MARCARS CONSTRUCTION COMPANY, INC., Appellant, *v.* K & H TRADING COMPANY, Appellee.

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

Argued May 30, 1977. Decided July 8, 1977.

1. An order of the Supreme Court to an appellant to file an appeal bond *nunc pro tunc* requires the filing to be executed without delay, even though the order specifies no date for completion.
2. It is the right and duty of every lawyer whenever there is proper ground for complaint against a judicial officer to submit his grievance promptly and fairly to the Supreme Court for redress.
3. The practice of judges in being absent without excuse or appearing late on the day assigned for the hearing of causes is contrary to the statutes and rules of court, and is a clear violation of duty.

This was a motion to dismiss an appeal on the ground that appellant, who had been allowed by the Supreme Court to file an appeal bond *nunc pro tunc* because the one previously filed by him was missing from the files in the case, did not file the second bond until 80 days after the reading of the judgment without opinion allowing the *nunc pro tunc* filing. The Supreme Court held that its order to file another bond should have been executed without delay, and the failure of appellant to do so was fatal to the appeal. The *motion* to dismiss was *granted*.

M. Fahnbulleh Jones for appellant. *Joseph Williamson* for appellee.

MR. JUSTICE AZANGO delivered the opinion of the Court.

At our March 1976 Term, appellee filed a motion to dismiss the appeal on the ground that no appeal bond had

been filed by appellant as the law requires. Appellant denied the correctness of the allegation, and annexed an affidavit sworn to by the Clerk of the Civil Law Court for the Sixth Judicial Circuit to the effect that an approved appeal bond had been received by him from appellant's counsel and filed in the case; and that at the filing of said bond a notice of completion of appeal had been issued, served, and returned by the sheriff.

In a judgment without opinion rendered on April 17, 1976, *Macars Construction Company, Inc.* v. *K & H Trading Company,* 25 LLR 243, the court observed that it was apparent that the absence of the bond from the file in the case could not be charged to the fault of the appealing party, according to the Clerk's affidavit annexed to the resistance. Since the Clerk of Court had sworn to the existence of the bond, the parties could not be made to suffer for any negligent act of an officer of court. Because of what appeared to be gross negligence or patent irregularity on the Clerk's part, we adjudged that the appellant should be allowed to file another appeal bond *nunc pro tunc,* as of the date of notice of completion of the appeal, which was the latest date on which the missing bond could have been filed. The Clerk of this Court was ordered to receive the bond when prepared and presented by the appellant's counsel and include it in the record now before us.

Accordingly, appellant prepared and filed an appeal bond on September 15, 1976, for the amount of $9,319, duly approved by Judge Samuel Payne Cooper, judge of the Debt Court, Montserrado County, with a special notation as follows: "Note as per judgment of the Supreme Court the bond is effective as of April 1, 1976."

During our present sitting, when this case was called for hearing, appellee moved this Court to dismiss the appeal on the ground of appellant's lateness in not filing the appeal bond until September 15, 1976. Referring to the Court's judgment without opinion on the previous motion

allowing appellant to file the bond *nunc pro tunc,* appellee argued for dismissal as follows: (a) that a notice of assignment for the expressed purpose of reading and enforcing the mandate of this Court growing out of the said judgment without opinion, was sent out and duly acknowledged and signed by counsel for both parties. Accordingly, the Debt Court Judge for Montserrado County, Judge Samuel Payne Cooper, on June 28, 1976, proceeded to have the mandate of this Court read and enforced; (b) that the appeal bond filed by appellant *nunc pro tunc* in effect tolled the statutes in favor of appellant for the period within which the appeal bond could be filed, and appellant should have taken advantage of the privilege and opportunity afforded by the judgment without opinion by filing the said appeal bond with the Clerk of the Debt Court not later than August 27, 1976, the same being sixty days from the date of the reading and enforcing of the mandate of this Court and not on September 15, 1976, as appellant did, eighty days from the date of the reading and enforcement of the mandate of the Supreme Court; (c) that the opportunity afforded appellant to file an appeal bond *nunc pro tunc* was a liberal and judicious act on part of the Supreme Court and should not be considdered a license to appellant to indefinitely delay the filing of the appeal bond and thereby to flout and disregard with impunity the statutes limiting the time for filing of an appeal bond. Since the bond was not filed within sixty days from the date of the reading and enforcement of the mandate of the Supreme Court by the lower court, the said appeal bond is late by any standard. The appeal should therefore be dismissed in accordance with the statute which provides that a failure to file a sufficient appeal bond within the *specified time* shall be ground for the dismissal of the appeal.

When this case was called for hearing, appellant argued in reply to the foregoing (a) that it was true that he signed the notice of assignment for the reading of the

mandate by the trial court and did not appear on the date and time for the reading and enforcement of said mandate; but this was no ground for dismissal of an appeal; (b) that the judgment without opinion rendered by this Court allowing appellant to file an appeal bond *nunc pro tunc* as of the date of the notice of completion of the appeal, the opinion in effect did not toll the statute in favor of appellant for the period within which the appeal bond should have been filed, but simply stated that the appeal bond should be considered filed as of a previous date. When this Court in deciding a case desires that an act should be performed by a party within a given or specified time, the Court usually states in its opinion the time within which said act should be performed. In several opinions the Court has stated directly and definitely the time within which an act should be done. Had the Court elected to have appellant file his bond within a specified period of time, it would have so stated. Appellee cannot interpret an opinion of this Court by implication; for even this Court does not interpret its opinion by implication; (c) that appellant does not interpret the opinion of this Court as a license to indefinitely delay the filing of the appeal bond and thereby disregard with impunity the statutes controlling the filing of an approved appeal bond, but he did not receive copy of the minutes of the Court showing the day of the reading and enforcement of this Court's mandate until more than seven weeks after it was made, and this was given him by an officer of the trial court who out of courtesy brought it to him—appellant's counsel. Immediately upon its receipt, appellant commenced processing his appeal bond and had it approved. It is well known that the judges who preside over the court, especially within Montserrado County, make assignments of causes and either do not appear in court on that day or are late and do not hear the causes assigned for that day. Secondly, they do not request lawyers to take rulings in such cases and have the minutes of the

court sent to the lawyer involved. The practice as we know is to have a lawyer take the ruling, and the judge orders the clerk or sheriff to send a copy of the minutes to the counsel of record who is absent. This was not done in the instant case. If appellant had received the minutes of court he would have immediately processed the appeal bond. See appellant's resistance to appellee's motion to dismiss appeal, counts 1, 2, 3, and 4.

In addition to our inability to accept the untenable excuses offered by appellant's counsel as to his failure in processing his appeal bond within the 60 days allowed by statute, we do not think appellant's interpretation of our order allowing him to file a bond *nunc pro tunc* was legally sound.

According to authorities, "nunc pro tunc," meaning "now for then," is the expression applied to amendment and correction made subsequently to the amended or corrected paper and by the court's order, with retroactive effect. 1 R.C.L., *Affidavits,* § 14 (1914). An order *nunc pro tunc* such as in the instant case, is an order now for then; that is, an order of a judge or court made as of a previous date. "An order may be entered *nunc pro tunc* when the delay has been due to the court, but not where it has been due to the fault of the party who seeks the order, nor will it be entered where the order will operate with injustice." 10 R.C.L., *Equity,* § 348 (1915).

It is therefore clear by these definitions there was no need for the stipulation of a definite date on which to file another bond. These orders should have been executed without delay. Failure on part of appellant's counsel is fatal.

When an appeal is imperfect, the court below may be ordered to resume jurisdiction and enforce its judgment with such conditions as the Supreme Court may impose. *Greene* v. *Clarke,* 11 LLR 171 (1952).

While we do not particularly accept the charges made against subordinate judges for their negligent failure to

observe the rules of their court as well as the statutes controlling trial of causes, we must however observe that some of these duties are not only administrative in nature, but are judicial as well; and in case of their failure to perform such duties, it is incumbent upon lawyers, who are arms of the court, to expose such malpractices of subordinate or inferior courts by any legal remedy available to them so that corrective measures may be taken. A lawyer who fails to do so is equally culpable and may not use the dereliction of the judges as an excuse for his own neglect. Moreover, he is a vital contributor to the failure of the courts to perform their duties. It is the right and duty of every lawyer, whenever there is proper ground for complaint against a judicial officer, to submit his grievance promptly and fairly to this appellate court for redress.

Nevertheless, judges should not have to be reminded that the performance of a plain duty necessary to the just determination of a cause should never have to be requested of a judge. "Clearing the trial docket by the disposition of cases shall be the foremost concern of the judge assigned to preside over the term." Rule 7, Circuit Court Rules. "The Circuit Courts shall meet regularly according to law, and the judges assigned shall be in prompt attendance, unless prevented by sickness or such other inability over which they have no control." Rule 1, Circuit Court Rules Revised. "On the first day of the opening of the court in regular session and on Saturdays, the Court shall meet at 10 A.M. and on all other days at 8 A.M. The recess and day-to-day adjournment of the court shall always be in the discretion of presiding judge, he having due regard for expediting as much work as possible within a working day." Rule 3, Circuit Court Rules Revised. Hence it is positively clear that a judge is without authority to appear in court for the performance of his duty any later than 8 o'clock in the morning on Mondays through Fridays or later than 10 A.M. on Saturdays. Acts of

judges who violate this rule should and must be declared ultra vires, for they are unauthorized by law, practice, or procedure within this jurisdiction.

It is our view that the appeal bond prepared and filed September 15, 1976, having been filed after the expiration of the statutory time and contrary to the orders of this Court, is hereby declared null and void. The appeal before us not having a valid appeal bond is hereby dismissed and the motion to dismiss granted with costs against appellants. And it is hereby so ordered.

Motion to dismiss appeal granted.