

JOSIAH FREEMAN, Appellant, v. ELIZABETH
COOPER and FRANCIS J. SAWYER, Appellees.

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

Argued March 20, 1968. Decided June 14, 1968.

1. When the failure to transmit the record on appeal from the lower court to the Supreme Court within the time prescribed by statute is the result of clerical omission, such ministerial failure cannot be charged to appellants, and a motion to dismiss the appeal on such ground will be denied.

Appellees, in effect, sought to dismiss the appeal taken from a judgment in their favor in an action of ejectment, on the ground that the record in the appeal had not been transmitted to the appellate court 210 days after judgment in the lower court. The omission was clearly shown to have resulted from clerical failure in the lower court and that appellant had complied in all respects with the statutes governing appeal procedure. The petition seeking dismissal of the *appeal* was *denied*.

J. Dossen Richards for appellant. *James G. Bull* for appellees.

MR. JUSTICE WARDSWORTH delivered the opinion of the court.

This petition is based on the fact that an action of ejectment was instituted by the petitioners herein against the respondent in the Sixth Judicial Circuit Court, Montserado County, final judgment having been rendered in favor of plaintiffs-petitioners in said case and defendant-respondent having allegedly failed to exercise diligence in causing the appeal record to be forwarded to this Court, in order that the appeal be heard and disposed of without unnecessary delay. Appellees filed a petition before this Court which is suggestive of a prayer for the dismissal of

the appeal, to order the trial court to resume jurisdiction and enforce its judgment.

For the benefit of this opinion we quote hereunder the four counts in said petition:

"1. That final judgment was rendered by Hon. John Dennis in the above entitled ejectment suit in favor of plaintiffs on the 17th day of February, 1967, to which judgment respondent excepted and announced an appeal to this Court.

"2. That even though respondent, defendant below, announced an appeal to this Court since the 17th day of February, 1967, a period of over 210 days from the said 17th of February up to the date of the filing of this petition, he, the said defendant, has not perfected and prosecuted his said appeal.

"3. That to all intents and purposes respondent does not intend prosecuting his appeal but has abandoned the same as can be more fully seen from attached certificate from the clerk of the Court, Sixth Judicial Circuit, Montserrado County.

"4. That as a result of the announcement by respondent of said appeal, respondent continues to occupy and enjoy the rents and profits of petitioners' land, subject of the ejectment suit in the court below, and intends to hold said appeal and case in suspense to the great loss, embarrassment and inconvenience of petitioners."

In opposing the petition, the respondent filed a two-count affidavit which we quote hereunder:

"1. Because respondent says that the entire petition is baseless and not entitled to the favorable consideration of this Court, because as to count two of said petition, respondent denies that he has not perfected and prosecuted his appeal. The fact, to the contrary, is that he had done so by filing an approved bill of exceptions and approved appeal bond and the notice of the completion of the appeal has been duly issued,

served and returned. This is all the law requires for the completion of the appeal.

“2. And also because respondent says, that having completed and prosecuted his appeal, this Court acquired jurisdiction over both the subject matter and the parties to the action, and the failure of the clerk of court to transmit the records provides no support to the petition; more than this, by a long line of decisions it has been held that the failure of the clerk of court to transmit the records on appeal is no ground either for the dismissal of the appeal or for an order for the enforcement of the judgment of the lower court.”

The subject matter of the petition is tantamount to importuning this Court to dismiss the appeal due to the fact that appellant has failed to superintend his cause to the extent of having the record on appeal in the above-mentioned case before this Court within the time prescribed by law for the transmission of the record on appeal from the trial court to the Supreme Court. Reverting to the statute which furnishes grounds for the dismissal of appeals, it is discovered that the ground upon which the petition is predicated is not included in the statute. Civil Procedure Law, 1956 Code 6:1020.

It is a well-established principle of law that the appellant in any given case must avoid procedural pitfalls, but in this case the alleged failure of the appellant to have caused the record on appeal to be transmitted to this Court before now is no legal ground for this Court to refuse jurisdiction of the appeal and order the trial court to resume jurisdiction and enforce its judgment.

Having carefully considered the petition from every legal angle, the Court fails to recognize any merits therein contained that will warrant granting the relief sought.

Therefore, in view of the foregoing, the petition is hereby denied, with costs to appellees. And it is hereby so ordered.

Petition denied.