In re: THE INTESTATE ESTATE OF THE LATE S. B. NAGBE, SR., PETITION FOR PROPER ACCOUNTING AND APPOINTMENT OF CHRISTIANA NAGBE AS CO-ADMINISTRATRIX

MOTION TO DISMISS APPEAL FROM THE PEOPLE'S MONTHLY AND PROBATE COURT FOR MONTSERRADO COUNTY.

Heard: June 8, 1981. Decided: July 29, 1981.

1. There is no legal requirement that the appellee has to sign for a copy of the notice of the completion of the appeal. What the law requires is that a copy of the notice must be delivered and or given to the appellee through the ministerial officer of the trial court.
2. The returns of the ministerial officer of a court to the service of process will be deemed correct and authentic, in the absence of any proof to the contrary. Mere assertion is not sufficient to rebut such presumption.

These proceedings emanate from a motion to dismiss an appeal announced from a judgment of the Monthly and Probate Court, Montserrado County. Appellee, movant herein, contended in her motion that no notice of completion of appeal was filed and served, either upon her or on her counsel, within 60 days as required by the statute. Appellee/movant further contended that the returns of the sheriff to the effect that she was served with the notice of completion of appeal was false.

Appellant, respondent herein, in resisting the motion, contended that the notice of completion of appeal was served on appellee within the statutory period, but that she had refused to sign for and accept same until she had consulted her lawyer. Appellant further contended that the returns of the sheriff are *prima facie* evidence of service and could not be overturned by mere allegations of the appellee.

The Supreme Court sustained the contentions of the appellant, holding that the returns of the ministerial officer are presumed to be true and that appellee had not brought forward proof to overcome that presumption. Accordingly,

the motion to dismiss was *denied.*

S. Raymond Horace appeared for appellant. *S. Edward Carlor* appeared for appellee.

MR. JUSTICE BORTUE delivered the opinion of the Court.

On the 28th day of May, A. D. 1981, the appellee, movant herein, filed a five-count motion to dismiss the appeal of the appellant, respondent herein.

In count one of the motion, the appellee contended that the final judgment in this case was rendered by the trial court on the 4th day of June, A. D. 1980, to which appellant excepted and announced an appeal to this Honourable Court.

In count two of the motion, the appellee averred that, according to computation of time, appellant should have served on appellee a copy of the notice of the completion of the appeal within sixty (60) days, that is, on or before the 3rd day of August, A. D. 1980; and that appellant failed to do so within the time prescribed by law. Appellee argued that failure to serve on appellee and file within the period of sixty (60) days a notice of the completion of the appeal, was and is a valid ground for the dismissal of an appeal.

Further, in counts three and four of the motion, the appellee contended that after the expiration of sixty (60) days from the date of the final judgment, June 4, 1980, appellant filed in the Chambers of Justice Yangbe, a petition for a writ of mandamus against appellee in connection with the alleged signing of the notice of the completion of the appeal, but that Justice Yangbe recused himself, as a result of which, the petition was referred to Justice Bortue who, after a careful study of it, denied same.

Appellee further stated in her motion to dismiss appellant's appeal, that at no time did an officer of the trial court ever approach her to sign any notice of the completion of the appeal, as falsely alleged in the returns of the sheriff in his endorsement at the back of the notice of the completion of the appeal.

In count five of the motion, appellee prayed this Honourable Court to dismiss the appeal; in that, no notice of the completion of the appeal was served on the appellee or her counsel within sixty days; and that according to the purported returns of the Sheriff, the appellee was served with a copy of the notice of the completion of the appeal on the 4th day of August, A. D. 1980. The appellee further averred that according to the returns of the sheriff to the said notice of completion of appeal, the said returns were false.

On the 8th day of June, A. D. 1981, appellant filed a five-count resistance to appellee's motion to dismiss the appeal.

In counts one and two of the resistance to the motion to dismiss appeal, appellant averred that he did serve his notice of the completion of the appeal on the appellee within sixty (60) days as the law prescribes; in that, while it was true that the sixty days expired on August 3, 1980, yet the said August 3, 1980, being a Sunday, and, therefore, *dies non*, the last day to have served his notice of the completion of the appeal, was on Monday, August 4, 1980, which he did as admitted in counts two and five of the motion to dismiss appeal.

Appellant argued that he was not without the expiration of the period of sixty days from the date of final judgment, but rather that he was within the sixty-day period as is prescribed by statute. Appellant further averred that it is true that he did file a petition for a writ of mandamus to compel appellee to sign the notice of the completion of the appeal, after every legitimate effort to do so had failed, but that the issuance of writ of Mandamus was denied by Mr. Justice Bortue.

In count three of the resistance to the motion to dismiss the appeal, appellant contended that the averment made in count four of the motion that "at no time an officer of the trial court ever approached appellee for the signing of notice of completion of appeal in this case," was false and misleading. Appellant further argued that recourse to the returns of the deputy sheriff for the People's Monthly and Probate Court, Montserrado County, made profert with the motion to dismiss the appeal, reveals that when the bailiff served the said notice of the completion of the appeal on the appellee, Christiana Nagbe, she refused to sign and accept the same until she could

consult her lawyer, and she therefore asked the bailiff to return to her in the afternoon, which he did, with Counsellor S. Raymond Horace accompanying him; and that accordingly, the returns to the notice of the completion of the appeal show that the same was served on the appellee, but that she refused to receive her copy. Appellant strongly argued that the returns of the sheriff are *prima facie* evidence in this respect, and could not thus be overturned by mere allegation of appellee as set forth in count four of her motion to dismiss appeal.

The appellant averred in count four of the resistance that appellee's motion was unmeritorious, in that, there had been no neglect on the part of appellant to perfect his appeal, his bill of exceptions having been approved and filed on the 14th day of June, A. D. 1980, and his appeal bond approved and filed on the 30th day of June, A. D. 1980. Appellant further stressed the fact that when the appeal bond was filed, it was encumbent on the clerk of court to issue the notice of the completion of the appeal and have the same served and returned to her office and that if an officer of court failed or neglected to perform this duty, that should and could not prejudice the interest and rights of a party litigant. Appellant contended that not only did the bailiff go to the appellee's home, but that he was also accompanied there by Counsellor S. Raymond Horace, of counsel for appellant, where they remained waiting until mid-night without seeing the appellee, and that when appellee failed to show up at her own home, the bailiff left a copy of the notice of the completion of the appeal with her husband to be delivered to her.

In count five of the resistance to the motion to dismiss, appellant strongly contended and maintained that the artifice of a party to prevent the smooth operation of justice should not prejudice the rights and interest of his adversary, because if this was countenanced by the courts, a floodgate would be opened to permit any unscrupulous persons to impede and/or defeat the administration of transparent justice.

According to the returns of the sheriff, the notice of the completion of the appeal was served on August, 4, 1980, by court's Bailiff Edward Ricks on counsel for appellant, who acknowledged the service of said notice of the completion of

the appeal by signing in the place provided therein for the appellant. However, when the said notice of the completion of the appeal was served on the appellee, Christiana Nagbe, she refused to receive, sign for and accept her copy, contending that until she consulted her lawyer, she could not receive, sign for and accept it.

Counsel for appellant argued before this Court that it was difficult to understand what the counsel for appellee's argument was about, because the sheriff's returns showed that the notice of the completion of the appeal had been served on the appellee, which fact had not been challenged in the court below; and that under our system of practice and procedure, it is the service upon the opposite party that is important, and that there was no statutory provision that the notice of the completion of the appeal must be signed by the party upon whom it is served.

According to the Civil Procedure Law, Rev. Code, 1: 51.9, it is provided thus:

> "After the filing of the bill of exceptions and the filing of an appeal bond as required by Sections 51.7 and 51.8, the clerk of the trial court, on application of the appellant, shall issue a notice of the completion of the appeal, a copy of which must be served by the appellant on the appellee. The original of such notice shall be filed in the office of the clerk of the trial court."

From the above quoted statute, it is plain, simple, and clear that there is no legal requirement that the appellee has to sign for a copy of the notice of the completion of the appeal; rather, the law requires only that a copy thereof be delivered to the appellee as a matter of notice. Notice, according to BLACK'S LAW DICTIONARY 1210 (4th ed.), is defined as follows:

> "Information; the result of observation, whether by the senses or the mind; knowledge of the existence of a fact or state of affairs; the means of knowledge."

Therefore, all that the statute requires to be done with respect to the service of a notice of the completion of the appeal is that the appellee should have some information or knowledge of the existence of the fact that the appellant has complied with the statute by applying to the clerk of the trial

court for the issuance of a notice of the completion of the appeal by the said clerk, and that a copy thereof be served by the appellant, through the ministerial officer of the trial court, on the appellee.

In *Jeto Liberia Clothing v. Breckwoldt and Company (Liberia) Ltd.,* 20 LLR 509 (1971), this Court held that:

> "The returns of a ministerial officer of a court to the service of process will be deemed authentic, in the absence of any proof to the contrary, and mere assertion is not sufficient to rebut such presumption."

In 62 AM. JUR. 2d., *Process,* §181, we have the following legal authority:

> "Assuming that the return may be impeached, there is nevertheless, in accordance with the familiar rule that it is presumed that official duty has been regularly performed, a strong presumption in favour of the correctness of the return of service as made by the officer, and the proof of its falsity should be clear, satisfactory, and convincing. In other words, a proper official return of service is presumed to be true and accurate until the presumption is overcome by proof."

In view of the foregoing facts, circumstances and the citations of law relied upon in this opinion, it is our determination and holding that the motion to dismiss the appeal as filed by the appellee, is devoid of any legal merits to warrant consideration by this Court. The said motion is, therefore, denied. Costs are to abide final determination of the main case.

The Clerk of this Court is ordered to re-docket the main case to be heard at the next term of this Court. And it is hereby so ordered.

Motion to dismiss denied.