

CITIBANK N. A., by and thru its General Manager, **LEN MAESTRE**, Appellant,
v. **EISENHOWER YORK** and **TEIDI WILES-YORK**, Appellees.

Heard: April 21, 1988. Decided: July 29, 1988.

1. At any time before trial, any party may, insofar as it does not unreasonably delay trial, once amend any pleading made by him by: (a) Withdrawing it and any subsequent pleading made by him; (b) paying all accrued costs made by the opposing party; and (c) substituting an amended pleading.

2. While it is true that any party may withdraw at any time and refile any pleading previously filed by him, it is mandatory that such withdrawal of and amendment should be within ten days from the date of the last pleading.

3. Where a party elects to withdraw and refile an amended pleading after the statutory period of ten days, such election of withdrawal and refiling must be construed as a gross violation of the law and provides a basis for the dismissal of the amended pleading.

Appellant Citibank N. A. appealed from the trial judge's ruling denying its motion to dismiss appellees' amended complaint in an action of damages brought by the appellees against the appellant. The basis for the appellant's motion was that the withdrawal by appellees of their original complaint and reply and the substitution of the complaint with an amended complaint were without the time allowed by statute as same had been done beyond the period of ten days after the pleadings had rested.

The Supreme Court held that the trial court had erred in not sustaining the motion to dismiss, filed by the appellant, noting that the withdrawal of the original complaint and the filing of the amended complaint beyond the ten days allowed by statute was a gross violation of the law and a basis for the dismissal of the amended complaint. The Court opined that while a party had the right to withdraw any pleading and to substitute the same with an amended pleading, these acts had to be done within the time allowed by statute, and that a failure by the appellees to comply with the statute warranted the dismissal of the action. The Court therefore *reversed* the ruling of the trial court and *dismissed* the action.

H Varney G. Sherman of the Maxwell & Maxwell Law Offices appeared for appellant.
Joseph P. Findley of Findley & Associates Law Firm appeared for appellees.

MR. JUSTICE BELLEH delivered the opinion of the Court.

This case has come before this Court on appeal from the Sixth Judicial Circuit Court, Montserrado County, on a four-count bill of exceptions, against the ruling of the trial judge denying the appellant's motion to dismiss the action of damages.

According to the records certified to this Court, appellees, on December 13, 1986, filed an action of damages in the Civil Law Court, Sixth Judicial Circuit, Montserrado County, against Appellant Citibank, alleging in substance that Appellant Citibank was responsible for their illegal imprisonment by the Debt Court for Montserrado County, in that Appellant Citibank had gotten the clerk of the debt court to place an "arrest clause" in the writ of execution issued by the said debt court, which led to their imprisonment.

The records further reveal that appellant having been served with the writ of summons and a copy of appellees' complaint, filed its answer on December 24, 1986 and simultaneously filed a motion to dismiss. We hereunder quote said motion to dismiss verbatim for the benefit of this opinion:

"MOTION TO DISMISS

1. That movant is a party defendant in the action of damages filed by the respondents herein as plaintiffs and movant has filed an answer. Movant requests court to take judicial notice of the records of this Honourable Court."

2. That movant says that respondents as plaintiffs filed on December 13, 1981, an original complaint containing five (5) counts and a writ of summons was issued and served on movant on December 15, 1986. Movant filed and served on respondents a nineteen (19) count answer on December 24, 1986. Copies of the complaint with the summons and the answer are exhibits "M/1 " and "M/2", hereto attached respectively.

3. That movant also says that instead of the respondents filing their reply on or before January 3, 1987 (the statutory 10 (ten) days allowed for responsive pleadings), respondents filed and served the reply on January 5, 1987. So movant moved this Honourable Court to strike out the reply. Copies of the reply and the clerk's certificate and the motion to strike out the reply are hereto attached as exhibits "M/3" and "M/4" respectively.

4. That movant also says that respondents knowing that their reply, exhibit "M/3",

was a legal nullity for having been filed out of statutory time, and respondents, also knowing that their complaint contained several legal defects, as attacked by movant's answer, the respondents decided to withdraw their complaint with reservation to refile and did file the amended complaint and notice of withdrawal on January 12, 1987. Copies of the said notice of withdrawal and amended complaint are exhibits "M/5" and "M/6", hereto attached respectively.

5. That movant says that the Supreme Court has opined that when a party desires to withdraw a pleading and refile an amended pleading, the withdrawal and refiling must be done within ten days after service of the responsive pleading which has warranted the withdrawal of the first pleading. If not, the amended pleading will be stricken and there would be nothing before the court to take judicial cognizance of.

6. That movant says that the notice of withdrawal and amended complaint were filed and served nineteen days after movant had filed and served its answer and so said amended complaint is a legal nullity and this Honourable Court cannot take jurisdiction over the said amended complaint.

7. That movant says the action of damages grows out of the enforcement of a mandate of the Supreme Court of Liberia in which the Supreme Court of Liberia ordered the debt court to resume jurisdiction in an action of debt by attachment wherein respondents are defendants, and enforce the judgment entered in said action of debt by attachment."

8. That the alleged acts and other alleged conduct complained of by the plaintiffs, in keeping with plaintiffs own averments in the complaint, are alleged acts and conduct in the Debt Court for Montserrado County in a regular proceeding cognizable before said debt court and properly presided over by the judge of the said debt court.

9. That this Honourable Civil Law Court has no jurisdiction to try, investigate, render judgment or make any award for any alleged act committed in the debt court by the judge of the debt court and properly presided over by the judge of the said debt court.

10. That if the mandate of the Honourable Supreme Court of Liberia is not enforced by the debt court according to its tenor or according to law, the remedy available to the aggrieved party is for the Honourable Supreme Court and this Honourable Civil Law Court has no jurisdiction over the manner and way in which said mandate is enforced and cannot investigate or try or hold liable a party to the proceedings in the

debt court for anything that that party to the proceedings in the debt court did in pursuit of or during the course of the enforcement of said Supreme Court mandate.

11. That the plaintiffs' complaint, though entitled "action of damages" is in essence a complaint against the manner and form of the enforcement of a mandate of the Supreme Court ordering the debt court to enforce and execute its judgment. Under Liberian law, it is not the heading of the case that confers jurisdiction; it is the averment of the complaint. The complaint being a complaint based upon the mandate of the Supreme Court, this Honourable Court has no jurisdiction over same. Movant attaches the opinion of the Supreme Court and other attendant documents to show that this matter is a complaint on manner and form of the execution of the mandate of the Supreme Court, all such documents in bulk being exhibit mM/7" hereto.

12. That as a matter of fact, respondents have sought and obtained relief from the Honourable Supreme Court and their complaint to the Honourable Supreme Court was against the judge of the debt court and did not involve movant. Movant therefore submits that this Honourable Civil Law Court lacks jurisdiction in this matter.

WHEREFORE, and in view of the foregoing, movant prays for the dismissal of the entire suit with cost against the respondents."

On January 6, 1987, appellant obtained a certificate from the clerk of court showing that appellees' reply was filed on January 5, 1987, one day after the statutory period of ten (10) days. On January 9, 1987, Appellant Citibank filed and served on appellees' counsel a motion to strike out appellees' reply for reasons that said reply had been filed and served without the statutory period. We hereunder quote appellant's motion, word for word:

"MOTION TO STRIKE OUT PLAINTIFFS' REPLY

1. That movant herein, as defendant in the principal action of damages, filed its answer to the plaintiffs' complaint on the 24th day of December, A. D. 1986 and served a copy of its answer on one of plaintiffs' counsel, Counsellor Joseph P. Findley of Findley and Associates Law Firm on the 24th day of December, A. D. 1986. Movant prays Your Honour to take judicial notice of the filing date of its answer. Movant also attaches hereto a copy of receipt as evidence of the date of receipt of the answer by respondents' counsel to form a part of this motion as exhibit "M/1".

2. That movant says under Liberian law, a responsive pleading is mandatorily required to be filed with the court and served on the opposing party within ten (10) days as of the date of service of the pleadings , to which it responds. The answer having been filed with the Court on December 24, 1986, it is mandatorily required that the reply be filed with the court and served on movant or its counsel on or before January 3, 1987.

FOR RELIANCE MOVANT CITES THE FOLLOWING CITATION: section 9.2, sub-section 3 of the Civil Procedure Law, Rev. Code 1:

3. That in spite of the requirement of law, as stated in count two of this motion, respondents herein, as plaintiffs, did not file their reply with this Honourable Court until January 5, 1987, and had same served on movant's counsel on the same said January 5, 1987. Copy of the clerk's certificate as evidence of the time of filing of the reply is attached hereto as exhibit "M/3". Movant also prays Your Honour to take judicial notice of the filing date on the face of the respondents' reply as filed by the clerk of this Honourable Court.

WHEREFORE and in view of the foregoing, movant prays Your Honour to dismiss and strike out the reply and order that the pleadings in the action of damages rest with the complaint and the answer and grant unto movant any other and further relief as is just and equitable." On January 12, 1987, appellees paid accrued costs to Appellant Citibank and withdrew their complaint and also their reply. On the same day, that is to say, on January 12, 1987, appellees filed an amended complaint with substantially the same averments as the original complaint and praying for the same general damages of \$3 million.

On January 22, 1987, Appellant Citibank filed an answer to the amended complaint and simultaneously filed a motion to dismiss the amended complaint and the entire suit. Appellees filed a reply and a resistance to appellant's motion to dismiss. The assigned judge of the Civil Law Court for the March Term, A. D. 1987, on April 3, 1987, ruled denying and dismissing the motion to dismiss. Whereupon appellant excepted to the ruling and announced an appeal to this Honourable Court on a four count bill of exceptions. We do not attach importance to counts 1, 3, and 4 of the bill of exceptions which relate to some aspect of the ruling of the trial judge to appellant's motion to dismiss as well as appellant's attack on the jurisdiction of the Civil Law Court as it relates to this case. We shall therefore deal only with count two of the bill of exceptions.

Count two of the bill of exceptions reads:

"2. That Your Honour erred when Your Honour ignored the Supreme Court opinion in *Singbe v. Powell*, action of ejectment, March A. D. 1983 Term, decided July 6, 1983 and overruled movant's contention that the withdrawal and amendment of the complaint and reply were irregular and violative of law and so said amended complaint should be dismissed."

Substantially, the contention of appellant is that the withdrawal and amendment of the complaint were irregular and violative of law, and that therefore the said amended complaint and reply, together with the entire action of damages, should be dismissed.

The issue presented from the foregoing is whether the withdrawal of appellees' complaint and the subsequent filing of their amended complaint were timely.

Our statute in respect to service of pleading, sub-paragraph 3, TIME OF SERVICE OF RESPONSIVE PLEADING, provides that "except as provided in section 11.3(10), service of an answer or reply shall be made within ten days of service of the pleading to which it responds." Civil Procedure Law, Rev. Code 1: 9.2

(3). Also, our statute on amendment of pleadings, found at section 9.10(1) states:

"1. *Amendment to pleadings permitted.* At any time before trial, any party may, insofar as it does not unreasonably delay trial, once amend any pleading made by him by:

- (a) Withdrawing it and any other subsequent pleading made by him;
- (b) Paying all costs incurred by the opposing party in filing and serving pleadings subsequent to the withdrawn pleading; and
- (c) Substituting an amended pleading."

The above quoted provisions of our statute are clear and unequivocal. The appellant does not deny or dispute the right of appellees to withdraw and refile any pleading made by them in the court below; nor has appellant denied that all accrued cost incurred by them was not paid by appellees. Rather, the issue presented here, as we have mentioned earlier, is whether the withdrawal of appellees' complaint and the

subsequent filing of appellees amended complaint were timely and within the pale of the law.

The controlling factor with respect to the withdrawal and amendment of pleadings is that whilst it is true that any party may withdraw at any time and refile any pleading previously filed by him, it is mandatory that such withdrawal and amendment should be done within the ten days period and no more.

In the instant case, the records reveal that the action of damages was filed by appellees on December 13, 1986. The records further show that when Appellant Citibank was served with the writ of summons together with copy of appellees' complaint, it filed its answer along with a motion to dismiss within the statutory period of ten (10) days. We observe further from the records that appellees filed their reply on January 5, 1987, one day after the statutory period of ten (10) days. Appellant then filed a motion to strike out appellees' reply for reason that same had been filed without the statutory period of ten days. Appellees, conceding the soundness in law of appellant motion to strike out appellees' reply, paid accrued costs, withdrew their complaint and reply, and filed an amended complaint.

While it is true that it is the right of any party to withdraw and refile his pleading in keeping with section 9.10 of the Civil Procedure Law, Rev. Code 1, it is also true that where a party elects to withdraw and then refile an amended pleading after the statutory period of ten days provided for withdrawal and amendment of pleadings, such election of withdrawal and refile of amended pleadings must be construed as gross violation of section 9.11. In the case *Singbe v. Powell*, action of ejectment, March Term, A. D. 1983, this Court held that "there is a time limit of ten days within which a party desiring to withdraw and amend may do so after service of a pleading to which it responds." *Singbe v. Powell*, 31 LLR 141 (1983). Also in the case *United States Trading Company v. King*, 14 LLR 579 (1961), text at 581-582, this Court held: "Every reply and subsequent pleading, including a reply to a cross claim, shall be filed and served not later than ten days after service of the pleading to which it is responding, unless additional time therefor is granted in accordance with the provisions of section 9.10."

The opinion stated further that "it is our considered opinion therefore that the question of undue delay could possibly apply if, after all the pleadings under the statute had been exhausted, the ten days allowed for filing a responsive pleading to one last filed has expired. The party intending to amend would be claiming an extraordinary right if the period of the time allowed by him had passed or elapsed, in

which case the enjoyment of such a right could only be available by leave of court."

In keeping with the statutory provisions and the opinions of this Court quoted *supra*, it is our holding that the contention of appellant, contained in count two of the bill of exceptions, is well taken for the reason that the appellees' withdrawal, as well as the refiling of the amended complaint, were in violation of our law. Hence, same was without statutory time as contemplated by law. The judgment is hereby *reversed* and the motion to dismiss the entire action is hereby granted. Costs disallowed. And it is hereby so ordered.

Judgment reversed.