

Rostock Diesel Service GMBH, Fisherweg 421, 18069 Rostock, Germany, by and thru its Attorney-in-fact, Sherman & Sherman, R. Fole Sherman Law Building, 17th Street & Cheeseman Avenue, P. O. Box 10-3218, 1000 Monrovia 10, Sinkor, Monrovia, Liberia Movant/Appellee versus **MN "Aqua Sierra," K65SZ 70/125A, 1352-00 Argosy Ship Management, Inc.**, 99 Aktimiaouli Str. 185, Piraeus, 18538, Greece, currently berthed in the territorial waters of the Republic of Liberia, specifically at the Freeport of Monrovia, represented by its **Owner(s), Charterer(s) Captain, Agent(s), and/or any person having authority over the MN "Aqua Sierra,"** to be identified, of Monrovia, Liberia Respondent/Appellant

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

Heard: 24 October 2006 Decided: 21 December 2006

MR. CHIEF JUSTICE LEWIS DELIVERED THE OPINION OF THE COURT.

On 2 February 2004, the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, entered final judgment in this case in favor of the movant/appellee and against the respondent/appellant in the amount of Euros 501,805.56 as special and general damages. The respondent/appellant excepted to the final judgment of the trial court, and announced an appeal to the Supreme Court of Liberia.

On 2 April 2004, the respondent/appellant filed its appeal bond in the amount of US\$825,000.00, secured by real properties of several individuals, including Beatrice Mark, Moses M. Siryon, Ambulai S. Kamara, Peter T. Nyemah and Vafley Siryon. The bond was approved by then assigned circuit judge, the late Judge Wynston O. Henries. On the same day, the respondent/appellant filed its notice of completion of appeal which was served on counsel for the movant/appellee.

On 20 April 2004, the movant/appellee filed a fifteen-count motion to dismiss the respondent/appellant's appeal, maintaining that although the bond tendered by respondent/appellant shows on its face to be in the amount of US\$825,000.00, which amount appears adequate if all the other requirements are met, a review of the supporting documents, property valuation statements and surety affidavits show that eighty percent (80%) of the properties pledged as surety for the bond are encumbered. The movant/appellee contends, therefore, that the respondent/appellant's appeal bond is inadequate, insufficient and incurably defective for which the appeal should be dismissed.

The movant/appellee states specifically that the properties owned by Beatrice Mark, Moses M. Siryon, Ambulai S. Kamara and Peter T. Nyemah, pledged as surety for the respondent/appellant's appeal bond, were used and pledged as security for the appeal bond in the case *West Africa Contractors Corporation (WACCO), the International Road Construction Corp, Liberia, Ltd. and the Civil Construction Corp. v. Khoueiri*. The movant/appellant attached to its motion, as Exhibits "M/2" and "M/3," respectively, copies of Mansour Kroueiri's appeal bond evidencing that the properties of the above named sureties were part of the real properties pledged as security to that appeal bond, and certificates from the Sheriff for Montserrado County and the Clerk of the Supreme Court of Liberia evidencing the non-release of the properties of said sureties.

The movant/appellee, relying on *Liberia Industrial Development Corporation v. Thorpe and El Nasr Export-Import Company*, 31 LLR 714, 717 (1984), maintains that where an appeal bond is materially defective or insufficient, it cannot be considered as a bond filed to meet one of the jurisdictional steps required to be taken to complete the appeal, and that therefore the appeal will crumble and the court is without jurisdiction to hear and decide the case on the merits.

In an eighteen-count resistance to the movant/appellee's motion to dismiss, the respondent/appellant admits that the real properties offered as security by Moses M. Siryon and Peter T. Nyemah, valued at US\$250,000.00 and US\$200,000.00, respectively, are encumbered, but denies that those of Beatrice Mark, Varfley Siryon and Ambulai S. Kamara are encumbered. The respondent/appellant submits, also, that in addition to the property valuation bond tendered, its appeal is also secured by the proceeds from the sale, on 24 September 2006, of the MN "Aqua Sierra" equivalent to \$700,000.00, which are being held in escrow at the International Bank.

We accept that the one issue determinative of the movant/appellee's motion to dismiss is whether an appeal in rem admiralty proceedings is dismissible on grounds that the appeal bond is insufficient, where prior to the hearing of the appeal, the res in the in rem proceedings is sold and the combined value of the proceeds from the sale of the res, the MN "Aqua Sierra," and the real property offered as security exceed the value of the judgment appealed from?

In deciding this issue, we shall address two sub-issues:

1. Whether the appeal bond tendered and approved by the trial judge, excluding the real properties of Moses M. Siryon and Peter T. Nyemah, valued at US\$250,000.00 and US\$200,000.00), respectively, which the respondents/appellants admit are encumbered and therefore could not legally be used to indemnify the movant/appellee, is sufficient?

2. Whether the proceeds from the sale of the res, MN "Aqua Sierra, may be used to augment the indemnity in case the answer to the first question is no?

We hold that the appeal bond tendered and approved by the trial judge, excluding the real properties of Moses M. Siryon and Peter T. Nyemah, which the respondents/appellants admit are encumbered and therefore could not be used to indemnify the movant/appellee, is insufficient.

Section 51.8 of the Civil Procedure Law 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. . . ." (Emphasis supplied).

On the amount to be fixed by the trial court, this Court has held that an appeal bond ". . . is inadequate when the indemnity provided therein is less than the amount of the judgment." *Karneh v. Republic*, 18 LLR 91, 94 (1967); *Thompson v. George*, 26 LLR 239, 245 (1977); *Forestry Development Authority v. Forestry Development Authority Workers Union (FDAWU)*, 39 LLR 684, 689 (1999).

As earlier stated, the amount of the final judgment rendered against the respondents/appellants is Euros 501,805.56. Against this final judgment, an appeal bond in the amount of US\$825,000.00 was approved by the trial judge. When the combined value of the encumbered properties of Moses M. Siryon and Peter T. Nyemah is deducted from the amount of the appeal bond, there leaves a balance of US\$375,000.00 only which is less than the amount of the judgment.

The second issue is whether the proceeds from the sale of the res, MN "Aqua Sierra," may be used to augment the indemnity in view of our holding on the first issue?

Without deciding whether the proceeds from the sale of the MN "Aqua Sierra" are legally being held in escrow, we hold that the proceeds may not be used to augment the indemnity.

It is the opinion of this Bench, and we hold that § 51.8 of the Civil Procedure Law is clear and unambiguous:

"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. . . ." (Emphasis supplied).

Section 63.2(1) of the Civil Procedure Law provides the definition for "legally qualified sureties:"

". . . Unless the court orders otherwise, a surety on a bond shall be either two natural persons who fulfill the requirements of this section or an insurance company authorized to execute surety bonds within the Republic."

Cash to the value of the bond, or cash deposited in the bank to the value of the bond as evidenced by a bank certificate does not come within § 63.2(1) definition of "legally qualified sureties."

Valuables to the amount of the bond which are easily converted into cash does not come within § 63.2(1) definition of "legally qualified sureties."

Several opinions of this Court have expressed this view:

In *Cavalla Rubber Corporation v. The Liberian Trading and Development Bank*, 38 LLR 316, 320-1 (1996) counsels for the movant prevailed in their arguments before this Court that § 51.8 of the Civil Procedure Law requires that an appeal bond shall be secured by legally qualified sureties who shall be either two or more natural persons with at least one of them being a freeholder of property to the value of the bond, or an insurance company authorized to issue surety bond in Liberia, and that cash, manager's check, certified checks and other such securities for bonds, in general, do not qualify as security for an appeal bond.

In *Williams v. the Intestate Estate of the late Willie G. M. Bowler*, decided during its March Term, 2000, this Court held:

"Section 51.8 of the Civil Procedure Law requires that an appeal bond shall be secured by legally qualified sureties who shall be either two or more natural persons with at least one of them being a freeholder of property to the value of the bond, or an insurance company authorized to issue surety bond in Liberia."

In *Lewis v. Freeman*, again decided during its March Term, 2000, this Court held also:

"The security for an appeal bond shall be two or more legally qualified sureties; and only natural persons, who are freeholders or an insurance company authorized to issue security bond in Liberia qualifies as a surety."

In *Gabbidon v. Toe*, 23 LLR 43, 47 (1974), this Court held:

"Our law does not give us the authority either to add or take from, when the Legislature has commanded unless the said command clearly breaches provisions of the Constitution."

We hold that § 51.8 of the Civil Procedure Law does not breach any provision of the Constitution.

In view of our holding, we hereby recall all those opinions which have held that other forms of securities, other than "two or more legally qualified sureties with at least one of them being a freeholder of property to the value of the bond or an insurance company authorized to issue security bond in Liberia," may qualify as security for appeal bonds.

In view of the foregoing, the movant/appellee's motion to dismiss is hereby granted. The Clerk of this Court is ordered to send a mandate to the judge of the Civil Law Court for Montserrado Court to resume jurisdiction over this case and to give effect to this judgment. It is so ordered.

Motion to dismiss granted.