MARCUS-JONES AG.J. I also share the opinion expressed by my learned brother Dove-Edwin that the property conveyed to Joseph E. Metzger as well as the property conveyed to Mrs. Cromanty's two grand-nieces do not enter into the picture now, and consequently the declaration should not be amended to exclude them.

In all other respects I agree with the judgment that the appeal be dismissed.

[COURT OF APPEAL]

Freetown
March 9,
1962

Ames Ag.P.,
Benka-Coker
C.J.
Dove-Edwin
J.A.

ELIJA J. SPECK . . . . . *Appellant*

v.

GBESSAY KEISTER . . . . . *Respondent*

[Civil Appeal 13/61]

Practice—Appeal—Preliminary objections to hearing of appeal—Compliance with rule of court—West African Court of Appeal Rules, 1950, *rr.* 14 (4), 21 (1).

On June 23, 1961, respondent recovered judgment against appellant. On July 17, appellant died. On October 31, a motion was filed asking that his two executors be substituted for him for purposes of taking an appeal. In November, the Court of Appeal extended the time within which to appeal, and in February, 1962, the appeal was set down for hearing. At the hearing, counsel for respondent raised certain preliminary objections to the hearing of the appeal, of which the first was that "the appeal is not properly before the court." The ground for this objection was rule 14 (4) of the West African Court of Appeal Rules, 1950, which provides:

"No application for enlargement of time in which to appeal shall be made after the expiration of one month from the expiration of the time prescribed within which an appeal could be brought. . . . Any such application may be made to the court or to the court below . . . and when time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal."

It appeared that no copy of the order granting the enlargement of time was annexed to the notice of appeal.

Held, striking out the appeal, that the appeal was not properly before the court, since the requirement of rule 14 (4) had not been complied with.

The Court (Dove-Edwin J.A.) also said, obiter, that appellant's executors could bring an appeal against a judgment given against appellant touching the properties they were to administer, and that the Court of Appeal had inherent power to extend the time for appeal beyond the time specified in rule 14 (4) of the West African Court of Appeal Rules, 1950.

Cases referred to: *Chief Oloto and another* v. *Chairman, Lagos Executive Development Board* (1950) 13 W.A.C.A. 57; *Anoje* v. *Ukweje* (1955) 15 W.A.C.A. 41.

Cyrus Rogers-Wright (*James Mackay* with him) for the appellant.
Edward J. McCormack for the respondent.

DOVE-EDWIN J.A. The respondent in this appeal filed a notice to raise certain preliminary objections under rule 21 (1) of the Rules of the West African Court of Appeal as applied to the Sierra Leone Court of Appeal.

The grounds of objection set out in the notice are as follows:

(1) The appeal is not properly before the court.

(2) The court erred by granting extension of time to appeal herein.

(3) The appellants as personal representatives, ipso facto, cannot appeal on behalf of the deceased testator.

A brief outline of the matter is as follows: The claim was for specific performance. Pleadings were filed and the hearing concluded. On June 23, 1961, judgment was entered for plaintiff for specific performance and taxed costs. The defendant died on July 17, 1961. On October 31, 1961, a motion was filed asking that the two executors of the deceased's will be substituted for the deceased with a view to appeal.

In November 1961 this court extended the time within which to appeal although the three months set for appeals and the one month extra in rule 14 (4) of the rules had run out. In February 1962 the appeal was set down for hearing and at the hearing the preliminary objections set out above were taken.

In my view, objection (3) has no substance. The personal representatives of the deceased in this case, his executors, could bring an appeal against a judgment given against deceased touching the properties they are to administer.

Ground (2) need not be seriously considered, although I concede that rule 68 of the W.A.C.A. Rules, mentioned by this court as the rule under which the time was extended, was mentioned in error. No rule need have been mentioned, this court acting in its inherent jurisdiction in a matter in which it felt it would meet the ends of justice to do so.

The first objection seems to me to have some substance. Rule 14 (4), as amended, reads:

> "No application for enlargement of time in which to appeal shall be made after the expiration of one month from the expiration of the time prescribed within which an appeal may be brought. Every such application shall be supported by an affidavit setting forth good and substantial reasons for the application and by grounds of appeal which, prima facie, show good cause for leave to be granted. When time is so enlarged a copy of the order granting such enlargement shall be annexed to the notice of appeal."

The copy of the order mentioned in the rule is mandatory and must be followed.

Appellant's answer to this is that he paid the sum of £5 8s. 0d. for the filing of all papers after the time was extended.

The fact is that the record as it appears is incomplete. Loose documents made after the application for substitution of the executors were served to this court but they do not contain the vital copy of the order that should be annexed to the appeal.

I have perused the whole file and this copy was never attached and consequently neither respondent nor this court nor appellant has such copy.

In the circumstances the omission to follow the rule is fatal and, it is my opinion, that the appeal is not properly before the court and should be struck out.

The appellants have had their opportunity when the time was extended by this court and have failed to take advantage of it; no further consideration could be extended to them.

AMES AG.P. I agree that one of the preliminary objections raised by Mr. McCormack must succeed; namely, that based on the failure to attach a copy of the order extending the time to the notice of appeal as required by rule 14 (4).

At the last session of this court, we had before us a motion praying for an order:

(1) to substitute two executors for the deceased defendant;

(2) for an extension of time within which they could appeal; and

(3) for a stay of execution.

Two affidavits were filed in support of the application, and attached to one of them as an exhibit was a copy of the notice of appeal, which would be given if the time was extended. Paragraph 4 of that affidavit ended thus:

> ". . . and that for reasons appearing hereafter we be granted special leave to appeal out of time to this court, and that the petition of appeal filed herein do remain and be deemed to have been filed herein."

An additional prayer should not be included in a paragraph of an affidavit.

The order made on that application was: "The application is allowed as prayed with costs. Time is extended for a fortnight from today."

The words "as prayed" in that order refer to the three prayers contained in the notice of motion. Upon the making of this order, the applicants should have obtained a copy of the order, and attached it to their notice of appeal, and filed them with copies for service and paid the fee for a notice of appeal, filing and service. They paid the fee but did nothing else.

The registrar must have taken the copy of the notice of appeal attached to the affidavit as the notice of appeal, because he summoned the parties to settle the record and did settle it and made an order for security for costs, and so on, and the matter proceeded as if it was a properly filed appeal. The result is that we have an appeal record containing the record of the hearing before the judge, the application by motion to this court referred to above, with the affidavit and copy of notice of appeal, but not the notice of appeal or a copy of the order which was made at the hearing of the application.

The responsibility for having the order drawn up was on the appellants and it cannot be shown that any was drawn up, and none was served upon the respondent as required by rule 14 (4). Mr. McCormack argues that this is statutory requirement and that failure to comply with it is fatal. I think that he is correct.

I regard this matter as unfortunate. It savours somewhat of a mere technicality. Some of the rules contain provisions by which faults may be overcome, for example, rule 20 (2), 21 (2) or 23 (3), but rule 14 has no such provision. Rule 35 does not help because that only applies when there is an appeal properly before the court.

There was in the West African Court of Appeal (Civil Cases) Ordinance (Cap. 14) the following discretionary provision:

> "7. Notwithstanding anything hereinbefore contained, the Court of Appeal may entertain any appeal from the court below on any terms which it thinks fit."

What could and could not be done under that section was explained in *Chief Oloto and another* v. *The Chairman, L.E.D.B.* (1950) 13 W.A.C.A. 57 and *Anoja on behalf of, etc.* v. *Opara Ukweje and 19 others* (1955) 15 W.A.C.A. 41.

It is useless to consider this matter in the light of those decisions, because the Ordinance has been repealed by the Courts (Appeals) Ordinance, 1960 (No. 18 of 1960), and this latter Ordinance, by which this court is bound, does not contain any such provision as that of the repealed section 7.

[COURT OF APPEAL]

Freetown
March 19,
1962

Ames Ag.P.
Bankole Jones
Ag.C.J.
Marke J.

JOE GBONDO *v.* REGINA

[Criminal Appeal 3/62]

Criminal Law—Homicide—Murder—Malice aforethought—Trial—Whether trial judge correct in allowing witness to answer hypothetical question—Whether verdict unreasonable.

Accused was the lover of one Kadie Bangura, a woman whose husband was away from home. During the farming season they had a joint rice farm. One day the accused went to her in her house for his share of the rice from their farm; she gave him some rice and he went away. Later, he came back, found the door closed and asked her to open it. When she did so, he went in and saw her husband's brother lying on the bed. He asked her why the brother was there, and hit her, whereupon she called to the brother to come to her assistance. According to her testimony, the accused then stabbed the brother in the arm with a pocket knife. (Accused denied this in his testimony.) A witness who arrived shortly thereafter testified that he saw the brother lying on the ground in a pool of blood with accused holding him around the waist. Another witness said that he saw the brother lying on the ground and the accused standing near him. A third witness, who lived in the same house, testified that when accused had come to the house the second time he had said that he had not been given his fair share of rice and that "he was going to do bad with the people." A chiefdom police corporal found a blood-stained pocket knife belonging to Kadie Bangura's husband underneath some leaves on top of a container of cassava. The brother died on the way to the hospital.

Accused was convicted of murder by the Supreme Court (Cole J.) sitting at Bo with two assessors. He applied for leave to appeal on two grounds: (1) that the verdict was unreasonable; and (2) that the judge wrongfully allowed a witness to answer a hypothetical question put to him by one of the assessors.

Held, dismissing the application, (1) that, having regard to the evidence and to the fact that the judge and assessors had the benefit of seeing the witnesses, it was not possible to say that the verdict was unreasonable; and

(2) that it was within the discretion of the judge to allow a witness to answer a hypothetical question put to him by one of the assessors.

Claudius Doe-Smith for the appellant.
John H. Smythe (Solicitor-General) for the respondent.

AMES AG.P. This is an application for leave to appeal against a conviction of murder had in the Supreme Court at Bo before Cole J., sitting with two assessors. We allowed it to be argued on the grounds of appeal, as an appeal.

There are two grounds of appeal. The second is that the learned judge wrongfully allowed a witness to answer a hypothetical question put to him