JOHN COOPER, Appellant, v. **CFAO (Liberia) Ltd.**, Appellee.

APPEAL FROM THE NATIONAL LABOUR COURT, MONTSERRADO COUNTY.

Heard: October 24, 1988. Decided: December 29, 1988.

1. When a defendant serves his or her answer, or notices, or make a motion after a writ has been served upon him or her, the requirement for an appearance has been satisfied.

2. A party waives any defense regarding a motion to dismiss when he elects not to present or assert such a defense either by motion or in his answer, reply or returns. The sole exception to this rule is a defense of lack of jurisdiction.

3. When a defendant who is not served with process, takes steps in his defense, or seek relief from the court in a way and manner as though the court has jurisdiction over the subject matter and of his person, that defendant thereby submits himself to the jurisdiction of the court, and is bound by its action as if he had been regularly served with process.

4. When a defendant is served with process, he must promptly raise any objection he has regarding the irregularity of the service.

5. A defense of lack of jurisdiction over the person should be raised either in the answer to a complaint or returns to a petition or in a motion filed simultaneously with the answer or returns.

Appellant filed a petition before the National Labour Court for judicial review of a decision of a hearing officer of the Ministry of Labour. Appellee filed a motion to dismiss the petition, which the judge granted. On review, the Supreme Court held that the judge committed reversible error in granting the motion to dismiss the petition, since appellee had failed to raise the defense of lack of jurisdiction of his person. The Court ordered the court below to resume jurisdiction and hear and determine the case. Reversed.

M Fahnbulleh Jones and Cyril Jones for appellant. H Varney G. Sherman and M Wilkins Wright for appellee.

MR. JUSTICE KPOMAKPOR delivered the opinion of the court.

On June 13, 1988, C.F.A.O., movant/respondent, now appellee/respondent (appellee) in these proceedings, filed a one count motion to dismiss the petition for judicial review of John Cooper, respondent/petitioner, now appellant/petitioner in this Court (appellant), before His Honour Arthur K. Williams, judge, National Labour Court.

The one-count reads thus:

"That under the law in vogue in this jurisdiction, a petition for judicial review at a court of law should mandatorily carry with it a judge's order and not a written direction. However contrary to this law, the petitioner filed the petition for judicial review accompanied by a written direction instead of a judge's order. Copy of the clerk's certificate to this effect is hereto attached as exhibit "M/1".

The appellant filed a two-count resistance to the motion to dismiss the petition, count-two (2) of which we deem relevant for the determination of the issue raised:

The movant/respondent not having challenged the jurisdiction of the Court over the subject matter of his person, this Court cannot entertain said motion, especially with the returns and/or answer of the movant/respondent. It is a settled principle of law that except for motion to dismiss for want of jurisdiction over the subject matter, all other motions to dismiss must be filed simultaneously with the responsive Pleading. In the instant case, the movant/respondent filed and served the Resistance to the petition on the 4th day of April 1988, but filed his frivolous motion to dismiss on the 13th of June 1988, in contravention of the statutes, therefore, said motion, by law, cannot be entertained by this Honourable Court and therefore should be dismissed.

In sustaining appellee's contention that the petition for judicial review be dismissed, Judge Williams held that the movant/respondent had the legal authority at any time before final judgment to challenge and raise such jurisdictional issues, on the .ground that the petitioner failed and neglected to file his petition with judge's orders.

From the foregoing facts, the issue for our determination is simply, whether the lower court was warranted in denying the motion to dismiss the petition, even though said motion was filed two months after the petition had been served on the movant

and he had filed his returns.

In count-two of appellant's three-count bill of exceptions, he squarely raised the issue:

Because Petitioner/Appellant says that Your Honour failed to pass upon and sustain the contention of petitioner/ appellant that under the law, except as to motions for jurisdiction over the subject matter, all such motions must be filed simultaneously with the responsive pleading and the same should also be raised in the responsive pleading. The respondent/appellee filed his returns on the 4th day of April and two months and nine days thereafter filed his Motion to dismiss, contrary to law. But Your Honour totally disregarded this salient point of law and sustained the motion to dismiss. To which ruling petitioner/appellant then and there excepted. (Our emphasis).

The petitioner admits that under the law and practice, he should have attached to his petition for judicial review a judge's order, instead of a written directions, but strenuously argues that such a contention on the part of appellee should have been raised either in the returns to the petition or in a motion filed simultaneously with the answer or returns.

The parties are in agreement as to what the issue before us is. For the appellee, he states it thus: "Whether a motion to dismiss a petition should be denied merely because such a motion was not filed simultaneously with the responsive pleading?" The Civil Procedure Law on "appearance" provides that when the defendant or respondent, as in the instant case, serves his answer, or notices, or makes a motion after a writ has been served upon him, the requirement for an appearance has been satisfied. Civil Procedure Law, Rev. Code 1:3.61.

The appellant has primarily relied on the Civil Procedure Law, § 11.2 (1) (a), (b) and (c), in contending that the trial judge grossly erred in granting appellee' s motion to dismiss, which was filed by the latter a little over two months after his answer has been filed and served on his adversary.

This provision, § 11.2 (1), provides that when a party who has been served with a summons wishes to contest the jurisdiction of the court over his person, he must do so simultaneously at the time of serving his responsive pleading. In obedience to the statute, the party contesting the jurisdiction of the court over his person, usually the defendant or respondent will couch his objection in his answer and a corresponding

motion to dismiss. Both of these documents are filed simultaneously and within ten (10) days. In the instant case, however, the appellant filed his returns within the statutory period, but neglected to file his motion to dismiss until after more than two months had elapsed. During his argument before this Court, counsel for appellee admitted that the issue of the jurisdiction of the court of his person was not raised in his returns.

The issue involved here, jurisdiction of the person, is so basic that we need not be labor it, in view of the facts of this case and the statute controlling. The statute cited, supra, further provides that a party waives any defense regarding a motion to dismiss when he elects not to present or assert this defense either by motion or in his answer, reply and returns. The exception to this rule is lack of jurisdiction over the subject matter which is not so waived. Civil Procedure Law, Rev. Code 1:11.2 (6).

The contention of appellant that the defense of jurisdiction of his person was not timely raised by appellee must be and is hereby sustained. In Reeves v Webster-Ankra, 22 LLR 181, 185 (1973), this Court held that he who is silent when he should speak is taken to have assented. In the case at bar, the appellee traversed every issued raised in the six-count petition when he received the writ with the petition, but neglected to raise at any point in his twelve-count "respondent's returns", the defense that the court lacks jurisdiction of his person.

In Greaves v. Jantzen, 24 LLR. 420, 425 (1975), this Court, citing King v Williams, 2 LLR 523, 525 (1925), held, that when a defendant, although not served with process, takes such a step in his defense, or seeks relief at the hand of the court in a way and manner as though the court had jurisdiction of the subject matter and of his person, he thereby submits himself to the jurisdiction of the court and is bound by its action as if he had been regularly served with process. This rule also holds that when a defendant is served with process, he must raise promptly any objection he has regarding the irregularity of the service.

It is our holding, therefore, that the trial judge committed reversible error in dismissing the resistance and granting the motion to dismiss the petition for judicial review.

We have no alternative, therefore, but to reverse the ruling appealed from with costs against the appellee, and the Clerk of this Court is ordered to send a mandate down to the court below ordering it to resume jurisdiction over this matter, and proceed to hear and determine same. And it is hereby so ordered.

Ruling reversed.