MOHAMMAD SILLAH et al., Appellants, v. **H. VARNEY G. SHERMAN** and **JOYCE W. D. SHERMAN**, Appellees.

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

Heard: November 27, 1989. Decided: January 9, 1990.

1. An appeal will not be dismissed where another judge regularly sitting or assigned to the circuit has approved the bond, and especially so when the Supreme Court has ordered him to do so and that the failure of the trial judge to approve an appeal bond is not one of the statutory grounds for the dismissal of an appeal.

2. The failure to comply with any of the statutory requirements within statutory time is ground for dismissal of an appeal.

3. Failure of the appellant to file an approved appeal bond and to secure and file notice of completion of appeal deprives the appellate court of jurisdiction; hence, grounds for dismissal of the appeal.

4. An appeal will be dismissed for failure to serve a notice of completion of appeal even where such failure is due to the neglect of the clerk of the trial court in complying with the appellant's directive to issue such notice.

5. It is the duty of the appellant to superintend the appeal and ensure that all the legal requirements are completed.

H. Varney G. Sherman and Joyce W. D. Sherman, the appellees, filed a six-count motion to dismiss appellants' appeal for failure on the part of the appellants to file an approved appeal bond and to have a notice of completion of the appeal issued, served and returned served within statutory period. Appellants filed a seven-count resistance to the appellees' motion, alleging, among other things, that they timely filed an approved bond but that it was the clerk of court who did not only change the date on the notice of completion of the appeal from September 29, 1989 to September 30, 1989 but did not deliver same to the ministerial officer until the following Monday, October 2, 1989.

The Supreme Court held that the allegation of the appellants that the bond was timely approved was untrue. The Court also held that had the appellants superintended or properly supervised their appeal, perhaps the omission would not

have been so fatal, as their failure to see to it that the legal requisites were completed, rendered the appeal dismissible. Therefore, the appeal was dismissed.

Johnnie N. Lewis appeared for the appellants. *H Varney G. Sherman* appeared for the appellees.

MR. JUSTICE AZANGO delivered the opinion of the Court.

At the call of the case, our attention was called by counsel for appellees, who is himself one of the appellees, that they had filed a motion to dismiss the appeal. The motion embraces the following:

1. That the final judgment in the action of ejectment was rendered on the 31' day of July, A. D. 1989.

2. That under the law, an approved appeal bond should have been filed on or before the 29t h day of September, A. D. 1989 and notice of completion of appeal issued, served and return served on or before the 29th day of September, A. D. 1989. However, by 10:00 a.m. on September 30, 1989, no approved appeal bond had been filed and no notice of the completion of the appeal had been issued, served and return, served as per clerk's certificate.

3. That it was not until subsequent to the issuance of the clerk's certificate that the resident circuit judge approved the appeal bond on Saturday, September 30, 1989 and backdated it to Friday, September 29, 1989 for reasons best known to himself, notwithstanding, the fact that the law requires that the Assigned Judge Varnie D. Cooper should not have approved the appeal bond unless good cause can be shown for not submitting the appeal bond to the trial judge for approval within statutory time. Movants/appellees submit that respondents have no good cause for not submitting the appeal bond to the trial judge for approval within statutory time.

4. That this Supreme Court has held on many occasions that in order to assure full indemnification of the appellee and to assure compliance with the judgment, the value of the appeal bond should be at least one-and-one-half times the judgment value. The judgment amount in this case is twenty-nine thousand, one hundred ($29,100.00) dollars in damages in addition to the recovery of the property purchased by movants/appellees at the price of twenty-five thousand ($25,000.00) dollars as per the warranty deed presented into evidence by movant/appellees. The total judgment value therefore is fifty-four thousand one hundred ($54,100.00) dollars and a

sufficient appeal bond should have been Eighty-one thousand, one hundred fifty dollars ($81,150.00).

5. That the surety to respondents/appellants' appeal bond is the Mutual Assurance of Africa, Inc., which though authorized to serve as the surety to bonds as in keeping with its organizational papers filed with the appeal bond, a decision of this Supreme Court shows that said Mutual Assurance of Africa does not have the financial capacity or the assets to cover this appeal bond for forty thousand dollars ($40,000.00), given that said Mutual Assurance of Africa, Inc., is currently sole and exclusive surety on various bonds in the courts of Montserrado County alone in the amount of four million five hundred thirty-eight thousand six hundred and sixty-nine dollars and eighty two cents ($4,538,669.82), and said Mutual Assurance of Africa Inc., does not have the asset to cover these outstanding bonds. These various out-standing and existing surety bonds are evidenced by copies of clerk's certificates.

6. That under the law, unless the Mutual Assurance of Africa, Inc., can show that it has surplus assets over and above the four million five hundred thirty eight thousand six hundred sixty nine dollars eighty two cents ($4,538,669.82) for which it has already issued surety bonds, and that such surplus assets are unencumbered, the surety bond of forty thousand dollars ($40,000.00) is insufficient and defective. As a matter of fact, attached to each surety bond should be the most recent financial statement of said Mutual Assurance of Africa, Inc. submitted to the Bureau of Insurance of the Ministry of Commerce and Industry and the Ministry of Finance, which when compared to its liabilities as stated in count five (5) above and all other liabilities, will reveal that said Mutual Assurance of Africa, Inc. does not have unencumbered and surplus assets in the amount or in excess of forty thousand dollars ($40,000.00). Indeed, just as a natural person who is surety on a bond must show evidence of his unencumbered real property by a property valuation certificate from the Ministry of Finance, an insurance company authorized to be surety must show its financial capacity by a certificate or other financial papers approved by a governmental or other regulatory agency so as to assure this court of compliance with the judgment to ensure indemnification of movant/appellees. The mere filing of the authority to be surety does not assure the Court of any compliance with the judgment as the insurance company could very well be insolvent even though it has the authority to be surety.

Based on the foregoing, the appellees prayed this Court to dismiss the appeal and order the trial court below to resume jurisdiction and enforce its judgment and grant unto appellees any further relief as to such matters made and provided by law.

Resisting this motion to dismiss, appellant's counsel con-tended and argued, as follows:

1. That traversing count two of the motion, respondents deny the allegations therein contained to the effect that by 10:00 a.m. on September 30, 1989, no approved appeal bond had been filed and no notice of completion of appeal bond had been served and returned served, and that the certificate issued, marked M/2, was issued in bad faith. Respondents say that on Friday, September 29, 1989, they, by and through their legal counsel, presented their appeal bond to His Honour Hall W. Badio, Sr. then presiding over the Civil Law Court, for his approval. But because he was then conducting court, instructed that it be delivered to the clerk of court, Irene Ross-Railey, who would lay same on his desk for his approval. In addition to the appeal bond, counsel for respondents/appellants also delivered to the clerk the notice of completion of appeal, which had been prepared by his office (as is normally done) dated September 29, 1989, and the fees of twenty-five dollars ($29.00), i.e. ten dollars for the clerk of court and fifteen dollars for the ministerial office to have the notice of completion of appeal served upon counsel for movants/appellees. Respondents/appellants submit that the appeal bond was timely approved by the trial judge, but the clerk of court not only neglected to have same filed on the same day, but elected to change the date appearing on the notice of completion of appeal prepared by counsel for respondents/appellants on September 30, 1989, and did not deliver same to the ministerial officer until the following Monday, October 2, 1989, for reasons best known to himself. Respondents/appellants submit that these acts being acts of the clerk of court, when respondents/appellants' counsel had done everything to have all the statutory requirements for completion of an appeal met by Friday, September 29, 1989, respondents/appellants pray most respectfully that count two of the motion be overruled.

2. Further to count one of this resistance, respondents/ appellants say that on delivering the appeal bond to the clerk of court, based upon the instructions of the trial judge, he left town immediately for Gbarnga, Bong County, where he was involved in a criminal trial, and did not return until Sunday evening, October 1, 1989.

3. As to count three of the motion, respondents/appellants say that the appeal bond was approved by His Honour Hall W. Badio, Sr., who was then assigned and presiding over the Civil Law Court.

4. As to count four of the motion, respondents/appellants say that the amount of indemnification is adequate; for the amount of the judgment is twenty-nine thousand

one hundred dollars ($29,100.00). Respondents/appellants pray that count four be overruled and dismissed.

5. As to counts five and six of the motion, respondents confirm that the movant/appellees have failed to show that the appeal bond is insufficient. Respondents/appellants submit that where the appellee attacks a bond as being insufficient, it is the duty of said appellee to show the insufficiency, rather than to require the appellant to show that the bond is sufficient. Respondents/appellants pray, therefore that counts five and six of the motion be overruled.

6. Further traversing count six of the motion, respondents say that it is not a requirement of the law that to each surety bond with Mutual Assurance of Africa, Inc., as surety, there must be attached its most recent financial statement submitted to the Bureau of Insurance and the Ministry of Finance.

7. Respondents/appellants deny all and singular the allegations of law and facts contained in the motion which have not been made a matter of special traverse in this resistance. Based on the foregoing resistance, the respondents/appellants prayed that the motion to dismiss is denied and the merits of the appeal heard by this Court.

Reference to these issues, the Court says that counts one and two of the motion are sustained as against counts one, two, three, of the resistance. Section 51.8 of the Civil Procedure Law provides that the appellant shall secure the approval of the appeal bond by the trial judge, and an appeal will not be dismissed where another judge regularly sitting or assigned to the circuit has approved the bond, and especially so when the Supreme Court has ordered him to do so. The failure of the trial judge to approve an appeal bond is not one of statutory grounds for the dismissal of an appeal. *King Peter's Heirs v. Gigger,* 27 LLR 287 (1978). But the failure to comply with any of the statutory requirements within statutory time, is ground for dismissal of the appeal. Civil Procedure Law, Rev. Code 1:51.4, 1:51.9.

Recourse to the records of this case shows a certificate of the clerk of court, and it specifically states that:

"This is to certify that at 10:00 a.m. on Saturday, September 30, 1989, upon a careful perusal of the records of the above captioned case, upon the request of Counsellor Varney Sherman, it is discovered that no approved appeal bond had been filed and no notice of completion of appeal had been issued, served or returned served. Hence, this certificate.

"GIVEN UNDER MY HAND AND SEAL
OF THIS HONORABLE COURT THIS
30TH. DAY OF SEPTEMBER, A.D. 1989
t/ Irene Ross-Bailey
s/Irene Ross-Bailey
CLERK/CIVIL LAW COURT,
MONTSERRADO COUNTY"

Another significant point appearing from the records which should not escape the judicial eyes is the lack of authenticity and the doubts surrounding the alleged approval of the appeal bond. There is a question as to whether or not the appeal bond and the notice of completion of the appeal were in fact and in law presented on the 29th day of September, A. D. 1989 to His Honor, Hall W. Badio, Sr., for approval, when we have observed that the bill of exceptions was presented to and approved by His Honour Varnie D. Cooper, "the assigned trial judge on the 7t h day of August, A. D. 1989. Why were the appeal bond and the notice of completion of the appeal not presented and approved on the same day to be within the sixty (60) days period as required by law? This supports the probity of the clerk's certificate, which must be, to all intents and purposes, accepted as valid, and the notation made by Judge Badio on the appeal bond and the notice of the completion of the appeal must be disregarded.

Moreover, it is the requirement of the law that failure of the appellants to file an approved bond and to secure and file notice of completion of the appeal deprives the appellate court of jurisdiction and, of course, constitutes grounds for dismissal of the appeal. *Marh v. Sinoe,* 27 LLR 320 (1978).

It is also the requirement of the law that an appeal will be dismissed for failure to serve a notice of completion of appeal even where such failure is due to the neglect of the clerk of the trial court in complying with appellant's direction to issue such notice. It is the duty of appellants to superintend the appeal and to see that all legal requisites are completed. *Cole v. Larmi,* 25 LLR 450 (1977). The Court holds that the argument of the respondent/appellant, that on Friday, September 29, 1989, they by and thru their legal counsel presented their appeal bond to His Honour Hall W. Badio, Sr., then presiding over the Civil Law Court for his approval, but because he was then conducting trial, instructed that it be delivered to the clerk of the trial court, Irene Ross-Railey, who lay same on the trial judge's desk for his approval is fallacious. The second argument that in addition to the bond, counsel for respondent/appellants

also delivered to the clerk the notice for the completion of the appeal which had been prepared in his office and dated September 29, 1989, and fees of twenty-five ($25.00) dollars i.e. ten dollars for the clerk of court and fifteen dollars for the ministerial officer to have the notice of completion of appeal served upon counsel for the movants/ appellees is not credible and dehors the records. The third argument that the appeal bond was timely approved by the trial judge but the clerk of court, not only neglected to have same filed on the same day but, elected to change the date on the notice of completion of the appeal prepared by counsel for respondents/ appellants to September 30, 1989 and did not deliver same to the ministerial officer until the following Monday, October 2, 1989 for reasons best known to herself is a serious but unsupported and unsubstantiated allegation. That fourth submission that the acts or neglect and omission were those of the clerk of the trial court and not appellant, because appellant's counsel had done everything to have all of the statutory requirements for completion of the appeal met by Friday, September 29, 1989, are not credible.

We hold the view that these contentions are untenable and unacceptable. The allegations that the appeal bond was timely approved by the trial judge is untrue as per appellants' appeal bond. The legal maxim *falsus in uno falsus in oninibus* therefore properly applies in this case..

As to the submission that the clerk had failed, neglected and refused to performed his duties in respect of the appeal bond and the notice of completion of appeal, appellants, knowing that such conduct, if true would have been detrimental or prejudicial to their appeal, should have adopted the appropriate legal remedy by applying for the writ of mandamus against the clerk or the court to perform a legal duty. Why didn't they? This is fatal.

It is also our view that had respondents/appellants superintended or exercised the charge of oversight of, or overseeing with great diligence with the power of direction or taking care of, or directed with authority or control, regulated or properly supervised their appeal, perhaps the omissions would not have occurred. Their failure to see that all of the legal requisites were completed renders the appeal dismissible, especially so when the clerk, in her certificate, has clearly stated that at 10 :00 a.m. on Saturday, September 30, 1989, upon a careful perusal of the records of the case, upon request of Counsellor Varney Sherman, it was discovered that no approved appeal bond had been filed and no notice of completion of appeal had been issued, served or returns served. One wonders now and then where the alleged approved bond, notice of completion of appeal would be, if they were not in the files of the clerk of court. This is strange, indeed.

As to issues four and five of the resistance, they are overruled inasmuch as we have found the entire motion unmeritorious. Therefore, there is hardly any necessity for a traversal of the issues or a laborious legal treatment or research on the said counts.

It is therefore our view that the motion being sound in law, same should be and is hereby granted and the appeal dismissed.

The Clerk of this Court is hereby ordered to send a mandate to the court below, with instructions that it will resume jurisdiction over the subject matter and enforce its judgment. Costs are ruled against the respondents/appellees. And it is hereby so ordered.

Motion granted; appeal dismissed.