WALSH CONSTRUCTION COMPANY OF LIBERIA, Appellant, *v.* FOUAD KLAT, Appellee.

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

Argued March 21, 1966. Decided June 30, 1966.

1. Assumption of suretyship by appellant's counsel in signing the appeal bond is not sufficient ground for dismissal of the appeal by the Supreme Court.
2. Appellant's failure to complete the issuance, service, and return of the notice of appeal within the statutory period of time is ground for dismissal of the appeal. 1956 CODE 6:1013.

In an action for damages for breach of contract, a *motion* to dismiss the appeal was *granted.*

Joseph W. Garber for appellant. *J. C. N. Howard* and *Jacob H. Willis* for appellee.

MR. JUSTICE WARDSWORTH delivered the opinion of the Court.

When the above-entitled case was called for hearing by regular assignment by this Court, the clerk informed the Court that a motion to dismiss the appeal in said cause had been filed by the appellee.

For the benefit of this opinion we shall quote the three counts constituting the said motion as filed by appellee in these proceedings, which read as follows:

> "1. Because appellee says that the appeal bond in this case is incurably bad and defective in that it violates the rules of this Honorable Court which must be observed at all times. Appellant elected to have as one of its sureties Counsellor Phillip J. L. Brumskine, of counsel for appellant in the court below, who took active part in the trial of the case. The appeal

bond being incurably defective constitutes legal ground for the dismissal of an appeal and appellee so prays.

"2. And also because appellee says that the notice of appeal which completes the appeal and places the person and subject matter of the case under the jurisdiction of this Honorable Court of dernier resort was not issued, served, and returned within statutory time, that is 60 days after rendition of final judgment. Appellee contends that, final judgment having been given on the 8th day of September, 1965, all jurisdictional steps toward the perfection of appellants' appeal should have been completed on or before the 8th day of November, 1965. A recourse to the records in this case reveals that final judgment was rendered on the 8th day of September, 1965, and that the notice of appeal was issued on the 12th day of November, 1965, quite 64 days after final judgment, and that said notice of appeal was not served on appellee and returned until the 16th day of November, 1965, quite 8 days after the expiration of the period required by statute.

"3. And also because appellee says that by virtue of the facts stated in Count 2 *supra,* this Honorable Court cannot exercise jurisdiction over the appeal because of the illegal issuance, service, and return of the notice of appeal which, under our statutes and the several decisions of this Court, constitute legal grounds for the dismissal of an appeal."

In countering appellee's motion to dismiss appellants' appeal, appellees filed the following five-count resistance.

"1. Because appellants submit that the signing by Counsellor Phillip J. L. Brumskine of appellant's appeal bond does not in itself and by itself, render said bond defective.

"And this appellants are ready to prove.

"2. And also because appellants say that the rule, the violation of which has been alleged, is a circuit

court rule and not a Supreme Court rule and that, if appellee felt that this rule had been violated by appellant, he should have first brought such violation to the attention of the lower court and not wait to raise the alleged defectiveness of the bond in this respect for the first time in the Supreme Court.

"And this appellants are ready to prove.

"3. And also because appellants say that should the case itself be decided against appellants and appellants could not pay the amount in question, which is an impossibility, surety Brumskine, for whose protection as a lawyer the rule was evidently passed, who owns substantial assets and who, by signing the bond, has voluntarily waived his said protection against execution of his property, would not be permitted to claim immunity for his property.

"And this appellants are ready to prove.

"4. And also because appellants say that this Honorable Court has laid down the rule that where, as in this case, both a bill of exceptions and the related appeal bond have been filed within statutory time and the notice of appeal has been served after 60 days but before attack by motion, a motion to dismiss the appeal will be denied.

"And this appellants are ready to prove.

"5. And also because appellants submit that appellee, realizing that both the verdict and the judgment in this case are manifestly legally insupportable, has sought to have the matter determined by a motion to dismiss which, in his opinion, offers him an easier way out.

"And this appellants are ready to prove."

Appellee's contention that the appeal bond in these proceedings was defective by reason of the fact that said bond was signed by counsel for appellant as surety in violation of the rules of this Court would seem plausible at first

blush. But reverting to the rules of the Supreme Court, no such provision prohibiting counsel from assuming suretyship for clients exists, although the circuit court rules do contain such an inhibition.

We concede the point that a lawyer representing his client should not give recognizance in any legal matter for his client, but the rules of the Supreme Court in vogue are silent in this respect. Since the alleged violation involved one of the rules for the governance of the circuit court, the matter should have been submitted to the trial judge for his consideration and disposition before the approval of the bond in question, rather than presenting said matter in the first instance to the Supreme Court for its determination thereof. Therefore Count 1 of appellee's motion is hereby not sustained.

Upon careful perusal of the records in this case, it is observed that final judgment was rendered by the trial judge on the 8th day of September, 1965. According to a certificate over the signature of Jonathan R. B. Campbell, assistant clerk of the Circuit Court of the Sixth Judicial Circuit, Montserrado County, a notice of appeal in the above entitled cause was issued on the 12th day of November, 1965, and served on the 16th day of November. In computing the time for the rendition of final judgment, the 8th day of September, 1965, to the service of the notice of appeal on November 16, 1965, the contention of appellee in his motion that the service of the notice of appeal was without the statutory period is well founded in law.

The statute with respect to completion of appeal provides that:

> "Such bond shall be approved by the trial judge and filed with the clerk of the court within sixty days after rendition of judgment.
>
> "Upon approval and filing of the bond the clerk shall forthwith issue a notice to the appellee informing him that the appeal is taken and to what term of court

and directing the appellee to appear and defend the same. The appeal shall thereupon be complete." 1956 CODE 6:1013.

In view of the foregoing, it is evident that the completion of an appeal, including the issuing, service, and returns of a notice of appeal should be performed within 60 days from the rendition of final judgment.

In its brief, appellant contended:

". . . that where the bill of exceptions and an appeal bond are filed within the statutory period, the late filing of a notice of appeal, that is after 60 days, does not provide a ground for dismissal unless the notice of appeal is served on the appellee after a motion to dismiss the appeal on this ground has been filed."

In support of this contention, appellant cited *Buchanan* v. *Arrivets*, 9 L.L.R 15 (1945). But Syllabus 5 of that case reads as follows.

"Where a party in superintending the preparation of records discovers that a notice of appeal is missing and has not been served and returned, a Justice presiding in Chambers may upon application before the appeal is attacked by motion, issue an order for service and return of the notice of appeal."

And Syllabi 1, 2, and 3 of *Morris* v. *Republic*, 4 L.L.R. 125 (1934), read as follows.

"1. Every appeal must be taken and perfected within sixty days after judgment.

"2. The service of a notice of appeal 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 the statutory time, this Court will dismiss said appeal for want of jurisdiction.

"3. The statute relating to the time within which appeal must be taken is imperative and includes everything necessary to be done to bring the appellee properly before the appellate court."

Consequently when appellant discovered that the notice of appeal had not been issued, served, and returned, the appellant should have taken steps to remedy this omission before the motion to dismiss the appeal was filed. The appellant should have applied to the Justice presiding in Chambers to order the issuance, service, and return of the notice of appeal; and failure to do so was an incurable legal blunder.

In view of the foregoing, the motion to dismiss the appeal herein is granted with costs against appellant. And it is hereby so ordered.

Appeal dismissed.