

International Bank (Liberia) Limited (IBLL), Represented by its Authorized Officers of the City of Monrovia, MOVANT/APPELLEE VERSUS **SIRR Marketing Inc.** represented by its Owner/CEO) Israel Akinsanya and all other Authorized Officers of the City of Monrovia, Liberia, 1st RESPONDENT/APPELLANT AND **Israel & Tawae Akinsanya**, their Agents, Successors and Assigns of the City of Monrovia, Liberia, 2nd RESPONDENTS/APPELLANTS

MOTION TO DISMISS APPEAL

LRSC 30

Heard: May 20, 2014 Decided: August 7, 2015

MR. JUSTICE BANKS DELIVERED THE OPINION OF THE COURT.

This motion to dismiss emanates from a ruling handed down by the then Assigned Circuit Court Judge of the Sixth Judicial Circuit, His Honour J. Boima Kontoe, in which he granted the movant's petition for the foreclosure of mortgage and, therein, ordered the respondents to pay the movant the amount of US\$904,084.62, plus another ten percent of the adjudged amount as attorney's fees and costs related to the proceedings. The judge also declared that if the respondents did not satisfy the judgment within the statutory prescribed time, the mortgaged property would be designated for sale by the sheriff to allow the movant to recover the amount it was owed. The records show that the respondents, endeavoring to comply with the four requirements for the completion of an appeal, as contained in Section 51.4 of the Civil Procedure Law, (a) excepted to the July 30, 2013 ruling and announced an appeal therefrom to the Supreme Court;(b) filed its bill of exceptions within ten days of the judgment;(c) filed an appeal bond on September 25,2013 and,(d) on the same day filed its notice of completion of appeal. It should be noted that although Section 51.8 of the Civil Procedure Law mandates that the appellant serves the appellee with a notice of the filing of the appeal bond and Section 51.9 likewise requires the service of the notice of completion of the appeal, there is no indication in the records of the case that either document was actually served on the appellee, the movant herein. However, given that the movant chose to not rely on the apparent lack of service as a basis for having the appeal dismissed, we are left to conclude that the movant was Indeed served but, for reasons unbeknownst to this Court, the evidence of the service is not included In the certified records of the case file that was forwarded to this Honorable Court.

The actual core of the movant's motion to dismiss the respondents' appeal, as revealed in the below quoted motion, is that the respondents' appeal bond is faulty because it flouts the Supreme Court's requirement that an appellant's surety, an insurance company, provides sufficient proof that it is indeed capable of fulfilling its obligation to indemnify an appellant. The motion to dismiss appeal states as follows:

AND NOW COMES International Bank (Liberia) Limited, Movant in the above-entitled cause of action and respectfully prays Your Honours to grant this Motion to Dismiss Appeal and showeth the following legal and factual reasons, to wit:

1. That Movant herein, as Petitioner, filed a Petition for Foreclosure of Mortgage in September 2011, praying for the foreclosure of two (2) separate properties with buildings constructed thereon which

buildings are mortgaged as collateral security for amounts advanced by Movant to Respondents.

2. That the Civil Law Court for the Sixth Judicial Circuit (the "Court") on July 30, 2013 rendered final judgment: (a) granting the Petition for Foreclosure of Mortgage;(b) ordering that the mortgaged properties could be redeemed by the Respondents upon the full payment of US\$904,084.62; and (c) ordering the sale of the mortgaged properties at public auction and the proceeds used to satisfy the judgment in the event of the failure of the Respondents to satisfy the judgment within the time provided by statute.

3. Respondent excepted and announced appeal to the Honourable Supreme Court, sitting in its October A.D. 2013 Term. Attached hereto and marked Exhibit "M/1" is copy of the Court's Final Judgment which also reflects Respondents' entry of exceptions and announcement of appeal.

4. That on August 9, 2013, Respondents Bill of Exceptions were approved by the presiding Judge of the Court and said Bill of Exceptions were filed the same day.

5. That on September 25, 2013, the presiding Judge approved Respondents' Appeal Bond in the amount of US\$1,808,169.24 (One Million Eight Hundred Eight Thousand One Hundred Sixty Nine United States Dollars & Twenty Four Cents). Thereafter, Respondents' Notice of Completion of Appeal was served on Movant and filed with the Court. Attached and marked Exhibit "M/2" in Bulk is one copy each of Respondents' Appeal and an Affidavit of Sureties and Notice of Completion of Appeal.

6. Movant says that the Honourable Supreme Court has held in a long line of cases that a surety's allegations that he/she/it has the capacity and the liquidity or assets to underwrite the obligations undertaken by him/her/it in an appeal bond without attaching to the said appeal bond appropriate evidence to substantiate such allegations renders said appeal bond defective; and where an appeal bond tendered/filed in support of an appeal is defective, and the defect rises to the level to render the appeal dismissible, the appeal will be dismissed. Jihad A. Khallk vs Mohammed K. Musahson & Sosa Musahson, Opinions of the Supreme Court October Term 2013.

7. Movant contends that Respondents' appeal bond tendered/filed by Respondents is defective and that the defect rises to the level to render the appeal dismissible for the reasons that:

a. the Respondents' Bond does not show any evidence of a clearance from the Ministry of Finance confirming that taxes due at the time of the execution of the bond have been fully paid by Sky International Insurance Company, the Surety;

b. the Respondents' Bond also does not show any evidence that Sky International Insurance Company, the Surety, is liquid or possesses assets within the Republic of Liberia sufficient to cover the amount stated in the Bond, that is US\$1,808,169.24, the value of the bond;

c. although the Affidavit of Surety alleges that US\$1,808,169.24 are reserved, set aside and available to cover legal costs and damages, there is no evidence from any bank or other entity attached to Respondents' bond to show that US\$1,808,169.24 have in fact been reserved, set aside and made available by Sky International Insurance Company, the Surety, to underwrite the obligation stated in the bond.

Attached and marked Exhibit "M/3" Is the Clerk's Certificate In substantiation of the foregoing.

d. the Reinsurance Cover Note, reference number UAIB/5103/T/OS/2013 dated January 14, 2013 and issued by The United African Insurance Brokers Limited of Nigeria in favour of Sky International Insurance Company, the Surety, states that Cash Loss under the Cover Note is US\$45,000.00. The said amount is grossly inadequate and insufficient to cover the US\$1,808,169.24 undertaking, the value of the bond.

WHEREFORE, and in view of the foregoing legal and factual reasons, Movant prays Your Honors to grant this Motion to Dismiss and, by so doing, to dismiss Respondents/Appellants appeal, order the Court below to proceed to assume jurisdiction and enforce its Decree of Foreclosure, rule Respondents/Appellants to pay all costs of these proceedings, and grant to Movant such other and further relief as to Your Honors deem legal, just and equitable.

With respect to motions filed at the level of the Supreme Court, the Rules of the Supreme Court, specifically Section II, Part 1, states: "if the facts [of the filed motion) are not admitted, the opposite party shall file answering affidavits and serve the copies thereof on the moving party, who shall file replying affidavits if necessary and serve copy thereof upon his adversary." In addition to the answering affidavits that are required under the Supreme Court Rules, this Court also permits respondents, if they intend to combat the legal or factual substance of a movant's motion, to file a resistance. Despite the existence of these two alternative avenues for challenging the present motion to dismiss the appeal, the respondents declined to file either an answering affidavit or a resistance. Rather, the respondents proceeded to file a brief, which is titled "Respondent's Legal Brief in Resistance to Motion to Dismiss Appeal. Perhaps, the respondents presumed that such a brief could suffice as a form of a legitimate objection to the counts contained in the movant's motion, but the objective of a legal brief filed before the Supreme Court is to further elaborate on the legal contentions the party intends to impress upon the Court. When a matter is before the Supreme Court on appeal, those legal contentions broached in the brief are to originate from the points raised in the lower court and, further, in the bill of exceptions, and failure to do so amounts to an estoppel that bars that party from presenting those arguments to this Court for our consideration. Jackson et al. v. Mason et al, 24 LLR 97 (1975); The Heirs of the late S. B. Nagbe, Jr. v. The Intestate Estate of the late S.B.Nagbe,Sr.,40 LLR 337 (2001); Monrovia Construction Corporation v. Wazami, 23 LLR 58 (1974). Applying that same trend of thought to motions that are filed before the Supreme Court, such as in the current case, this Court holds that the arguments in the movant's brief must have been presented in either the motion or replying affidavit and, similarly, the arguments in the respondent's brief must have been brought forward either in the resistance or the answering affidavit.

The respondents, though, filed neither an answering affidavit nor a resistance to the movant's motion to

dismiss the respondent's appeal. There are no source documents from which the brief extracted the legal arguments submitted to this Court. Despite the lack of the prerequisite filings, the respondents nonetheless tendered a brief in support of its resistance to the motion to dismiss. Having determined that an answering affidavit or a resistance is a condition sine qua non for the filing of a brief before this Court, we are precluded from taking into account any of the positions taken by the respondent in its brief. The only filings we are therefore obligated to consider as we determine the legitimacy of the movant's attempt to have the respondent's appeal dismissed are the movant's motion to dismiss the appeal as well as its supporting legal brief. Thus, after a sagacious reading of those two documents although the issues were similarly addressed in the respondents brief, we of the considered opinion that we are obliged to answer the following questions to justly evaluate the motion to dismiss.

1. Was it appropriate for the movant to challenge the respondent's appeal bond in the Supreme Court?
2. Did the respondent provide the required documents to substantiate the surety's declaration that it was capable of indemnifying the movant?

Chapter 63 of the Civil Procedure Law, specifically Section 63.5, dictates that any exception to a bond must be filed within three days of the receipt of the notice of the filing of the bond. Certain situations exist, such as the present case, in which this prerequisite creates a jurisdictional quandary when the bond that is being excepted to is an appeal bond. The respondents, in harmony with Section 51.4 of the Civil Procedure Law, filed their appeal bond and the notice of completion of appeal within the allotted sixty days of the rendition of the judgment. Notwithstanding the respondent's completion of their appeal, the fact that the appeal bond was filed on September 25, 2013, the very same day the movant alleges that the notice of completion of appeal was filed and served makes this scenario the first issue that this Honorable Supreme Court has to address.

This Court has steadfastly upheld the position that a court is without authority to act when it lacks competent jurisdiction. [CITATIONS] That concept is relevant to the present case because the question arises as to which court has jurisdiction to hear the movant's contest of the respondent's appeal bond. This Court has held that once the appellant files the notice of completion of appeal with the clerk of the subordinate court and serves it on the appellee, the subordinate court is immediately divested of any and all jurisdiction to handle even the most negligible aspect of the case. [CITATIONS] The records of this case show that the respondents' notice of completion of appeal, although wrongly titled, "Notice of Completion of Appeal Bond", was issued on September 25, 2013. However, there is no evidence of the date the notice was actually filed in the Civil Law Court and no indication of the date it was served. The movant, as verified by the signature of its legal representative, acknowledged receipt of the notice of completion of appeal but there is no indication of the date on which the document was signed by the movant's lawyer. Seeing as the lower court was stripped of its jurisdiction over this case when the notice of completion of appeal, after being filed, was served on an appellee, without a date of service, how are we to determine the date the Supreme Court assumed jurisdiction to assess the substantive issues the parties have presented on appeal?

The movant, in its motion to dismiss the appeal, asserts that the respondents' notice of completion of appeal was filed and served on the very same day, September 25, 2013. Since the respondents opted to not file a resistance to the movant's motion to deny any of the movant's claims they consider to be false, this Court has no other option but to resort to employ the foundational legal principle that states, what is not denied is deemed admitted. [CITATIONS] We believe that there is particular legal justification for this assumption since the notice carries the date of September 25, 2013, and that unless a service date is shown to be different, the date on the instrument is deemed to be the date also that service was made. Thus, operating on the presumption that the notice of completion of appeal was both filed and served on September 25, 2013, we hold that that date is precisely when the Civil law Court yielded jurisdiction of this legal action to the Supreme Court.

Having concluded on the date this appeal was transferred to the Honorable Supreme Court, we note the appeal bond was filed earlier on that same date. With the filing of the appeal bond on the same day taking place as the filing and service of the notice of completion of appeal, the respondent effectively preempted the movant from objecting to the adequacy of the respondents' appeal bond in the Civil Law Court because, once the appeal was perfected, which occurs once the notice of completion of appeal is filed and served, the only court clothed with the authority to proceed with this case was this Honorable Supreme Court. The issue of challenging an appellant's appeal bond in the Supreme Court after the completion of the appeal process is one that is far from novel. In the most recent instance in which this Court was called upon to address the question, *Taye v. Kiawu et al.*, decided on December 30, 2014, Associate Justice Jamesetta Wolokolle, delivering the Opinion of this Court, voiced the frustration and disappointment of this Court that this seemingly settled subject continues to be raised "[I]n the case where both the appeal bond and the notice of completion of appeal are served on the appellees the same day; although the sixty-day period for perfection of appeal had not expired, the appellees definitely could not have properly filed their objection to the bond in the trial court as the matter had been removed to the Supreme Court, and as stated above, no trial court can have or exercise concurrent jurisdiction with the Supreme Court in any case. We hope that lawyers can put to rest this issue long settled by the Supreme Court that the filing and service of the notice of completion of the appeal removes the matter completely from the lower court to the Supreme Court and therefore no challenge of the bond can thereafter be made in the lower court. Counsellors appearing before this Court are expected to take notice of settled principles enunciated by this Court in the interpretation of our appeal statute and govern themselves accordingly." We uphold the Court's holding in the *Taye* case and reaffirm that there is no circumstance under which the subordinate court retains jurisdiction to hear an attack on an appellant's appeal bond where the appeal bond is filed simultaneously with the filing and service of the notice of completion of appeal.

As regards the second issue, this Honorable Supreme Court is keenly aware that the Constitution of the Republic of Liberia has entrusted it with the weighty duty to be the body that the inhabitants of the Republic expect to ensure that matters in the subordinate courts are justly and equitably conducted. It is on this basis that we would rather eschew the dismissal of appeals for dealing with the substantive issues that are extant in each case. *Citibank v Hansen & Soehne (Liberia) Ltd.*, 35 LLR 69 (1988); *Khalik v Musahson*, decided on January 17, 2014. To lawfully inquire about the merits or demerits of any appeal

to determine the soundness of the subordinate court's decision, the Supreme Court must acquire jurisdiction. *Dahn et al. v Waeyen et al.*, 29 LLR 119 (1981); *Toe v FrontPage Africa et al.*, decided on July 15, 2013. This Court acquires jurisdiction to probe into the merits of a case only when the parties against whom judgments have been rendered duly perfects their appeal. *Mulbah v. Russell et al.*, Supreme Court Opinion, October term, 2014, decided on December 4, 2014; *Houseini v. Kaydea*, decided on July 5, 2012. See also Section 51.16 of the Civil Procedure Law. Hence, in order to inquire into whether the respondents have advanced valid arguments with regard to the lower court's judgment, we must first determine that the respondents complied with all of the legal requirements as it completed Its appeal.

In the case *Reeves v. Quiah Brothers*, decided on March 1, 2012, this Court, in interpreting the object of having a legal requirement to file bonds in certain situations, stated: "[W]e do believe that the Legislature intended that insurance companies serving or desiring to serve as sureties to a bond, whether criminal appearance bond, bail bond, civil bond, appeal bond or any other bonds required under the laws of Liberia, would be held to certain minimum standards, have certain qualifications and meet certain requirements as would secure the opposing party against uncertainty, injury or further damages." This Court, in the same case, enumerated the minimum standards to which all insurance companies who serve as sureties shall be held to account.

"1. The exhibition or attachment to the bond of the Articles of Incorporation of the insurance company as evidences that the company does exist;

2. Registration certificate of the insurance company with the appropriate government ministry or agency indicating that it is authorized to do business in Liberia and that it is in good standing;

3. Clearance from the Ministry of Finance evidencing that all taxes due as at the time of the execution of the bond have been fully paid; and

4. Evidence, such as a certificate or other legal instrument from an appropriate legal authority such as the Central Bank or other insurance authority or similar government entity having regulatory responsibilities for insurance companies, that the insurance company possesses assets, within the Republic of Liberia, sufficient to cover the obligation undertaken by the insurance company in the bond, exclusive of other bonds to which it is already serving as surety, commensurate with the amount stated in the bond.

Consistent with the constitutional and statutory mandate to make rules and issues orders for the promotion of justice, as are not inconsistent with the Constitution and statutes of the Land, and as we believe must have been the dear intent of the Legislature, we hold the above to be the standard to which insurance companies must adhere in serving as surety to a bond and this is the standard which all judges of our lower courts must ensure are adhered to. This interpretation of the law, made herein by this Court, shall take effect in all future cases brought before this Court in which insurance companies are serving as sureties".

A review of the documents proffered by the respondents exposes the abundant truth that the respondents failed to fulfill the requirements elucidated in the Quiah case. The respondents attached amended articles of incorporation for Sky International Insurance Corporation as well as a valid certificate of business registration from the Liberia Business Registry, plus a valid insurance license from the Central Bank of Liberia that empowered the company to engage in the business of offering insurance. These items confirm that Sky International is an existing corporate entity with the proper legal authorization to partake in the insurance business. Yet, despite providing proof of its surety's existence and authority, the respondent did not meet the third and fourth requirements to show that their surety is in a satisfactorily sound financial state to indemnify the movants. Although the third requirement for insurance companies who intend to serve as sureties is to offer a tax clearance from the Ministry of Finance that all the taxes owed at the time the bond is executed have been satisfied, the respondents have presented no tax clearance. Without such, the movant cannot be secured that Sky International has the assets to both pay the adjudged amount, which is US\$904,084.62 plus another ten percent of the adjudged amount as attorney's fees and costs for the proceedings, as well as the tax liability that is owed to the Government of Liberia and that is precisely why this Court made it a requirement for insurance companies to provide a tax clearance.

At the time of the Quiah ruling, the proper authority to get this tax clearance from was the Ministry of Finance but in the intervening time period, the Legislature created the Liberia Revenue Authority to serve as the body to which all taxes should be paid. Consequently, this Court holds that, from henceforth, instead of obtaining the clearance from the Ministry of Finance as ordered by this Court in the Quiah case, the tax clearance should be acquired from the Liberia Revenue Authority.

In count 4 of the Affidavit of Surety, the surety asserts "That the foregoing money reserved set aside and available is US\$1,808,169.24, same being current money of this Republic of Liberia free and above its incomes and liabilities". These kinds of assertions and allegations are why this Court highlighted the fourth and final requirement in the Quiah case, which is that the appellant submits a certificate or legal instrument from a suitable authority to substantiate that the insurance company, while taking into account all of the bonds it is currently serving as a surety, is possessed of sufficient assets within Liberia to indemnify the appellee. In a complete disregard of this legal obligation, the respondent, once again, offered no such verification. The respondent did not even make available a bank statement for this Court to at least be aware of the liquid cash of which the insurance company boasts. The respondents' surety, in an attempt to bolster the appeal bond, brought forward a reinsurance cover note from the United African Insurance Brokers Limited, a corporation that, according to the cover note, is located in Lagos, Nigeria. The respondent, once more, did not offer any proof that this Nigeria based entity has sufficient capability to guarantee that the movant's judgment is protected. Section 63.2(1) of the Civil Procedure Law demands that the only insurance companies who may be surety on a bond are "one(s) authorized to execute surety bonds within the Republic." There are no documents in the file to suggest that the United African Insurance Brokers Limited have the authority to be a surety on an appeal bond, whether in the Republic of Liberia or in any other place. We do not even know if this entity lawfully exists and operates

anywhere in the world and we have no idea of its financial standing, as neither its charter or articles of Incorporation are attached to the appellants appeal bond. The only thing we do know is the respondents' surety attached a document that purports to be a reinsurance cover note from a supposed entity that may have an office in Nigeria. In order to protect the interest of appellees here in Liberia, we hold that any insurance company seeking to offer reinsurance to another insurance company that intends to serve as surety on an appeal bond must also show not only that the reinsurer legally exist but also the ability or capacity to perform the obligation undertaken by the Liberian Insurance surety, or that it is in good standing in the country of incorporation.

This Court says that having been deprived of several of the mandatory requirements, stated above, this Court cannot consider the respondents' bond to be acceptable or to fulfill the requirements of the law.

Wherefore and in view of the foregoing, it is the holding of this Court that the motion to dismiss the appeal is granted and the appeal is ordered dismissed. The Clerk of this Court is hereby ordered to send a mandate to the court below instructing the judge presiding therein to resume jurisdiction over the case and give effect to this judgment. Costs are ruled against the appellants. **AND IT IS HEREBY SO ORDERED.**

Counsellor Stephen B. Dunbar of the Dunbar and Dunbar Law Offices appeared for the movant. Counsellor G. Alfred Sayeh of the Law Offices of Sayeh and Sayeh appeared for the respondents.