WALTER ZAZA BOI AND SONNEY YENGO, Administrator and Administratrix of the Estate of the late DARWOSU KABEH, Plaintiffs/Appellants, *v.* **AYO BEATRICE CUMMINGS**, by and through her husband, ALEXANDER B. CUMMINGS, Defendant/Appellee.

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

Heard: December 4 and 5. Decided: January 11, 1985.

1. The requirements of the provisions of sections 53.2 and 51.9 of the Civil Procedure Law, Liberian Code of Laws Revised, regarding legally qualified sureties are not the same as the requirements of the 1956 Code.
2. The 1956 Code requires the court to automatically issue a notice of completion of appeal once an approved bill of exceptions and an approved appeal bond have been filed in the office of the clerk of court, whereas the Revised Code stipulates that following the filing of the approved bill of exceptions and the approved appeal bond with the clerk of court, the appellant must make application to the clerk for issuance and service of a notice of completion of appeal.
3. Under the revised Code, an appeal bond secured by sureties must be accompanied by an affidavit of surety setting forth the description of the property offered, sufficiently identified so as to establish a lien on the bond.

Plaintiff, who had instituted an action of ejectment in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, against the defendant/appellee, appealed to the Supreme Court from a ruling of the trial court dismissing plaintiff's action when disposing of the issues of law.

When the case was called for hearing before the Supreme Court, the Court's attention was brought to a motion to dismiss filed by the appellee. The motion stated that the appellant's bill of exceptions was not approved by the trial judge, that the appeal bond had not been approved by the trial judge, and that the no-tice of completion of appeal had not been served and filed as prescribed by the appeal statute.

The Court refused to dismiss the appeal, opting instead to abate the action without prejudice to the parties. The Court noted that not only was the original file missing, but also that neither counsel for the parties had correct, accurate and complete copies of the records as would enable the Court to mete out transparent justice. The Court observed that since under the 1956 Code, the obligation to issue a notice of completion was upon the clerk of the trial court, without any intervention by the appealing party, it was difficult to rule out the possibility that the notice of completion of appeal had not been issued and served.

Moreover, the Court further observed that while the copies of the appeal bond found in the Court's file was not approved by the trial judge, yet the appellant's copies showed approval by the trial judge. The Court concluded that in the midst of such confusion, where the complete records could not be located and counsels for the parties lacked complete copies to enable the Court to render a fair and impartial judgment, the action should be abated without prejudice to the parties. The Court therefore *denied* the motion to dismiss and *ordered* the action *abated*, without prejudice to the parties.

A. Benedict Clarke appeared for appellee. *Robert G W. Azango* appeared for appellants.

MR JUSTICE MORRIS delivered the opinion of the Court.

The plaintiffs/appellants instituted an action of ejectment against the defendant/appellee in

the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, June Term, 1959. Pleadings progressed to plaintiffs' surrejoinder and rested. During the disposition of the law issues, the judge dismissed the complaint. Plaintiffs excepted to the judge's ruling and announced an appeal to this Court for appellate review.

When the case was called for hearing, counsel for defendant/ appellee informed us that he had filed a motion to dismiss the appeal because of the defectiveness of the appeal bond. This is the motion to dismiss, filed by the defendant/appellee:

> "Appellee in the above mentioned cause moves this Honourable Court to dismiss appellants' appeal for the following reasons, to wit:
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> 1. Because appellants, now plaintiffs then, filed an action in the Civil Law Court, Sixth Judicial Circuit, Montserrado County, in the June Term of Court in 1959, lost the action and announced an appeal to the Honourable Supreme Court.
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> 2. Appellee's counsel requested that a search of the original records of the Civil Law Court for the re-cords of the case in question be made, an exhaustive effort was made by the records division, but the file could not be found. Thereafter, an application was made to the current clerk of the Civil Law Court for a certificate of non-discovery. The said clerk refused on the grounds that he was not the clerk of court at the time of the trial.
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> 3. Because when an examination of the records of the Supreme Court was made, it was discovered that appellants failed to file and serve appellee with notice of completion of appeal, neither was there any evidence that one was issued and signed by the clerk and a return made.
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> 4. That the bill of exceptions found in the records of the Supreme Court was never approved by the trial judge. The bond tendered by the appellants was defective; that same was never approved by the trial judge; that no property valuation or description of property was attached even though the bond was meant to be a property bond; that no sureties affidavit was attached; and neither was there any indication of the figure at which the bond had been fixed.
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> 5. Appellee respectfully request this Honourable Court to take judicial notice of the records of this Court which show clearly that appellants have failed to comply with the process necessary for the com-pletion of appeal as prescribed by law.
>
> WHEREFORE and in view of the foregoing, appellee moves this Honourable Court to dismiss the appeal in keeping with law and grant unto appellee such other and further relief as to law and justice doth appertain."

In countering this motion, the plaintiffs/appellants main-tained, as to count two, that if the clerk of court had refused to issue a certificate for non discovery, the defendant/appellee should have appealed to the Justice in Chambers for mandamus to compel the clerk to issue said certificate.

With reference to counts three, four and five of the motion, the plaintiffs/appellants contended that they had fully complied with the statute governing appeals. They attached photo copies of the bill of exceptions and the appeal bond duly approved by Judge Joseph Findley who heard the case.

The appellee also contended that the properties were not described in the affidavit of surety and no notice of appeal was served on the appellee. Let us examine the statute that was in vogue at the time to ascertain whether or not the description of the properties offered in the bond were sufficiently identified in the affidavit of surety to place a lien on the bond as was provided for, as well as determine upon whom the obligation for the issuance of notice of completion of the appeal was placed. The Civil Procedure Law, 1956 Code 6:1013, under "Appeal Bond: Notice of Completion of Appeal", at 294, states:

"Every appellant shall give an appeal bond in an amount to be fixed by the court, with two or more legally qualified sureties, to the effect that he will indemnify the appellee from all cost or injury arising from the appeal, if unsuccessful, and that he will comply with the judgment of the appellate court or of any other court to which the case is removed. 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."

We also quote sections 462, 463 and 464:

"§ 462. *How bail may be given.*--In the civil action in which bail may be required the defendant may give bail as follows: He shall enter into a recognizance or bond containing the stipulation set forth in section 460 above, which recognizance or bond shall be secured by any of the following:

a) Two or more legally qualified sureties; or

(b) By tender of the amount required as bail in cash, checks, stocks, or ether negotiable securities capable of being readily converted into money; or

(c) By offer of unencumbered real property on which taxes have been paid and which is held in fee by the defendant.

The judge, justice, magistrate, or other officer autho-rized to receive bail must approve a bail bond secured as provided in this section upon being satisfied that the sureties are qualified or that the security offered is adequate, genuine, and as represented by the defendant.

Cash, checks, stocks or other negotiable securities received as bail shall be deposited by the sheriff in the government depositary, or some reliable bank, and a receipt therefor shall be taken showing the amount deposited, the purpose of the deposit, order of the judge, justice, magistrate, or other officer authorized to receive bail.

§ 453. *Legally qualified sureties.*--Sureties qualified by law shall each be freeholders or householders of the Republic of Liberia and shall have a combined worth equal to or exceeding the amount specified in the bond on which they are to be sureties exclusive of their exempt properties and over and above all their debts and liabilities.

§ 464. *Testing sufficiency of surety.*--If any party is dissatisfied with the sufficiency of any surety, he may, upon three days' notice, require said surety to attend before the judge of the court in which the action is pending and may there examine him under oath about his sufficiency in such manner as the judge thinks proper. If the judge finds that the surety is insufficient, he shall require another surety in his stead."

It is crystal clear from the above provisions of the statute of 1956 that the provisions of sections 63.2, *Legally Qualified Sureties* and 51.9, *Notice of Completion of Appeal* of the Rev. Code I, are not the same as those of the 1956 statute. For example, after the filing of the approved bill of exceptions and appeal bond, the clerk of court is to issue the notice of the completion of the appeal, according to the 1956 Code; whereas the provision of the Civil Procedure Law, Rev. Code 1, is that after the filing of the approved bill of exceptions and appeal bond, the appellant is to make application to the clerk of court to issue a notice of the completion of appeal. Further, in the 1956 Code there is no provision for the properties offered for a bond to be sufficiently identified in the surety affidavit so as to establish a lien on said properties. Instead, the sureties must only be freeholders and householders. Under the Civil Procedure Law, Rev. Code I, the bond must be accompanied by an affidavit of surety setting forth the description of the properties offered, sufficiently identified so as to establish a lien on the bond, etcetera.

Since the issuance of the notice of the completion of an appeal after the filing of an approved bill of exceptions and an approved appeal bond is an obligation placed upon the clerk of court by the 1956 Code, it is difficult to rule out that there was no notice of the completion of the appeal issued and served on the appellee.

There are many interacting features in this case. Although the Morgan, Grimes and Harmon Law Firm was the original lawyer for the appellee, yet there is no notice of either additional or change of counsel in the file. Instead, the only notice as to counsel found in the records reads:

"Madam Clerk:

You will please take judicial notice and spread upon the records of this Honourable Court that hence forth this Firm shall be carrying the legal interest of the appellee in the above referenced case

Sgd. A. Benedict Clarke, Jr.
COUNSELLOR-AT-LAW
HORACE & HORACE LAW FIRM"

Secondly, the original file is missing and the counsel for both parties seem not to have the correct and complete copies of the records so as to enable the court to mete out transparent justice. For example, the copies of the appeal bond and bill of exceptions found in the Supreme Court file are not approved by the trial court, yet the ones produced by appellants' counsel are approved by the trial judge. When the original records of a case cannot be located and the counsel on both sides do not have the complete copies of the original records so as to enable the Supreme Court to render a fair and an impartial judgment as in this case, the action will be abated without prejudice to either party.

In view of all we have narrated, the laws cited, and, because the original records cannot be located and both counsels do not have the full and complete copies of the records so as to enable the Supreme Court to make a fair determination of the case, the entire action is hereby abated without prejudice to both parties. Costs disallowed. And it is hereby so ordered.

Motion denied; action abated.