CAMER LIBERIA CORPORATION, represented by its Manager, Defendant/Appellant, v. **A. H. BASMA & SONS (LIBERIA) INC.,** represented by its General Manager, **S**AMIH BASMA, Plaintiff/Appellee.

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

Heard: November 9, 1983. Decided: December 21, 1983.

1. Rules of practice are for the purpose of aiding in the speedy determination of causes.

2. Courts are established for the higher purpose of the administration of justice and, where the strict enforcement of the letter of a rule would tend to prevent or jeopardize the administration of justice, the rule must yield to the higher purpose and be relaxed by the court.

3. An attorney of record for a party may enter into a recognizance for his client.

4. Although a motion is not a pleading, the rule governing amendments, as contemplated by the statute regulating forms of pleadings, applies to motions.

5. Courts of justice will avoid the refusal to hear litigants because of immaterial technicalities.

6. The points of law or facts not tendered in the pleadings or motions will not be introduced or argued during the hearing of the case.

Plaintiff/appellee filed before the Civil Law Court for the Six Judicial Circuit, Montserrado County, an action of damages against defendant/appellant for loss of goods.

Trial was held in the said court and a verdict was returned in favor of plaintiff/appellee, wherein it was awarded $128,293.14 (One Hundred Twenty Eight Thousand Two Hundred Ninety-Three Dollars Fourteen Cents). The verdict was confirmed by the judge in his final judgment, following the court's denial of the appellant's motion for a new trial. From that judgment the defendant/appellant announced and perfected an appeal to the Supreme Court.

When the case was called for hearing, counsel for appellee informed the Supreme Court that appellee had filed a motion to dismiss the appeal on the grounds that (a) the appeal bond was signed by an attorney of record for the appellant as one of the sureties to said bond; (b) the affidavit of sureties did not contain a description of the two pieces of property offered as security to the appeal bond; and (c) the appellant had failed to serve appellee notice of the filing of the appeal bond.

The Court rejected all of the contentions of the appellee in the motion to dismiss the appeal. The court held that while it was true that a counsel was forbidden by the Rules of the Circuit Court from serving a surety for his client, the Rule was repugnant to the proper

administration of justice which was the primary reason for the setting up of the courts in the first instance. The Court held that the Rule was also repugnant to the basic rights to acquire, use and dispose of property in accordance with the dictates of one's conscience. As such, the Court said, it could not uphold the contention of the motion.

As to the second contention, the Court opined that the affidavit of sureties had met the mandatory requirements of the statute in describing the property used to secure the appeal bond; it did not matter whether that description was in the affidavit of sureties or otherwise, especially as there was no question raised as to the insufficiency of the value of the various properties. The Court noted that under the circumstances, the contention that the affidavit of sureties had failed to show which description belonged to the property of a particular surety was legally immaterial.

With regard to the last contention, the Court opined that the statute on appeal does not require that notice of the filing of an appeal bond be given to the adverse party, and hence, the failure to give such notice did not constitute a ground for the dismissal of the appeal. The Court therefore denied the motion to dismiss the appeal.

The P. Amos George Law Firm appeared for the appellant. Julius Adighibe appeared for the appellee.

MR. JUSTICE YANGBE delivered the opinion of the Court.

Plaintiff/appellee brought a suit of damages for loss of goods against the defendant/appellant in the Civil Law Court, Sixth Judicial Circuit, Montserrado County. Trial was had therein which resulted in favour of plaintiff/appellee with an award of $128,293.14. The verdict was accordingly confirmed in a final judgement of the trial court. Defendant/appellant has appealed from the judgement to this Court for review. When the case was called for hearing before this Bench, our attention was called to an amended motion to dismiss the appeal and a resistance thereto filed by the parties.

The points of contentions we culled from the motion to dismiss and the resistance are:

a. Whether a bond of any nature signed by an attorney of record for his client, is valid in view of the inhibition contains in Circuit Court Rule 25?

b. Whether the affidavit of sureties in this case contains descriptions of the two pieces of properties offered, sufficiently identified to establish the lien of the bond?

c. Whether the failure of appellant to serve on appellee a notice for filing of the appeal bond constitutes a legal ground to dismiss the appeal?

d. Whether a motion is a pleading and can it be amended?

There are two sureties, namely, P. Amos George and Joseph S. 0. Coleman who signed the appeal bond for the appellant. The statement of property valuation of the former is $85,000.00 whilst the letter is $114,082.00, aggregating $199,082.00 over and above the penalty affixed in the bond by the trial judge. Notwithstanding, appellee has contended that P. Amos George is one of the attorneys of record for the appellant and Circuit Court Rule 25 forbids a lawyer to become a surety for his client, consequently, less the statement of the property valuation and signature of Counsellor P. Amos George from the bond, leaving only $114,082.00 statement of property valuation of Mr. Joseph S. 0. Coleman, the bond is insufficient to indemnify the appellee.

It is quite clear, and not denied, that Counselor P. Amos George was one of he lawyers for appellant in the trial court and continues to be at this level, and that he is also one of the sureties who signed the appeal bond for the appellant. It is further obvious that Circuit Court Rule 25 certainly forbids a lawyer from becoming a surety for his client. However, despite the tacit admission on part of appellant and well established by the record, yet, it has not legally resolved the first proposition posed hereinabove.

The appellee/movant has relied on the opinion of this Court in Cole and Cole v. Peabody, 13 LLR 252 (1958).

Looking carefully at the issues we are to determine in the instant case, it is legally vital to note here that in the Cole case, reported in 13 LLR 252, supra, no resistance was interposed to the motion to dismiss and no one appeared for the appellant. Hence, there was no controversial issue presented to the Court for its consideration and decision when the motion to dismiss the appeal was granted on the ground that an attorney of record was barred from being and signing as a surety to a bond for his client, whilst in this case, appellant has appeared by counsel and filed a resistance to the motion, raising several issues. We are therefore bound to pass upon the legal merits of the contentions raised by the parties.

One of the cases cited by counsel for appellant to counteract count one of the motion, supra, is Pratt v. Phillips and Summerville, 10 LLR 147 (1948). Because of the analogy of the facts and circumstances in that case and the one at bar, we have deemed it appropriate to narrate the pertinent facts and circumstances in the Pratt case, and they are:

Under the former rules of the Supreme Court:

"In the case of the death of either party, the name of the executor, or administrator may be substituted and the cause pending be proceeded with. Either party may submit a motion for such substitution and the same shall be disposed of as justice and equity may require.

If no representative of a deceased party shall appear with a motion for substitution for two terms after the death of the party, the cause may be stricken from the calendar upon the motion of the opposite party."

The Supreme Court, in addressing itself to the validity of the rule of court with reference to the consequence of non filing a motion for substitution of party, stated as follows:

"Rules of practice are for purpose of aiding in speedy determination of causes, while the courts are established for the higher purpose of the administration of practice...and, where the strict enforcement of the letter of a rule would tend to prevent or jeopardize the administration of justice, the rule must yield to the higher purpose, and be relaxed by the court."

Consequently, this Court was of the opinion that the Pratt v. Phillips case, cited earlier in this opinion, fell within the category of cases in which a court is justified in disregarding or relaxing any of its rules whenever the purposes of justice so require, since rules of courts are but a means to accomplishing the ends of justice, therefore, refused to strike the case from the docket and it relaxed the rule, as a result, the case was ordered proceeded with on the merits.

In another revelation on the relaxation of rules of courts in order to accomplish the ends of justice, this Court took a position in In re James Doe Gibson, Counselor-At-Law, reported in 16LLR 202 (1965). We quote the relevant rule of this Court, as follows:

"Upon a hearing had under such alternative writ, an absolute writ may be issued directing the performance, or non-performance, or cessation of any act, which to the Court or Justice thereof may seem just, legal or equitable, subject to appeal to the Supreme Court upon such conditions as the Justice may prescribe."

In that case, Counsellor James Doe Gibson was held in contempt of the Supreme Court by the Justice then presiding in Chambers, His Honour the late James A. A. Pierre. Although an appeal was announced by the lawyer, however, predicted upon the rule of this Court we have quoted hereinabove, the Chambers Justice insisted upon the enforcement of his ruling and Counsellor Gibson was left with no other alternative but to comply with the ruling.

Notwithstanding, Counsellor Gibson also insisted upon the review of the ruling of the Chambers Justice, arid upon appeal, this Court modified the ruling of the Chambers Justice to the effect that the rule relied upon by the Chambers Justice was declared unconstitutional and, hence, unenforceable.

Predicated upon our conviction that the positions this Tribunal took in the two cases cited above were for the higher purpose of the administration of justice, which is the primary reason for establishing our court system, we do not hesitate to apply the same principle in the case now before this Bench and declare Circuit Court Rule 25 repugnant to the basic

rights to acquire, use and dispose of property in accordance with the dictate of one's conscience. Roberts v. Roberts, 1 LLR 107 (1876) and 14 AM. JUR. , §§ 152 & 357. Therefore, our holding in Cole and Cole v. Peabody, 13 LLR 252 (1962) is hereby recalled.

The affidavit of sureties in this case was challenged by the appellee as being defective only because "there is no showing in the said affidavit of sureties which of the two insufficiently described property belonged to Surety Joseph S. 0. Coleman and which is owned by Surety P. Amos George, which makes the appeal bond all the more legally defective instrument...."

There are two separate pieces of properties offered by the two sureties in this case, which are separately and sufficiently described by the indications of the metes and bounds thereof, and these are mandatory and sufficient requirements of the statute as well as the several lines of opinions of this Court. It is, quite clear further, that all the properties described in the affidavit are securities for the appellee and there is no question as to the insufficiency of the values thereof. The bond having met the statutory requirement with respect to descriptions, whether in the body of the affidavit or otherwise, the contention that there is no showing as to which descriptions belong to the property of each surety, is legally immaterial and does not render the bond unenforceable. Courts of justice will avoid the refusal to hear litigants because of immaterial technicalities. Liberty ' v. Horridge, 2 LLR 422 (1923). See also Bank of British West Africa Ltd. v. Davies-Johnson, 3 LLR 223 (1931).

The grounds for dismissal of an appeal by trial court is failure of the appellant to file a bill of exceptions within the time allowed by statute, and by the appellate court, after filing of the bill of exceptions for failure of the appellant to appear on the hearing of the appeal, to file an appeal bond, or serve notice of the completion of the appeal as required by statute. The Civil Procedure Law, Rev. Code 1: 51.4 reads:

"The following acts shall be necessary for the completion of an appeal:

a. Announcement of the taking of the appeal;

b. Filing of the bill of exceptions;

c. Filing of an appeal bond;

d. Service and filing of the notice of the completion of the appeal;"

`Failure to comply with any of these requirements within the time allowed by statute shall be ground for dismissal of the appeal."

The current appeal statute does not require service of a notice on an appellee relative to the filing of an appeal bond; therefore, a failure so to do does not fall within any of the grounds specified in the sections of the statute, supra, and hence, under the doctrine of separation of powers, the court cannot legally read anything into the statute which the lawmakers did not

so intend. This Court has always upheld the principle that what the law does not give, it withholds.

The last controversial point is, whether a motion is a pleading and should the rules of pleadings apply to a motion? This argument has been raised in many cases, including Lamco J. V. Operating Company v. Verdier, 25 LLR 394, 397 (1977), in which this Court held:

`While a motion might not be a pleading, the rule governing amendments as contemplated by the statute regulating forms ofpleadings applies to motions also. 1956 Code 6:360. Therefore, any subsequent motion to dismiss filed after withdrawal of the first motion, should have been denominated 'amended motion.' That is the law, and that is our practice, and we have no authority to disregard it."

Appellant has also argued that the accrued costs were not paid by the appellee when he withdrew the first motion and refiled the amended motion to dismiss the appeal. His opponent called him to a point of order, on the ground that the issue of non-payment of costs was not raised by the appellant in the resistance to the amended motion, therefore, he was estopped from arguing it, and accordingly, this point was sustained during the argument of this case.

We would like to reiterate that the points of law or facts not tendered in the pleadings or motions will not be introduced or argued during the hearing of the case. This point is elementary in our adversary system and we will continue to uphold it.

Accordingly, the motion to dismiss the appeal is denied, the resistance thereto is sustained. The Clerk of this Court is hereby instructed to redocket this case to be heard on the merits during our March Term, A. D. 1984. Costs to abide final adjudication. And it is so ordered.

Motion denied