

THE SALVATION ARMY (LIBERIA) INC., by and thru MAJOR BRIAN J. KNIGHTLEY, Appellant, v. **GEORGE S. B. TULAY**, Appellee.

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

Heard: November 19, 1998. Decided: January 21, 1999.

1. The Supreme Court can only review issues that have been passed upon by subordinate courts and made the subject of appeal.
2. Factual matters contained in the bill of exceptions but which are still pending undetermined in the trial cannot be reviewed by the Supreme Court; the Court can only pass on issues on appeal from a judgment of a subordinate court.
3. A party may move the court for judgment dismissing one or more claims for relief asserted against him in a complaint as of the time of service of his responsive pleading.
4. The party filing the last pleading is entitled to move the court first on any legal defect in the pleading of his adversary.
5. The doctrine of lis pendens is only applicable where there is another action pending between the same parties for the same cause in a court within the Republic of Liberia.

Appellee who claimed that he had paid for a parcel of land from the grantor of the appellant prior to the transfer of the said land to the appellant, and that therefore he, the appellee, was entitled to the said property, was sued in an action of ejectment by the appellant. Following the filing of the reply, the appellee filed a motion to dismiss the action, claiming that there were matters of the same nature pending before the Monthly and Probate Court for Montserrado County and the Civil Law Court for Montserrado County, relying for the request on the doctrine of lis pendens. The appellee also asserted that the appellant's deed was defective and that because he had paid for the premises, the appellant's action should be dismissed.

The trial court sustained the contentions in the motion and dismissed the appellant's action. From this action of the trial judge an appeal was taken to the Supreme Court.

The Supreme Court reversed the judgment of the trial court, holding, firstly, that the motion was filed untimely in that not only did the law provide that the last pleader is

the party entitled to move the court on the legal defect of the pleading of his adversary, and that the appellee had failed to file the motion at the time that he filed his responsive pleading. The trial court, it said, should therefore not have sustained the motion.

Secondly, the Supreme Court said, the doctrine of *lis pendens* was not applicable and should not have been sustained by the trial judge since the actions to which the appellee had referred were not the same as ejectment action, noting that one action was for damages and concerned injury to property, while the other was a challenge to the probate of a deed, none of which involved ejectment. The Court therefore reversed the judgment and ordered the trial court to proceed to dispose of the law issues.

Francis S. Korkpor of the Tialia and Associates, Inc. for the appellant. *George S. B. Tulay* of Tulay & Associates appeared for the appellee.

MR. JUSTICE MORRIS delivered the opinion of the Court.

The records transmitted to this court revealed that in July 1992, appellee and one Jessie Payne, attorney-in-fact for one Mrs. Victoria Johnson Maxwell, agreed and consented to sell a piece of land located between the Pan African Plaza and Toyota Garage, directly opposite the Monrovia City Hall, for an amount of LD\$100,000.00. Appellee alleged that between July 1992 and October 15, 1992, he paid the amount of LD\$50,000.00 to the said Jessie S. Payne against the LD\$100,000.00 and moved in the promises in 1992. Appellee also asserted that between October 15, 1992 and to June, 1994, he could not locate Mrs. Victoria Johnson-Maxwell, but that when he managed to get in touch with her in 1993, he paid her US\$10,000.0 for the premises in question. He further alleged that he agreed to pay the US\$10,000 both in cash and goods, such as African gowns, shirts, dresses and arts and crafts, and that by July 13, 1995, he had allegedly paid to the said Victoria Johnson Maxwell an amount of US\$5,700.00, excluding the values of the African gowns, dresses, shirts, etc.

Appellee stated that in all he sent a cash total of US\$15,600.00 to Mrs. Victoria Johnson-Maxwell in U.S.A. excluding the LD\$50,000.00, he had paid to Jessie S. Payne. He further said that he was informed that between the 15' and 22' day of February, 1996, that Mrs. Maxwell, thru the influence of Mr. Jessie S. Payne, had or was about to sell the piece of land; that upon hearing of this news, he filed, on January 23, 1996, a caveat against the probate of any lease agreement, deeds or any

other documents from Mrs. Victoria Johnson Maxwell; and that said caveat is still pending before the Probate Court for Montserrado County.

Appellee asserted further that in September 1996, appellant herein carried 50 ex-fighters on the premises and forcibly opened all the doors, illegally entered therein and put appellee's family and other relatives and dependants' belongings outside, took away valuables, and damaged the rest, for which unwholesome acts appellees and others affected, filed an action of damages for wrong before the Sixth Judicial Circuit Court, Montserrado County.

On October 11, 1996, appellee filed a bill of information before the probate court informing the court of the illegal probate and registration's of appellant's deed on February 13, 1996, with out notice and information to him, even though his caveat was filed on January 24, 1996, and that the caveat was still pending before the said court undetermined.

On February 3, 1997, the appellant herein instituted an action of ejectment against appellee in the Civil Law Court for the Sixth Judicial Circuit, during its March Term, A. D. 1997, presided over by His Honour M. Wilkins Wright, then resident circuit judge.

Appellant also stated in its complaint that all efforts to have the appellee meet with it in connection with the said matter, through a conference to ascertain the reason/or intention for appellee continued use and occupation of its legitimate premises failed. Appellant prayed the trial court to eject and evict appellee from appellant's premises and that appellant be placed in possession of the subject property.

On the 14th day of February, A. D. 1997, appellee filed a nine-count answer to the appellant's complaint. In count 2, appellee contended that from the time he and Mrs. Maxwell agreed for him to buy the premises in question for US\$10,000.00, he made the first payment to her in 1993 or 1994. Therefore, the premises was not hers but appellee's. Hence, she could not have legally sold said premises to the appellant in January, 1996, and if she did, appellee argued, said sale was illegal and had no effect on appellee. Appellee also further asserted in his answer that appellant's deed, exhibit "A" to the complaint, was illegally probated and registered, and that as such, same was a legal nullity and had no legal effect on him since he had filed information before the probate court and said information was still pending before the said court undetermined. Appellee also contended that by the delineation of

contract, the premises in question was owned by him and not the appellant. Hence, he could not be evicted, ousted and ejected from said premises.

Appellee also submitted that the entire complaint was the subject matter of dismissal, in that, there were two cases relative to the subject matter between the appellee and appellant pending in the Civil Law Court and the Probate Court for Montserrat County. Hence, the action of ejectment should be dismissed.

Appellee prayed the trial court to dismiss appellant's complaint with costs against the appellant and that his (appellee's) answer be maintained and sustained. Appellant filed its reply on the 19th day of February, A. D. 1997, and pleadings rested.

On February 28, 1997, appellee filed a motion to dismiss appellant's action, informing the trial court that the appellee was a party-defendant in the case out of which the motion grew, and that at various times between 1992 and 1996 he had paid to Mrs. Victoria Johnson Maxwell, the owner of subject property, various amounts totaling, USD20,000.00, for two separate pieces of property, plus African goods, such as, dresses, gowns, shirts, and arts and crafts, in addition to LD\$50,000.00 paid to Mr. Jessie G. Payne, attorney-in-fact for Mrs. Maxwell. Appellee contended that based on the mutual agreement between him and Mrs. Maxwell and Mr. Payne, he moved into and took possession of the premises in July, 1992, and was still in possession up to the present.

Appellant filed a five-count resistance to appellee's motion to dismiss contending that count one of the motion contained no traversable issue, hence not a subject of contention; that the motion lacked legal reasons for which the complaint should be dismissed; that the facts are repeated as contained in the appellee's answer.

Appellant contended that under the rule of pleadings notice must be given to the adversary of the defenses a party intended to rely upon. Appellant prayed the court below to dismiss the motion, rule the complaint to trial, dismiss the answer, and place the appellee on bare denial.

On the 16th day of May, A. D. 1997, His Honour M. Wilkins Wright, then resident circuit judge, granted appellee's motion to dismiss appellant's action of ejectment on ground that appellant's title deed was defective and on the doctrine of *lis pendens*. The court appointed counsel excepted to this ruling and announced an appeal to this Honourable Court which was granted by the trial judge. The appellant has filed a seven-count bill of exceptions.

Appellant alleges in its bill of exceptions and argued before this Court that the ruling of the trial judge was erroneous and prejudicial, in that, appellee's motion to dismiss appellant's action of ejectment was contrary to law. In other words, appellant contended that there was no other action pending before the same parties for the same cause in the courts within this Republic, the ground used by the trial judge for granting the motion to dismiss. Appellant also, argued that the trial judge committed a reversible error when he reviewed the act of the probate court to the effect that appellant's title deed was defective for reason that it was probated and registered within a period shorter than four (4) months and that the land was surveyed without the due notice to the appellee. In short, appellant submitted that the probation of a conveyance is not reviewable in an action of ejectment.

It was further contended by appellant that the appellee's motion to dismiss appellant's complaint was untimely filed, in that the said motion was not filed at the time of service of appellee's responsive pleadings, but 14 days after the service of the answer and appellant's reply.

Appellant further argued that a title deed probated presents issue of facts to be tried by a jury and that appellee's motion to dismiss could not challenge a title deed for reason that a motion was not a substitute for an answer. Appellant further asserted that the appellee had failed in his answer to appellant's complaint to traverse the averments contained therein with respect to the ownership to the property and to profert title and other relevant documents in establishing title to the disputed property.

Appellant therefore prayed this Court to reverse the ruling of the trial judge dismissing appellant's action of ejectment anti to grant appellant's resistance to said motion.

Appellee, on the other hand, contended that a contract of sale of the subject property was concluded between Jessie S. Payne and appellee in 1992, and between Victoria Johnson-Maxwell and him in 1993, whereupon he paid the sum of USD14,200.00 against the purchase price of USD20,000.00 by January 16, 1996. This, appellee said, made him the legal owner of the property as of the first payment of the purchase price to his grantor, Victoria Johnson-Maxwell. As such, his grantor was divested of the ownership of the premises when, on January 16, 1996, she executed appellant's deed for the premises. Hence, appellee contended that the sale was unlawful and illegal and could not stand.

This Court is reluctant to decide appellee's issue of ownership of the subject property pursuant to a contract of sale allegedly concluded between appellee and his grantor upon which he allegedly made an initial payment on the ground that there is an action of ejectment pending before the Civil Law Court to determine the parties' title and right of possession to the disputed property. For, to do so would mean delving into the merits of the ejectment suit which is not the subject of appeal before this Court.

The third contention raised and argued by appellee was that the probate court was wrong in probating on February 3, 1996, a deed against which probation a caveat was filed on January 24, 1996, without giving notice and information to the caveat-or. The fourth contention raised and argued before this Court by appellee was that appellant's deed against which probation a caveat was filed, could not be used in an action of ejectment by the appellant, for reason that the said deed could not be considered as legal title until the dispute was settled. Appellee also contended that appellant's deed for the disputed property was subject of litigation in the Monthly and Probate Court for Montserrado County, wherein a caveat and a bill of information had been filed and remained undetermined.

This Court is cognizant of its scope of appellate review, that is, that it can only review issues that are passed upon by subordinate courts and made the subject of appeal. Hence, appellee's issues three and four are not subject of the appeal before this Court as those issues are yet to be determined by the Monthly and Probate Court for Montserrado County, as admitted by the appellee.

The fifth issue raised and argued before this Court by appellee is that the caveat and the bill of information filed and presently pending before the Monthly and Probate Court for Montserrado County and the action of ejectment pending before the Civil Law Court undetermined involved two or more cases pending between the same parties in a court of competent jurisdiction, and that as such, the motion filed by the appellee was legally granted by the trial judge dismissing the ejectment suit.

Appellee also raised the issue of appellant's failure to file a notice of change of counsel with the clerk of the trial court and to serve a copy thereof on appellee's counsel. This Court however observes during the arguments of this case that appellee conceded the filing and service of a notice of change of counsel by the appellant herein.

The seventh and final issue raised by the appellee was that the appellant had failed to deny the allegations of fact made by him to the effect that he had moved on the premises in July, 1992, and that he concluded a contract of sale with the grantor of the disputed property and subsequently made an initial payment of US\$14,200.00 excluding the sum of LD\$50,000.00 paid to one Jessie S. Payne for the subject property. These allegations, pleaded and not denied by the appellant, he said, are therefore deemed admitted.

We are impotent to decide appellant's issue number seven on ground that the factual matters contained therein are cognizable before the trial court for determination of the ejectment suit which is pending undetermined. This Court can only pass on issues on appeal from a judgment of a subordinate court. The subject of appeal before this Court is to determine whether the doctrine of *lis pendis* is applicable in this case for which appellant's action of ejectment was dismissed upon motion of appellee. We cannot therefore decide any other issue which is not subject of the appeal before this court, for to do so will delve into the merits of the ejectment suit which is not on appeal before this Court.

Predicated upon the contentions of the parties as contained and summarized from the certified records, briefs and arguments before this Honourable Court, we have determined that the cardinal issues for the determination of this case to be:

1. Whether or not appellee's motion to dismiss was timely filed in contemplation of our statute.
2. Whether or not there was another action pending between the same parties for the same cause of action for which the doctrine of *lis pendens* is applicable.

These issues will be decided in the order in which they were raised. As to the issue of timelessness of appellee's motion to dismiss and the legal grounds upon which it was filed, this Court observes that the appellee filed his answer on the 14th day of February, A. D. 1997 and that his motion to dismiss appellee's complaint and the entire action was filed on the 28th day of February A. D. 1997, fourteen (14) days after the filing and service of his answer and nine (9) days subsequent to the filing of appellant's reply. It is an elementary principle of law, practice, and procedure in this jurisdiction that a party may move the court for judgment dismissing one or more claims for relief asserted against him in a complaint as of the lime of service of his responsive pleading. Civil Procedure Law, Rev. Code 1: 11.2, *Pretrial Motions and Practice, Motion to Dismiss*.

In the case *Horace v. Harris*, 9 LLR 372 (1947), this Court held that "the party filing the last pleading is entitled to move the Court first on any legal defect in the pleading of his adversary. Thus, the filing, on February 28, 1997, of appellee's motion to dismiss appellant's complaint, 14 days after service of the answer, was untimely and should have been dismissed by the trial judge.

With respect to the issue of *lis pendens*, this Court observed from the records that the appellee filed an action of damages for wrong against the appellant in the Civil Law Court for the Sixth Judicial Circuit Court and that the appellant subsequently filed an action of ejectment against the appellee in the same court. These two actions are still pending undetermined. Secondly, we observed from the records that appellee filed a caveat in the Monthly and Probate Court for Montserrado County against the probate and registration of appellant's deed and a bill of information in the probate court regarding the probate and registration of appellant's deed without notice to the appellee. There is no showing in the records that the appellee ever made any efforts to have the caveat and bill of information heard, and which were still pending before the probate court undetermined up to and including the time appellant instituted its ejectment suit.

The appellee filed a motion to dismiss appellant's action of ejectment pursuant to chapter 11; section 11.2(d) of the Civil Procedure Law, Rev. Code 1, which provides that a party litigant *may move the court to dismiss one or more claims for relief asserted against him in a complaint* at the time of service of his responsive pleading on ground that there is another action pending between the same parties for the same cause in a court in this Republic (Emphasis ours).

This Court holds that there are two separate and distinct actions pending between the same parties, in that an ejectment suit does not present the same cause as that of an action of damages for wrong. The former relates to lawful title and possession of a property but the latter concerns itself with injury done to a property. The doctrine of *lis pendens* is only applicable where there is another action pending between the same parties for the same cause in a court within this Republic, in accordance with the statutory provision's, stated *supra*. Thus, the doctrine of *lis pendens*, appellee strongly contended, was inapplicable to the instant case.

Wherefore, and in view of the foregoing, it is the considered opinion of this Court that the ruling of the trial court dismissing appellant's action of ejectment should be, and the same is hereby reversed. The motion to dismissed is denied and the case

remanded. The Clerk of this Court is hereby ordered to send a mandate to the court below commanding the judge presiding therein to resume jurisdiction over the ejection suit and proceed with the hearing of the case on the merits in keeping with law. Costs to abide final determination of this case. And it is hereby so ordered.

Motion to dismiss denied; judgment reversed.