

SAMUEL W. PAYNE, Appellant, v. MALCOLM  
LEWIS DINGWALL, LENONARA LEWIS  
HOWARD, EMMA LEWIS, GEE LEWIS,  
MARNEE GREENFIELD, and BAR YEE LEWIS,  
surviving heirs of THOMAS H. LEWIS, Appellees.

MOTION TO DISMISS AN APPEAL FROM THE CIRCUIT COURT OF THE  
SECOND JUDICIAL CIRCUIT, GRAND BASSA COUNTY.

Argued April 22, 1970. Decided June 11, 1970.

1. Where a motion to dismiss an appeal precedes a motion for diminution of record, the motion to dismiss alone is considered, and no new matter, therefore, will be allowed in opposition which seeks to amend papers on file before the Supreme Court, as, e.g., in the instant case where the certificate of the clerk of the trial court was proferted unsuccessfully, to indicate the clerical failure to note on the copy of the appeal bond that the 25-cent revenue stamp had been affixed.

During the pendency of an appeal, a motion to dismiss was made for failure to have affixed a revenue stamp on the appeal bond. Subsequently, a motion for diminution of record was brought by appellant. Appellant, in his opposition to the motion to dismiss, proferted a certificate from the clerk of the lower court, attesting to the fact that a revenue stamp had been affixed to the original copy of the appeal bond. The appellate court would not entertain the motion for diminution and characterized the certificate of the clerk as new matter it would not consider. *Appeal dismissed.*

*Joseph F. Dennis* for appellant. *Jacob H. Willis* and *Momo F. Jones* for appellee.

MR. JUSTICE SIMPSON delivered the opinion of the Court.

A motion to dismiss the appeal, dated November 12, 1968, was filed on November 12, 1968, during the October Term, 1968, of the Supreme Court.

The motion averred that inspection of the record transmitted to this Court evidenced the nonaffixing of the required 25¢ revenue stamp on the appeal bond. In the circumstances, the bond, as filed, was materially defective and did not comply with the provisions of our Civil Procedure Law, 1956 Code, 6:1020. This section specifically enumerates that failure to file an appeal bond, or a material defect in an appeal bond, constitutes a ground for dismissal of an appeal. The appellees cited *Freeman v. Republic of Liberia*, 2 LLR 189 (1915), *Gibson v. Tubman*, 13 LLR 217 (1958), and *Karnga v. Williams*, 11 LLR 294 (1952), in support of their position.

Appellant filed resistance on April 21, 1970. Count one of the resistance claimed that although the motion had been filed by November 12, 1968, on March 11, 1969, when appellant's counsel personally served a copy of his submission to this Court on counsellor Perry, whom he heard was appellee's counsel, all effort to secure a copy of the motion from appellee's counsel after he had filed it, proved fruitless. Appellant, therefore, contended that nonservice of the motion upon him constituted a ground for denial of the motion. He additionally contended that he filed a motion at this Court for diminution of record prior to receipt of the motion to dismiss.

In count two of the resistance, it was further averred by the appellant that appellee's contention in respect of non-affixing of the requisite 25¢ revenue stamp was grossly false, in that the stamp was, in fact, affixed upon appellant's bond at the time of its filing. In support of this contention, appellant proferted a certificate of the clerk of court, Second Judicial Circuit, Grand Bassa County, which, in effect, certified that there was a 25¢ stamp affixed on the original of the appeal bond.

In accordance with the above-cited section 1020 of the

Civil Procedure Law, a defective appeal bond constitutes a proper basis for dismissal of an appeal. In the case at bar appellant has contended that his motion for diminution was filed prior to receipt by him of the motion to dismiss. This Court has held that where the motion to dismiss precedes the motion for diminution, the motion to dismiss will generally be granted. The certificate proffered with the resistance to the motion to dismiss clearly evidences that it constitutes new matter introduced subsequent to the attack on the bond and if permitted to serve as a bar to the granting of the motion to dismiss, we would be allowing a dangerous inroad into our practice and procedure, for spurious documents would be permitted to defeat an otherwise legally justified claim.

In view of the above, this Court must hold that it cannot accept the proposition that there existed an omission at the time of the transmittal of the record of the case from the lower court, and must hold that the document before us constitutes a materially defective appeal bond, thus making the case before us a fit subject for dismissal and it is hereby dismissed, with costs against appellant. And it is hereby so ordered.

*Motion granted, appeal dismissed.*