

Hejazi Corporation, represented by and through its Authorized Representative,
Anis Hejazi, a Lebanese National, of the City of Monrovia, Liberia
RESPONDENT/APPELLANT Versus **Ms. Elise Cooper**, Administratrix of the
Intestate Estates of the Late Roland Cooper and **Nancy Cooper**, by and through her
Attorney-In- F act, Administrator of the Estate of Emmett W. Cooper, both of the
City of Monrovia, Liberia MOVANTS/APPELLEES.

LRSC 25

MOTION TO DISMISS APPELLANT'S APPEAL

HEARD: MARCH 31, 2010 DECIDED: JUNE 29, 2010

MR. JUSTICE KORKPOR DELIVERED THE OPINION OF THE COURT

On June 29, 2004, the movants/appellees filed a bill in equity for the cancellation of a lease agreement in the Civil Law Court, Sixth Judicial Circuit, Montserrado County.

They alleged, *inter alia*, that the lease agreement which they sought to cancel was obtained by fraud. The respondent/appellant filed returns denying the allegations contained in the complaint, and the movants/appellees thereafter filed a reply to the returns along with a motion for summary judgment. The motion for summary judgment was assigned, heard and on April 19, 2006, His Honour Kobo K. Nuta, presiding over the March, 2006 term of the Civil Law Court, Sixth Judicial Circuit, Montserrado County, entered ruling granting the motion for summary judgment, thereby cancelling the lease agreement. The respondent/appellant noted exception to the ruling and announced an appeal to this Court.

On April 25, 2006, respondent/appellant filed a bill of exceptions and an approved appeal bond, copies of which were served on movants/appellees.

On September 29, 2006, the movants/appellees filed a six-count motion to dismiss the respondent/appellant's appeal on the ground that the respondent/appellant failed to file and serve the notice of completion of appeal within the period of sixty (60) days after the rendition of ruling as required by statute. We quote the motion:

"1. Movants say that on April 19, 2006, Judge Kobo K. Nuta, Assigned Circuit Judge presiding over the March A.D. 2006 term of the Civil Law Court, Sixth Judicial Circuit, ruled granting movants/appellees' motion for summary judgment against the respondent/appellant. The appellant excepted to the ruling and announced an appeal to the Supreme Court of Liberia, sitting in its October Term, A.D. 2006..."

"2. Movants say in order for the Supreme Court of Liberia to legally acquire appellate jurisdiction over a matter, an appellant must fully comply with the provisions of § 51.4 of the Civil Procedure Law which stipulates the four (4) steps to complete the appeal process. Movants submit that these statutory requirements are mandatory, and the statute provides that failure by an appellant to comply with any of these requirements within the time allowed by statute shall be ground for dismissal of an appeal.

"3. Movants submit that our statutory and decisional laws governing appeals from courts of record to the Supreme Court mandate and require an appellant to complete all of its appeal requirements within sixty (60) days of the rendition of final judgment. In this instance, this meant that the appellant should have prepared, filed and served its notice of completion of appeal on or before June 19, 2006 — same being the 61st day after the rendition of the trial court's ruling, since June 18, 2006, the 60th day, fell on a Sunday. A certificate issued by the Clerk of the Civil Law Court, attached hereto as exhibit M/2, confirms that as of September 12, 2006 more than one hundred and forty six (146) days since the trial court's ruling, the respondent had failed to file a notice of completion of appeal."

"4. Movants' motion to dismiss the respondent's appeal is predicated upon the respondent/appellant's failure to have either filed or served its notice of completion of appeal within the statutory period of sixty (60) days after the rendition of the trial court's ruling granting the movant's motion for summary judgment."

"5. [Movants say] that §51.9 of the Civil Procedure Law requires an appellant to file his notice of completion of appeal with the clerk of the trial court and thereafter to serve a copy on appellee. Our Supreme Court has held in numerous opinions that an appellant must comply with these requirements within sixty (60) days of the entry of a trial court's final judgment."

"6. Movants say that §51.16 of the Civil Procedure Law mandates the dismissal of an appeal if the appellant fails to have filed or to have served the notice of completion of appeal within the statutory period. Our Supreme Court has repeatedly and consistently held that if an appellant fails to file or serve a notice of completion of appeal within the period of sixty (60) days after the entry of a final judgment, the appellant's appeal will be dismissed."

The respondent/appellant filed a resistance to the motion to dismiss the appeal. We quote counts 2, 3, 4, 5, 6 and 7 of the resistance.

"2. That as to count 3 of the motion, respondent concedes the averments to the effect that appeals from courts of record to the Supreme Court are to be completed within sixty (60) days after the rendition of final judgment and that respondent in the instant case was to have completed its appeal on or before June 19, 2006."

"3. That also traversing count 3 of the motion, respondent says that it completed its appeal process on May 31, 2006, by superintending the issuance, by the Clerk of the Civil Law Court, and service, by the ministerial officer of Montserrado County, on both counsels for movants and respondent, of the notice of completion of appeal in the case out of which this motion grows..."

"4. That as to count 4 of the motion, respondent confirms count 3 of the resistance and incorporates said count 3 into this count of the resistance in traversal of count 4 of the motion. Hence, count 4 of the motion along with the entire motion should be denied and dismissed."

"5. That as to count 5 and 6 of the motion, respondent says that the Supreme Court of Liberia held in the cases: *Vamply of Liberia versus J. Romeo Manning*, 25 LLR, 188 and *Boimah Taylor versus Pasi Wonkor Yarseah*, 25 LLR, 453 that an appeal will be dismissed for failure to serve on appellee a notice of completion of appeal. In the instant case, respondent superintended the issuance by the clerk and the service of the notice of completion of appeal fifty-four (54) days after the rendition of final judgment in the case out of which this motion grows. Hence, the completion by respondent, of the statutory requirement for the perfection of appeal."

"6. Also traversing counts 5 and 6 of the motion, respondent says that the Supreme Court of Liberia held in the case: *Citibank, N. A. Liberia Branch (In liquidation) Versus James A. A. Barrow*, 37 LLR, 727, that the service of a notice of completion appeal upon the appellee by the ministerial officer of the trial court completes the appeal and places appellee under the jurisdiction of the appellate court; when not completed within statutory time the court will dismiss said appeal for lack of jurisdiction; an appeal must be perfected within sixty (60) days after final judgment by the service of the notice of completion of appeal upon the appellee; and the notice of completion of appeal must not only be issued by the clerk of the court within sixty days after final judgment, but must be served within such time.... The Supreme Court also held in the case: *IIP Limited versus Gabriel Baccus Matthew*, 37 LLR, 808, that, service of notice of completion of appeal upon the appellee by the sheriff completes the appeal and establishes the jurisdiction of the Supreme Court. An endorsed acknowledgment of

such service by the appellee is sufficient proof thereof and the appeal is not dismissible solely by reason of the sheriff's failure to make separate returns. In the instant case, movant/appellee received and signed for a copy of the notice of completion of appeal through Christiana Sonpon Freeman on May 31, 2006, at the hour of 2:00 p.m. Accordingly and consistent with the laws cited herein the jurisdictional requirement for the perfection of an appeal has been fully complied with by respondent. Hence, this Court has jurisdiction over the appeal and movants' motion to dismiss respondent's appeal is a fit subject for denial and dismissal, and respondent prays Your Honours to so rule and declare."

"7. That further traversing counts 5 and 6 of the motion, respondent says that consistent with the practice and procedure hoary with age in this jurisdiction, the appellant makes application to the clerk and the clerk issues the notice of completion of appeal addressed to the sheriff directing him to receive the notice of completion of appeal issued in triplicate copies, serve same by leaving a copy with the appellee and return the original to the office of the clerk with the sheriff's endorsement on the back as to the manner of service. So, if the sheriff received the notice of completion of appeal, served same on the parties thereto as required by law and failed to make his returns as to the manner of service of said notice of completion of appeal, the party litigant cannot be and should not be penalized for the failure and neglect of the sheriff consistent and in keeping with the law, procedure and practice in this jurisdiction."

The movants/appellees filed a replying affidavit to the respondent/appellant's resistance. The filing of a replying affidavit is permitted under our practice, as provided under Part II, § 1 of the Revised Rules of the Supreme Court (1999). We quote counts 3, 4, 5,6,7, 8, 10 and 11 of the replying affidavit:

"3. As to counts 3 through 8 of the resistance, movants/appellees say that the appellant's notice of completion of appeal is fatally bad and defective because it is in violation of § 51.9 of the Civil Procedure Law, which mandates and requires an appellant to apply to the clerk of the trial court for the issuance of a notice of completion of appeal, and have the original of same filed with the clerk of the trial court, and thereafter have a copy served on the appellee — all within sixty (60) days of the trial court's judgment. Our Supreme Court has consistently held that if an appellant fails to comply with any of the procedures governing appeals within the statutory period of time, the appeal will be dismissed."

"4. Further to count 3, above, appellees submit that the appellant did not file its notice of completion of appeal within the statutory sixty-day period. A certificate issued by

the clerk of the Civil Law Court on September 12, 2006, which is attached as Exhibit "M/2" to appellees motion to dismiss, confirms that the notice had not been filed as of the date of the issuance of the aforesaid certificate. This was more than 146 days after the rendition of the trial court's ruling on April 19, 2006."

"5. Further to count 4 above, appellees say although appellant has annexed a purported notice of completion of appeal to its resistance, which is alleged to have been dated on May 31, 2006, appellees submit that the alleged May 31, 2006 date is in direct contradiction to and is inconsistent and at variance with the clerk's certificate issued on September 12, 2006 which confirms that the notice of completion of appeal was not filed. The decisional law in this jurisdiction governing the legal effect which must be given to a clerk's certificate is ITP versus Matthews, 37 LLR 808, text on page 814. In that case, the Supreme Court ruled that the clerk's certificate confirming the non filing or non service of a notice of completion is controlling and determinative and will not be disturbed."

"6. Further to count 5 above, appellees say that the alleged May 31, 2006 date which appears on appellant's notice of completion of appeal is obviously false and incorrect, because if this were the true date, neither the clerk who signed the clerk's certificate, nor the two filing clerks of the Civil Law Court who also attested to it, would have issued the certificate on September 12, 2006 — almost four (4) months later — confirming the non filing of the notice of completion of appeal. Appellees therefore submit as a matter of law, that the clerk's certificate must be considered conclusive and irrefutable evidence of the non filing of the notice of completion of appeal. The said count 3 of the resistance being false and without any factual basis, same should be overruled and dismissed."

"7. Further to count 6 above, appellees say additional evidence that the purported notice of completion of appeal was not submitted on May 31, 2006 to the trial court as is falsely alleged by the appellant, can be seen from the fact that the transcribed records of the trial court which were certified to the clerk of the Supreme Court does not list any notice of completion of appeal in the inventory of the documents; copy of the certified inventory is attached as Exhibit "R/1". This is conclusive and irrefutable proof that the notice of completion of appeal was not submitted to the trial court and therefore was not a part of the records which were forwarded to the Supreme Court on September 21, 2006."

"8. Further to count 7 above, appellees say that the fact that appellant's counsel reviewed verified and taxed the trial court's records without raising any issue that

appellant's notice of completion of appeal was omitted from the inventory further confirms that the notice of completion of appeal was not filed with the trial court. Sherman & Sherman, appellant's highly experienced and competent counsel, would not have taxed the records if the trial court's records were incomplete. They would have properly refused to tax the records and insisted on the inclusion of their notice of completion of appeal."

"9. Further to count 8 above, appellees say that appellant falsely alleges in count 3 of the resistance that the notice of completion of appeal was placed in the hands of the ministerial officer of the trial court for service on the appellees on May 31, 2006, after it had allegedly been filed. Appellees herewith submit an affidavit executed by the sheriff of the Civil Law Court which denies appellant's allegation; copy of the affidavit is attached as Exhibit 1R/2". According to Sheriff Carey, it was on October 6, 2006, when Sherman & Sherman presented him with the notice of completion of appeal and improperly requested him to back date returns showing that he had served the notice on appellees' counsel on May 31, 2006. The affidavit further confirms that he did not make any returns to the effect that the notice was served on appellees' counsel on May 31, 2006."

"10. Appellees submit that it is clear that it was only after appellees had filed their motion to dismiss the appellant's appeal on September 29, 2006 when the appellant belatedly and unsuccessfully attempted to rectify their fatal error by trying to improperly induce Sheriff Carey to make false returns that he had received and served the notice of completion of appeal on May 31, 2006."

"11. Appellees say it is timely filing and service of the appellant's notice of completion of appeal which establish and confer the jurisdiction of the Supreme Court to hear the appellant's appeal. § 51.16 of the Civil Procedure Law mandates the dismissal of an appeal if an appellant fails to file or serve the notice of completion of appeal within the statutorily mandated sixty (60) days, and our Supreme Court has consistently and repeatedly dismissed appeal because of an appellant's failure to file or serve its notice of completion of appeal within the sixty-day period."

We must say from the onset, that our law on appeal is strict, mandatory and clear. It says that failure to complete any of the requirements prescribed and within the time allowed by statute shall be ground for dismissal of an appeal. The requirements necessary for the completion of an appeal as provided for under § 51.4, 1 LCL Rev., tit. 1 (1973) are:

- a. Announcement of the taking of an appeal;
- b. Filing of the bill of exceptions;
- c. Filing of an appeal bond; and
- d. Service and filing of the notice of completion of appeal.

§ 51.9, 1 LCL Rev. tit. 1 (1973) provides:

"After the filing of the bill of exceptions and the filing of the appeal bond as required by sections 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."

§ 51.16, 1 LCL Rev., tit. 1 (1973) 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."

Both parties agree that failure of an appellant to strictly comply with any provision of the appeal process is a ground for the dismissal of an appeal. During argument before this Court, the movants/appellees contended that respondent/appellant failed to file and serve its notice of completion of appeal in time as provided by law. The movants/appellees therefore urged us to take judicial notice of the settled principle of law in this jurisdiction which says that when an appellant fails to satisfy all the statutorily mandated procedural steps to complete an appeal, the appeal will be dismissed.

The respondent/appellant, on the other hand, conceded that our appeal statute is strict and mandatory, but argued that it completed its appeal process by superintending the notice of completion of appeal which was issued by the clerk of the trial court and served by a ministerial officer. Count 3 of the respondent/appellant's resistance to the motion to dismiss appeal states:

"That also traversing count 3 of the motion, respondent says that it completed its

appeal process on May 31, 2006, by superintending the issuance, by the Clerk of the Civil Law Court, and service, by the ministerial officer of Montserrado County, on both counsels for movants and respondent, of the notice of completion of appeal in the case out of which this motion grows."

There being no disagreement on the point of law regarding the contention of the parties we must look to the records to see whether there was compliance with the appeal process. In other words, the question we must address is whether the records certified to us support the respondent/appellant's contention that it completed its appeal in time as required by statute?

We see in the records a copy of a notice of completion of appeal marked as "R/1", attached to respondent/appellant's resistance to this motion to dismiss appeal. The instrument which is dated May 31, 2006, has on its face a signature purported to be that of Ellen Hall, Clerk of the Civil Law Court. We see on the instrument, also, what appears to be the signatures of Johnny Momoh of the Sherman & Sherman, Inc., counsel for respondent/appellant and Christiana Sonpon Freeman of the Cooper and Togba and the Martin Law Offices, counsel for movants/appellees. Counsellor Johnny Momoh, while arguing before us, confirmed receiving and signing the instrument, but there is no such confirmation by Counsellor Christiana Sonpon Freeman. In fact by stating in count 4 of their motion to dismiss that movants' motion "...[is] predicated upon the respondent/appellant's failure to have either filed or served its notice of completion of appeal within the statutory period,..." the movants/appellees are disavowing the service of the notice of completion on them.

But because, according to the respondent/appellant, the notice of completion of appeal was served by the ministerial officer of Montserrado County on the counsel for movants/appellees, its appeal process was completed and its appeal cannot therefore be dismissed. The respondent/appellant has relied on the case: *ITP (Limited) vs. Gabriel Baccus Matthews*, 37 LLR 808 (1995). In that case, the Supreme Court held "[that] service of notice of completion of appeal upon the appellees by the sheriff completes the appeal and places the appellee under the jurisdiction of the appellate court. An endorsed acknowledgement of such service by the appellee is sufficient proof thereof and the appeal is not dismissed solely by reason of the sheriff's failure to make separate returns."

We confirm the principle of law in the *ITP* case stated *supra*, but hold that that principle of law is not applicable in the case before us. We shall come to this later in this opinion.

To support the contention that the respondent/appellant failed to serve and file notice of completion of appeal the movants/appellees obtained a certificate from the Clerk of the Civil Law Court which reads:

"REPUBLIC OF LIBERIA MONTSEERRADO COUNTY,
IN THE SIXTH JUDICIAL CIRCUIT COURT, MONTSEERRADO COUNTY, R.L.,
SITTING IN SEPTEMBER TERM, A.D. 2006 BEFORE HIS HONOUR: EMERY
S. PAYE ASSIGNED CIRCUIT JUDGE

IN RE: Mrs. Elsie Cooper, Administratrix of the Intestate Estate of the late Roland Cooper And Nancy Cooper, by and thru her Attorney-In-Fact, administrator of the Estate of Emmet Cooper, both of the City of Monrovia, Liberia PETITIONERS

This is to certify that from a careful perusal of the records of this Honourable Court, it is observed that the respondent has failed and neglected to file a notice of completion of appeal in the above captioned case up to and including the issuance of this clerk's certificate. Hence this clerk's certificate.

Given under my hand and seal of Court, this 12th day of September,
A.D. 2006, at the hour of 12:50 p.m. Court's seal:
Ellen Hall CLERK OF COURT.

Attested by: Nancy Washington File Clerk, Civil Law Court Montserrado County, R.L.
Margaret Brown Asst. File Clerk, Civil Law Court, Montserrado County, R.L."

The certificate says that the respondent/appellant did not file its notice of completion of appeal; the certificate does not speak of service. On the other hand, we see a signature said to be that of Christiana Sonpon Freeman, counsel for movants/appellees on the purported notice of completion of appeal suggesting that the notice of completion of appeal was served on the movants/appellees' Counsel. So, in the face of the movants/appellees' position that the respondent/appellant failed to serve and file notice of completion of appeal we ask, could it be that the signature of one of movants/appellees' counsel was improperly placed on the purported notice of completion of appeal? But whatever the true story is, we hold that the respondent/appellant was in violation of the statute on appeal in either case. That is to say, it is a violation of the statute on appeal if, as claimed by the movants/appellees, the respondent/appellant failed and/or neglected to serve and file its notice of completion of appeal. And the respondent/appellant is still in violation of the statute

if it only served or caused to serve the notice of completion of appeal on the movants/appellees' counsel, but failed to file a copy with the clerk of the trial court.

The procedure in our jurisdiction is, after announcing an appeal and after filing the bill of exceptions and the appeal bond, 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 appellees. The original of such notice shall be filed in the office of the clerk of the trial court. But the clerk of the trial court, in a certificate issued, categorically stated that the respondent/appellant failed to file a notice of completion of appeal. As a matter of law, we must consider the clerk's position on this issue conclusive. Moreover, we note that the purported notice of completion of appeal is not listed in the certified inventory of documents taxed by the counsels of the two parties. This is an indication that no notice of completion of appeal was ever failed. In any case as we have said, the position of the clerk of the trial court on this issue is conclusive.

The respondent/appellant claimed that the ministerial officer served the notice of completion of appeal on the counsels for both parties, but failed to file the original of such notice of completion of appeal with the clerk of the trial court. This claim was refuted by the Sheriff of Montserrado County. We quote an affidavit issued by Captain T. Ciapha Carey, Sheriff of the Civil Law Court which was attached to the movants/appellees' replying affidavit:

"REPUBLIC OF LIBERIA, MONTSERRADO COUNTY
IN THE OFFICE OF THE JUSTICE OF THE PEACE FOR AND IN
MONTSERRADO COUNTY, REPUBLIC OF LIBERIA

AFFIDAVIT

Personally appeared before me, in my office, Captain T. Ciapha Carey, deponent, who having been duly sworn and placed under oath, deposed as follows:

1. That he is the sheriff of the Sixth Judicial Circuit, Temple of Justice who is by law responsible for the service of all precepts emanating from the Civil Law Court.
2. That on Friday, October 6, 2006, he was given for the first time, a copy of a notice of completion of appeal by Mr. Jacob Nyumah, of the Sherman & Sherman Law Office, to make returns in the case: "Elise Cooper, et al. vs. Annis Hejazi", allegedly served by his office on the counsels of the party on May 31, 2006.

3. That to the best of his knowledge and belief, neither he nor any member of his staff receive from the office of the clerk, nor did he serve said notice on May 31, 2006, or any other date for that matter, or make any returns to the said notice of completion of appeal.

That all and singular the averments of facts are true to the best of his knowledge and belief as to those matters of information received he verily believes them to be true and correct.

Sworn and subscribed to before me this 7th day of October, A.D. 2006.

JUSTICE OF THE PEACE, MONT. CO . R.L.

Captain T. Ciapha Carey DEPONENT

\$5.00 Revenue Stamp affixed on the Original."

The foregoing affidavit distinguishes the ITP case relied on by the respondent/appellant from the case before us. In the ITP case, the records show that the sheriff served the notice of completion of appeal and that fact was acknowledged by the appellee's endorsement. The Court found that the sheriff failed to make "separate returns." But in the case before us, the sheriff categorically denies ever serving the notice of completion of appeal. In fact the sheriff has indicated in the affidavit, that an employee from the Sherman & Sherman, Inc. in person of Jacob Nyumah tried in vain to have him involved in acts of impropriety.

The controlling law in this jurisdiction is that the returns of ministerial officers of the courts are presumed to be correct. *Sheriff vs. Pearson et al.*, 35 LLR 693 (1989); also *Citibank N.A. vs. Jos Hansen and Sachne (Liberia) Ltd.* 36 LLR 198 (1989).

Although the foregoing affidavit issued by the sheriff is not returns to a precept, the said affidavit has an effect of stating emphatically under oath, what transpired concerning the service of paper purportedly made by the sheriff So, on the same line of reasoning that the sheriff's returns is presumed to be correct, we presume that the affidavit issued by the sheriff is correct, especially barring rebuttable evidence by the respondent/appellant. Thus, the facts of the ITP case are not analogous to the case before us.

We hold, therefore that the respondent/appellant did not comply with the provision of the appeal statute which requires the filing of the original copy of the notice of completion of appeal. This Court has repeatedly held that it is the serving and filing of the notice of completion of appeal that confers jurisdiction on the Supreme Court

to hear the appeal. It is not enough for an appellant to only serve the notice of completion of appeal on the appellee and be content, assuming that this is what even took place in the case before us. Under the appeal statute, serving and filing go hand in hand.

WHEREFORE, the movants/appellees' motion to dismiss appeal is hereby granted. The respondent/appellant's appeal is hereby dismissed. The Clerk of this Court is ordered to send the mandate to the lower court to resume jurisdiction over this case and enforce its ruling in the summary judgment. Costs against the respondent/appellant. It is hereby so ordered.

Appeal dismissed.

COUNSELLOR J. JOHNNY MOMOH OF SHERMAN & SHERMAN, INC. APPEARED FOR THE RESPONDENT/APPELLANT. COUNSELLORS SAMUEL R. CLARK AND JALLAH A. BARBU APPEARED FOR THE MOVANTS/APPELLEES.