

**MARKAR DAHN et. al., Appellants, v. JAMES G.
N. MARTEHN WAEYEN and ZOBAN WAEYEN,
Administrator and Administratrix of the Intestate
Estate of WAEYEN, Appellees.**

MOTION TO DISMISS AN APPEAL FROM THE CIRCUIT COURT FOR THE EIGHTH
JUDICIAL CIRCUIT, NIMBA COUNTY.

Heard: June 11, 1981. Decided: July 31, 1981.

1. Allegations averred in a motion to dismiss, which are not denied in the resistance, are deemed admitted.
2. To demand relief in the face of a motion to dismiss, the respondent must traverse the issues raised in the motion and then proceed to demand for the relief sought.
3. Unless the court has jurisdiction, it cannot go into the merits or demerits of an appeal. Hence, where the motion to dismiss is granted, the appeal must crumble.
4. An affidavit of sureties must contain (a) a statement that one of them is the owner or that both combined are the owners of the real property offered as security; (b) a description of the property, sufficiently identified to establish the lien of the bond; (c) a statement of the total amount of the lien, unpaid taxes, and other encumbrances against each property offered; and (d) a statement of the assessed value of each property offered.
5. An appeal bond must be accompanied by a certificate of the Treasury Department (now Ministry of Finance) that the property is owned by the surety or sureties claiming title to it in the affidavit, and that it is of the assessed value therein stated, but such a certificate shall not be a prerequisite to approval by the judge.
6. The statutory requirements for the perfection of an appeal are mandatory and must be fully met; otherwise, this Court will refuse jurisdiction. It must be shown that the sureties named in the affidavit are the owners of the properties pledged in the bond.
7. An appeal bond is defective when not accompanied by an affidavit of sureties complying with the provisions of the statute, and the appeal bond is further defective when not accompanied by a certificate from the Bureau of Revenue as required by the Civil Procedure Law.
8. A defective bond renders the appeal dismissible.

From a final judgment of the Eighth Judicial Circuit Court, Nimba County, appellants appealed to the Supreme Court. When the case was called for hearing, appellees informed the Court that they had filed a motion to dismiss the appeal on the grounds that the notice of the completion of the appeal was

not filed and served on appellee within the statutory time; that the affidavit of sureties did not describe the property secured by the appeal bond by metes and bounds; and that no certificate from the Ministry of Finance was attached to the bond to indicate the owners and the assessed value of the property tendered for the bond. Appellees, in their resistance, did not deny any of the allegations in the motion, but requested the court to vacate the main suit out of which the appeal grew.

The Supreme Court held that the appellants, by their failure to deny the allegations in the motion, had admitted them by operation of law. The Court also held that the grounds laid in the motion being jurisdictional requirements for the perfection of an appeal, must be fully met, and that since the appellants failed to fully comply with these requirements, the Court must refuse jurisdiction. Finally, the Court held that unless it had jurisdiction over the matter, it could not go into the merits or demerits of the appeal and, hence, could not consider the relief sought by the appellants. Accordingly, the Supreme Court *granted* the motion and *dismissed* the appeal.

Lewis K. Free appeared for appellants. *Raymond A. Hoggard* appeared for appellees.

MR. JUSTICE MORRIS delivered the opinion of the Court.

This case emanated from the Eighth Judicial Circuit Court, Nimba County, and is before us on appeal. When the case was called for hearing the appellees informed us they had filed a motion to dismiss the appeal because of the incurable defective appeal bond tendered in this case. The grounds laid in the three-count motion are: (a) failure of the affidavit of sureties to describe the properties secured by the appeal bond by metes and bounds, so as to establish a lien on the bond; (b) failure of the appellants to attach to the appeal bond a certificate from the Ministry of Finance to indicate that the sureties are the owners of the properties tendered for the bond and to state the assessed value of the properties; and (c) failure of appellants

to serve a notice of the completion of the appeal on the appellees in order to confer jurisdiction on this Court over the appellees. In resisting the motion, counsel for appellants did not deny any of the allegations in the motion to dismiss the appeal. Instead, appellants' counsel requested this Court to vacate the main suit, the ejectment action, now before us on appeal.

When counsel for appellants was asked why he had not traversed any of the allegations laid in the motion, he contended that in resisting a motion, one needs not be responsive to the demand in the motion, and he cited the Civil Procedure Law, Rev. Code 1:10.6. He strenuously argued before us that by the averment "Because appellees' motion is unfounded and wanting for a legal existence in that the entire ejectment action from its incipiency before the circuit court, up to its present stage is *void ab initio*", he had sufficiently traversed the allegations contained in the motion and indicated the defects appearing therein. We do not agree with appellants' counsel, in that under the fundamental rule of pleadings and practice, the averment quoted *supra* does not give that due and timely notice which the law requires to be given the appellees as to what appellants intended to establish against appellees' motion; for the averment does not state in what manner the motion is legally unsound or wanting for a legal existence. We consider the averment quoted above to be uncertain and ambiguous. Here is the relevant statute relied upon by counsel for appellants:

"Papers served in resistance to a motion may include a demand for relief from the moving party. Relief in the alternative or of several different types may be demanded; relief need not be responsive to that demanded by the moving party." *Ibid.*, 1:10.6.

We are of the opinion that the statute just quoted does not preclude a party from traversing allegations averred in a motion when that party is resisting the motion. We therefore hold that allegations averred in a motion to dismiss which, are not denied in the resistance, are deemed admitted. To demand a relief, the appellants should have first traversed the issues raised in the motion and then proceed to demand for the relief

sought. This Court is paralyzed to grant the relief sought by the appellants, absent the Court's jurisdiction over the cause. The issues raised by the movants are jurisdictional and unless the court has jurisdiction, it cannot go into the merits and demerits of the appeal. Hence, if the motion is granted, the appeal must crumble and be dismissed.

Count one of the motion attacked the affidavit of sureties for failure to describe the properties secured by the appeal bond by metes and bounds. We quote the body of the affidavit of sureties:

"PERSONALLY APPEARED BEFORE me, the undersigned, a duly qualified Justice of the Peace in the City of Sanniquellie, Nimba County, R. L., John Suah and William Dahn, SURETIES for appellants Markar Dahn et al., in the above entitled cause of action and made Oath according to law that they are householders and owners of houses within the City of Sanniquellie, Nimba County, R. L., and that all and singular the allegations of both law and facts as are set forth and contained in the foregoing and attached APPEAL BOND are true and correct to the best of their knowledge and belief and as to those matters of information they verily believe them to be true and correct.

Sworn and Subscribed to this 6th Day of October, A. D. 1978 in My Office in the City of Sanniquellie.

/s/ John Y. Paye

John Y. Paye

JUSTICE OF THE PEACE

/s/ John Suah

John Suah

/s/ William Dahn

William Dahn

\$1.00 Rev. Stamp affixed."

The relevant statute relating to the provision of affidavit of sureties stipulates that:

"Affidavit of sureties. The bond shall be accompanied by an affidavit of the sureties containing the following:

(a) A statement that one of them is the owner, or that

both combined are the owners of the real property offered as security;

(b) A description of the property, sufficiently identified to establish the lien of the bond;

(c) A statement of the total amount of the lien, unpaid taxes, and other encumbrances against each property offered; and

(d) A statement of the assessed value of each property offered." Civil Procedure Law, Rev. Code, 1: 63.2 (3).

Count two of the motion states that there is no certificate from the Ministry of Finance accompanying the appeal bond to indicate the assessed value of the properties and to show that the sureties are the rightful owners of the properties offered as security for the bond tendered. *Ibid*, 1:63.2.

The Civil Procedure Law also provides:

"Certificate of Treasury Department official.

The bond shall also be accompanied by a certificate of a duly authorized official of the Department of the Treasury that the property is owned by the surety or sureties claiming title to it in the affidavit and that it is of the assessed value therein stated, but such a certificate shall not be a prerequisite to approval by the judge."

Civil Procedure Law, Rev. Code, 1: 63.2(4.26)(7)

The affidavit of sureties attached to the appeal bond in the instant case does not state that the sureties are the owners of the properties offered as security for the bond, nor does it describe the properties by metes and bounds. It simply states that the sureties are holders and owners of houses within Sanniquellie City, Nimba County.

The statutory requirements for the perfection of an appeal are mandatory and must be fully met; otherwise, this Court will refuse jurisdiction. It must be shown that the sureties named in the affidavit are the owners of the properties pledged in the bond. *Jarboe v. Jarboe*, 24 LLR 352 (1975). This Court in *Baky v. Nah*, 20 LLR 38 (1970), held that an appeal bond is defective when not accompanied by an affidavit of sureties complying with the provisions of the statute, and the appeal bond is further defective when not accompanied by a certificate from the Bureau of Revenue as required by the

Civil Procedure Law, Rev. Code 1: 63.2(3) and (4). A defective bond renders the appeal dismissible. *Ibid.*, 1:51.08; and *Talery v. Cooper*, 21 LLR 116 (1972). Counts one and two of the motion are therefore conceded.

With reference to count three relating to the non issuance and service of the notice of the completion of the appeal on appellees, the Court observes that the notice of the completion of the appeal was executed on the 13th of December 1978 and served on counsel for appellees on January 31, 1979, but the counsel refused to sign for the same because, according to him, he had received a certificate from the clerk of court to the effect that no notice of the completion of the appeal had been filed. Final judgment was rendered on the 28th of September 1978. The notice of the completion of the appeal was written 76 days after the final judgment was entered (December 13, 1978), according to our calculation. The clerk of court issued the certificate on the 7th of December 1978 (70 days after final judgment). The notice of the completion of the appeal was served on the 31st of January, 1979, 125 days after the judgment date. The notice of the completion of the appeal was issued and served without the statutory time of 60 days. Civil Procedure Law, Rev. Code 1: 51.9. Hence count three of the motion is also sustained.

The resistance filed by the appellants to appellees' motion to dismiss the appeal is not pertinent to the motion, in that the appellants had not traversed or denied any of the issues raised in appellees' motion. We are therefore left with no other alternative but to grant the said motion.

In view of the facts mentioned and the laws cited *supra*, it is our considered opinion that the motion to dismiss appellants' appeal, being in conformity with the statute, same is hereby *granted* and the appeal is hereby *dismissed*. The Clerk of this Court is ordered to send a mandate to the court below commanding the judge presiding therein to resume jurisdiction over the cause and enforce the judgment. Costs against appellants. And it is so ordered.

Motion granted.