's certificate from the trial court on April 15, 2009, to substantiate that the respondent/appellant did not fully comply with the appeal statute. The clerk's certificate reads:

CLERK'S CERTIFICATE

This is to certify that from a careful perusal of the records of this Honourable Court, it is observed that the respondent in the above entitled cause of action has failed to file in this court its Notice of Completion of Appeal in the above entitled cause of action up to and including the issuance of this Clerk's Certificate. HENCE THIS CLERK'S CERTIFICATE.

At this juncture we shall quote the relevant provisions of our appeal statute applicable to the case before us.

Section 51.4, 1LCL Revised, Civil Procedure Law, requirements for completion of an appeal provides:

The following acts shall be necessary for the completion of an appeal: (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.

Section 51.8, 1LCL Revised, Civil Procedure Law, appeal bond provides:

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.

Section 51.9, 1LCL Revised, Civil Procedure Law, notice of completion of appeal provides:

After the filing of the bill of exception and the filing of the appeal bond as required by section 51.7 and 51.8, the clerk of the trial court on application of the appellant shall issue a notice of the 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.

We must note here that our law on appeal is quite clear and mandatory; it leaves no room for discretion. Where it is established that an appealing party had failed and/or neglected to comply with any of the grounds prescribed by statute, the appeal, as a matter of law, shall be dismissed; this is unequivocally stated under section 51.4, 1LCL Revised quoted above. Only in very rare and exceptional cases where good cause was established has this Court allowed an appealing party who did not meticulously comply with the appeal statute to have his/her appeal heard. In all such cases transparent justice is the overriding consideration.

But where it is clearly established that an appealing party had grossly failed, without a show of good cause, to comply with any of the grounds prescribed by statute to perfect an appeal, this Court is even precluded from opening the case file to pass on other issues raised by the parties. In fact, this Court has adopted the position that where a party fails to comply with the mandatory requirements as set forth by the statute for the completion of an appeal, the appellee in such case has not been brought under the jurisdiction of the Supreme

Court. *Lamco J V Operating Company et. al. v. Doekpar*, 32 LLR 58 (1984).

Thus, in a motion to dismiss appeal, only the contentious issues raised by parties regarding the appeal process is considered and passed upon, and unless the motion to dismiss is denied, other issues raised in the main case will not be considered. Therefore, while the parties in the instant case have raised several other issues, we are solely concerned with those contentious issues bordering on the appeal process. In other words, we must decide whether or not the respondent/appellant in this case met all requirements prescribed by statute to have its case heard on appeal by this Court? If yes, we shall consider the other issues raised in the main case on appeal, otherwise, the entire appeal, as a matter of law, shall be dismissed.

From the records, we see that on February 13, 2008, final judgment in the petition for relief from judgment was rendered. On the same day, the respondent/appellant, through its counsel, noted exception to the ruling and announced an appeal to the Supreme Court, thereby fulfilling the first requirement under the appeal process. Thereafter, the respondent/appellant filed its bill of exceptions on February 23, 2009, ten days after the rendition of the final judgment, thereby fulfilling the second requirement under the appeal process.

But no further steps were taken by the respondent/appellant in pursuit of the appeal after the filing of the bill of exceptions. This means that the respondent/appellant did not comply with two other mandatory requirements of the appeal statute-filing of an appeal bond, and service and filing of the notice of completion of appeal.

In the resistance to the motion to dismiss appeal and the brief filed and argued before this Court, the counsel for respondent/appellant did not deny that the respondent/appellant failed to comply with the last two steps of the appeal process. In an answer to a question from the bench, the counsel said he could not file an appeal bond because he did not receive funds from the respondent/appellant to process the appeal bond. Certainly, the failure of a party to provide funds to process an appeal bond is a flagrant and wanton act which by no means amounts to good cause. So, clearly there is no doubt that the respondent/appellant was in

violation of the statute on perfecting appeal by failing to file an appeal bond and to serve and file the notice of completion of appeal.

Section 51.16, 1LCL Revised, Civil Procedure Law, dismissal of appeal for failure to proceed provides:

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 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. [Emphasis supplied.]

In line with the statute quoted above, the Supreme Court has held that failure to file appeal bond and notice of completion of appeal deprives the Supreme Court of jurisdiction and the appeal will be dismissed. *Ahmar v. Gbartoe*, 42 LLR, 117 (2004).

Based on these authorities, we hold that the respondent/appellant having failed to file an appeal bond and to serve and file a notice of completion of appeal did not fully comply with the statute controlling appeal; the appeal announced by respondent/appellant from the trial court granting the petition for relief from judgment is therefore dismissed.

WHEREFORE, the ruling of the trial judge granting the petition for relief from judgment is hereby confirmed. The Clerk of this Court is ordered to send a mandate to the Sixth Judicial Circuit, Civil Law Court, Montserrado County, to enforce its ruling of February 13, 2008. Costs are ruled against the respondent/appellant. IT IS SO ORDERED.

RULING CONFIRMED.

Counsellors Emmanuel B. James and Rosemarie B. James appeared for the appellee/movant. Counsellor Jonathan Williams appeared for the respondent/appellant.

Please see pdf for Clerk Certificate