

THE AUGUSTUS W. COOPER HEIRS, represented by
COUNSELLOR EUGENE COOPER and D.
MUSULENG COOPER, Plaintiffs-In-Error, *v.* HIS
HONOUR TIMOTHY Z. SWOPE, Assigned Judge, Sixth
Judicial Circuit, Montserrado County, and THE HEIRS OF
THE LATE JESSIE R. COOPER, Defendants-In-Error.

PETITION FOR A WRIT OF ERROR TO THE
CIRCUIT COURT FOR THE SIXTH JUDICIAL
CIRCUIT, MONTSERRADO COUNTY.

Heard: November 2, 1998. Decided: December 4, 1998.

1. As a general rule, the face of a judgment is the test as to its finality.
2. The fact that other proceedings of the court may be necessary to carry into effect the rights of the parties, or that other matters may be reserved for consideration, the decision of which one way or the other has the effect of altering the decree by which the rights of the parties have been declared, does not necessarily prevent the decree from being considered final, unless there is some further judicial action contemplated by the court.
3. A final judgment is one which disposes of a case, either by dismissing it either before a hearing is had upon the merits, or after trial by rendering judgment either in favor of the plaintiff or defendant.
4. A ruling denying a motion to intervene is appealable because if granted it would make the movant a party to the suit and once denied, the movant would have no more standing as a party in the case. The denial of the motion therefore puts finality to the intervenor's side of the case, whether the judge labels the ruling interlocutory or otherwise.

5. A party against whom judgment has been taken who has for good reason failed to make a timely announcement of the taking of an appeal from such judgment, may within six months after its rendition file with the Clerk of the Supreme⁴ Court an application for leave for a review by the Supreme Court by writ of error.
6. No court of record should conduct any proceeding, however minute, without issuing a notice of assignment, except the parties acquiesce therein.
7. The court's appointment of an attorney to take the ruling for an absent lawyer will be deemed inadequate if the designated counsel fails to fulfill the purpose of the appointment.
8. A trial court's duty ends when a counsel who is present is designated to take a ruling for an absent lawyer.
9. The purpose of the statutory provision requiring the designation of an attorney to take the ruling for an absent lawyer is to preserve the right of the absent counsel or party to appeal and have an adverse judgment reviewed.
10. Lawyers who are deputized to take rulings for their absent colleagues must be careful and conscientious as any neglect to fully perform the duty associated with such appointment will be severely punished.
11. Error will lie to review the ruling of a lower court where the application is filed within the six months time limit prescribed by statute, where the designated counsel has failed to perform the duty for the absent counsel by appealing the ruling or judgment.
12. A person entitled to intervene in an action for the protection of his rights may elect to institute his own action in lieu thereof.
13. A person who has by statute been given the right to intervene is already entitled to intervene but he also has the choice to decline intervention and institute his own

suit. Thus, the right to intervene or to bring another suit is in the person, and the fact that he chooses one option does not negate his right to the other.

14. A trial court misapplies the law if it rules that if a movant has any cause of action, he should bring an independent action rather than seek intervention in an ongoing action.
15. Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading.
16. Averments in a pleading to which no responsive is required shall be taken as denied or avoided.
17. In the case of a motion filed in the trial court, the only papers required are the motion and resistance. As no further pleadings are required, averments in the resistance are taken as denied or avoided.
18. Motions are not the kinds of pleadings that require a three stage filing, such as complaint, answer and reply, but fall under a separate part of the statute.
19. Answering affidavits are not provided for as part of the pleadings under the Civil Procedure Law. Rather, they are provided for in the Rules of Court, and, nor being provided for under the Circuit Court Rules, they are confined to the Supreme Court. Hence, answering affidavits are not required or permissible in the circuit courts.
20. Under the statute, any person, upon timely application, shall be allowed to intervene in an action. Thus, while the statute requires that the application be timely, there is no definition of timeliness.
21. There are two forms of intervention: Permissive intervention and intervention as of right. The former is discretionary while the latter is mandatory. In the case of the former, the court, in exercising its discretion, shall

consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. However, in the case of the latter, the court does not have any discretion so long as the applicant shows his right to intervene.

22. It is erroneous for a trial court to hold or rule that a motion to intervene should be filed at the same time as the original pleadings in the main action were filed. The only statutory requirement is that the applicant must establish his right to intervene and he will be admitted as a party.
23. A trial court commits error in not entertaining a motion to intervene on its merit for reason of untimeliness when the term in which the case is filed or scheduled to be heard has not commenced.
24. It is the full responsibility of the appealing party not only to the superintendent but also to ensure the timely transcription and forwarding of the trial court's records to the appellate court.
25. Within ten days after the service of the notice of completion of appeal, the appellant must obtain a certificate from the Clerk of the Supreme Court that the trial court's records have been received by the said Clerk.
26. Both parties to an appeal case must file their respective briefs within five days after issuance of a certificate by the Clerk of the Supreme Court that he has received the transcribed records in a case from the trial court, or fifteen days after the service of the notice of completion of appeal. A violation to comply with this requirement shall render the violator liable in contempt of the Supreme Court.

Plaintiffs-in-error and defendants-in-error are heirs of

the late James F. Cooper who, prior to his death executed a Will leaving property owned by him and leased to CFAO to his three sons (fathers of the contending parties in this action) or children begotten to them in lawful wedlock, after the expiration of the lease. When the lease to the property expired and the property turned over to the Cooper family (the grand children of James F. Cooper), they determined that the occupants of the property should remain on the same such time as a suitable lessee could be found or the property partitioned amongst the beneficiaries. Thereafter, following disagreement amongst the heirs as to the rental to be charged for the premises, the heirs of Jesse R. Cooper and Edward A. Cooper (two of the sons of James F. Cooper) communicated with the tenants, directing that they recognized, deal with and pay rental to the property to one Ahmed K. Fardoun, the new lessee, and to enter lease agreements with the aforesaid lessee. This was countered by communication from the heirs of Augustus W. Cooper, also son of the late James F. Cooper, who instructed the tenants not to make any such payment to Mr. Fardoun as he held no lease agreement with the Cooper family. When the tenants failed or refused to carry out the instructions of the heirs of Jesse R. Cooper and Edward A. Cooper, the said heirs commenced an action of summary proceedings to recover real property against the tenants.

Following the exchange of pleadings between the parties to the suit, in which the respondents contested the standing of the petitioners as the sole heirs of James F. Cooper, the heirs of Augustus W. Cooper filed a motion to intervene, contending that they were heirs also of the late James F. Cooper and that they had a vital interest in the property in suit which they desired to protect. The trial judge, in the absence of the movants, ruled denying the motion to intervene, stating as the reasons therefor that the motion

was untimely, in that it should have been filed at the same time as the returns in the main suit were being filed, that the movants had failed to state in the motion any of the statutory grounds for intervention, that the movants had failed to deny the allegations in stated in an answering affidavit executed by the respondents which must therefore be deemed admitted as true, and that if the movants believed that they had a cause of action, they should file a separate action. The court records indicated that the court appointed an attorney to take the ruling, but that the attorney only excepted to said ruling and did not announce an appeal therefrom. The attorney subsequently denied that he was ever presented in court on the date indicated or that he was ever appointed by the court to take the ruling indicated in the court's records. Thus, growing out of an appeal not having been taken by the movants, plaintiffs-in-error, a petition for a writ of error was filed.

The defendants-in-error defended the action of the trial judge, stating that he had designated a lawyer to take the ruling and that the lawyer excepted to the said ruling without taking an appeal because the ruling was interlocutory and not a final judgment. They also asserted that because the plaintiffs-in-error had filed pleadings in the main case which remained pending at the time the motion was denied, that as the ruling denying the motion was interlocutory and not final, which rendered an appeal as an inappropriate remedy to have been pursued, and that since the writ of error related to only the rendition of final judgment, the writ of error could not lie. Additionally, the respondents filed a motion for relief, contending that the lower court's judgment, rendered after proceedings conducted by the court following the denial of the motion to intervene, could not be enforced; that the plaintiffs-in-error had failed to pay the clerk of the trial court to

prescribed the records for transmittal to the Supreme Court, thus causing delay in the disposition of the case; and that the negligent behaviour of the plaintiffs-in-error had rendered and was working prejudice and injury to the interests of the defendants-in-error.

The Supreme Court rejected the contentions of the respondents with regards to the denial of the motion to intervene. The Court held that the motion to intervene was a matter of right granted the plaintiffs-in-error by the statute and that once they had shown that they had protectible rights and interests, the trial court was without discretion to deny the motion to intervene. The Court also rejected the contention that the motion was untimely, noting that at the time the motion was filed, the trial court had continued hearing of the main case to the next term of court, which provided sufficient time for the court to hear and dispose of the motion and resistance and the pleadings filed by the movants relating to the main suit.

As to whether error would lie, the Court said that the ruling of the trial judge denying the motion to intervene was not interlocutory but final as to the plaintiffs-in-error since it had the effect of excluding forever their participation from the trial. The finality of the ruling as to the plaintiffs-in-error made it a final judgment; and since the ruling had been made in the absence of the plaintiffs-in-error and the lawyer designated to take the same had not appealed such final judgment, error, the Court said, was the proper remedy to pursue. The Court noted that a lawyer designated by the trial court to take the ruling for an absent colleague, but who fails to take the proper steps could be punished for his negligence.

The Court also opined as to the delay in the prosecution of the error proceedings that an appealing party had the obligation not only to superintend the transcription and

transmission of the records of the trial court, but the responsibility of ensuring that the transcription and transmission occur within ten days of the date of service of the notice of completion of the appeal. Additionally, the Court said, the parties had the responsibility of filing their briefs within five days thereafter.

In light of the above, the Court *reversed* the ruling of the trial court denying the motion to intervene, *reversed* the judgments rendered thereafter in the main summary proceedings to recover real property, *ordered* that the plaintiffs-in-error be permitted to intervene, and *instructed* that the trial court conduct the proceedings anew commencing with the disposition of the law issues after pleadings had been exchanged amongst the parties, including the intervenors.

Snosio E. Nigba of the Legal Services Inc. Law Firm appeared for plaintiffs-in-error. *Moses K. Yangbe* of the Cooper and Togbah Law Firm appeared for the defendants-in-error.

MR. JUSTICE WRIGHT delivered the opinion of the Court.

This case presents a classic example of the biblical saying that a house divided against itself cannot stand. The plaintiffs-in-error and the defendants-in-error are all first cousins, i.e., all children of three brothers; they are fighting among themselves for property owned by their grandfather, while strangers are enjoying the use of the property with no benefits accruing to any of the owners. The point of dispute that has brought this case to this Court is that one set of cousins contend that the other set of cousins are bastards and illegitimate children of their uncle and therefore cannot inherit with them the property of their grandfather. What is

amazing is that on previous occasions all of them have teamed up against a common opponent and on other occasions they have jointly signed leases for other properties to Mr. Kayed A. Ghamloush and Watamal respectively, but when it came to this piece of property, one group had said to the other that they are illegitimate. How sad for twentieth century Liberia marching into the new millennium!

Let us see who the parties are. The property owner is James Francis Cooper. His three sons are Jesse, Augustus and Edward. The plaintiffs-in-error, in persons Counsellor Eugene A. Cooper and Mrs. Dorothy Musuleng Cooper are children of Augustus W. Cooper, while the defendants-in-error, in persons of Counsellors Pauline Evelina Cooper and Henry Reed Cooper are children of Jesse R Cooper and also represent the children of Edward A. Cooper. The three sons are all dead and it is their children, being first cousins, who are the present parties in this case and are all grandchildren of James Francis Cooper.

James Francis Cooper of Monrovia, Liberia was married to Mrs. Ellen G. Cooper, which union produced several children, among whom are three sons: Jesse Reed Cooper, Augustus Washington Cooper and Edward A. Cooper, who are the subject of this case. The old man, James Francis Cooper, during his life time acquired and owned several pieces of property in Monrovia and elsewhere in Liberia and abroad.

On December 4, 1916 he leased out one of his many pieces of property to C.F.A.O., which is located and situated on Water Street near Mechlin Street, Monrovia. This lease expired on April 30, 1996, and as such said property reverted to him

On August 14, 1946, James Francis Cooper, conscious of the uncertainty of life, executed, made and declared his

Last Will and Testament wherein at clause four (4), pages two (2) and three (3), he willed and directed that the lease on his Water Street property leased to C.F.A.O., should remain in force for the full term and that the rents accruing therefrom be controlled and managed solely by his wife Ellen, in trust, and that annual payments therefrom made to twelve (12) person named by him or their lawful heirs by marriage. The Will further provided and directed that upon the termination of the lease, the Trust should cease and the fee simple title shall then vest in his sons, Jesse R. Cooper, Augustus Washington Cooper and Edward A. Cooper, and *their lawful heirs by marriage*” (Emphasis Ours)

From the records available in the case file, the Court finds that the lease expired on April 30, 1996 and that the property was formally turned over to the Cooper family on November 22, 1996 by C.F.A.O., represented by Counsellor Stephen B. Dunbar, Jr. and one Mr. M. S. V. Tarawalley, C.F.A.O.'s Coordinator in Monrovia. The devisees, heirs of Jesse R. Cooper, Edward A. Cooper and Augustus W. Cooper, agreed that occupants who were on the property should remain thereon until such time as they were able to find a suitable lessee and that if they could not find anyone to lease the place then they would partition the property amongst themselves. During the interim, a proposal to lease the property was received from one Ajami represented by Ahmed K. Fardoun. The Cooper heirs, amongst themselves, could not agree on the amount of rent to be paid and therefore the heirs of Augustus W. Cooper refused to sign the lease. On May 13, 1997, the said heirs of Augustus W. Cooper filed a caveat in the Monthly and Probate Court for Montserrado County against the probation of any lease agreement for the subject property between any person(s) and Mr. Ahmed K. Fardoun.

On June 17, 1997, the heirs of Jesse R Cooper issued and

circulated a notice signed by Counsellor Henry Reed Cooper and addressed to the tenants, informing the tenants to recognize, deal with and pay rental (arrears) to Ahmed K. Fardoun, the new lessee and to enter leases with Mr. Fardoun as of May 1, 1997. One day thereafter, on June 18, 1997, the heirs of Augustus W. Cooper by and thru their legal counsel, Counsellor Snosio Nigba, issued their own notice to counteract that of the Jesse R. Cooper heirs. In their counter notice, the Augustus W. Cooper heirs informed the tenants that there was no lease agreement between the Cooper family and Mr. Fardoun, and warned them not to pay any rent to him or enter into any lease with him, and that if they did, they would be doing so at their own risk because there was a caveat already filed with the probate court.

Upon the failure and/or refusal of the tenants or occupants on the premises to enter into leases with or pay rent to Mr. Ahmed Fardoun, the heirs of Jesse R Cooper and Edward A. Cooper represented by Counsellors Pauline Evelina Cooper and Henry Reed Cooper, as petitioners filed on June 21, 1997 a petition for summary proceedings to recover possession of real property against Helal Fawaz and Abdul R Shaheen, as respondents.

In their petition, the heirs of Jesse and Edward Cooper alleged that they are all legitimate owners of their grandfather's estate and recounted the relationship and transaction between them and the respondents, tenants, which led to the action being filed against them as tenants-at-will. In addition to the ouster of the respondent, petitioners demanded US\$6,000.00 per store per year from April 30, 1996, up to final judgment, as damages for wrongful detention.

The respondents, Helal Fawaz and Abdul R Shaheen, filed their returns containing nine (9) counts. Based upon

the relationship and misunderstanding between the Jesse R. Cooper and Edward A. Cooper heirs on the one hand, and the heirs of Augustus W. Cooper, on the other hand, as reflected in the notice of June 17,1997 and the counter notice of June 18,1997 from the contending sets of the Cooper heirs, the respondents, in their returns, essentially questioned the status and standing of the petitioners as the heirs of the late Jesse R. Cooper and Edward A. Cooper, and hence sole representatives of the estate of the late James F. Cooper, in the absence of letters testamentary or letters of administration, which would vest such authority and capacity in them.

Respondents further contended that since there was feud between the heirs of the late James F. Cooper, each group giving conflicting and contradictory instructions to the respondents as tenants of the estate, they the tenants had not refuse to pay rent but did not know whom to whom the rent should be paid, especially where one group had asked them to remain on the property until either a lease was entered or the property partitioned, none of which had happened yet.

Along with their returns on July 1,1997, respondents also filed a motion to dismiss the action challenging the legal capacity of petitioners to bring the suit. To the respondents' returns and motion to dismiss, petitioners filed their reply and resistance on July 8,1997.

In count five (5) of the reply, petitioners alleged that Counsellor Eugene A. Cooper was not a lawful grandchild of James F. Cooper in that he was not a legitimate child of Augustus Washington Cooper by lawful marriage. He was there-fore considered a *nilius filius* (no body's child or bastard) and consequently lacked inheritable blood according to law and clause four (4) of the Will.

As to respondents' allegation in the returns that they

were requested by the Cooper Family to remain on the premises, petitioners contended that the transactions relating to and affecting the real property should have been reduced to writing, and probated and registered within four (4) months after execution, and that therefore the oral agreements affecting the real property were invalid.

The petitioners, in their resistance to respondents' motion to dismiss, raised the same contentions, but went further to say that they in their petition gave notice to the court that relevant documents would be produced at the trial. Further, they said that this being an issue of fact, it could only be proved during trial and hence the petition could not be rendered dismissible.

Pleadings having rested at that, the Civil Law Court heard arguments on the motion to dismiss and the resistance on August 5, 1997 and entered its ruling the same day, denying the said motion for being filed prematurely. The Court then ordered that the law issues be proceeded with immediately and that the case be thereafter docketed for the next term of the court. Both petitioners and respondents excepted to this ruling but there and then proceeded to argue the law issues. Whereupon, the court reserved its ruling. The court, on August 18, 1997, handed down its ruling on the law issues, holding, among other things, that the returns contained mixed issues of law and facts and therefore was ruled to trial, together with the petition.

On the same day of the ruling on law issues ruling the case to trial, the heirs and administrator and administratrix of the Augustus W. Cooper Estate filed a three-count motion to intervene to protect their interests in and rights to the estate of their late grandfather, James F. Cooper. Along with said motion, the intervenors filed a fifteen-count returns.

In count one of the motion to intervene, the movants averred that Augustus W. Cooper was one of the sons of the late James F. Cooper who died seize of the property leased to C.F.A.O. and that movants were administrator and administratrix of the intestate estate of the late Augustus W. Cooper and also grandchildren and heirs of the Late James F. Cooper. Movants proferted several leases on behalf of the said Augustus W. Cooper Estate

In count two of the motion to intervene, movants reverted to clause four (4) of their grandfather's Will, whereunder the fee simple title in the trust property vested in his three (3) sons, Jesse R. Cooper, Augustus W. Cooper and Edward A. Cooper, thereby creating a tenancy in common, with all three sons having undivided interest in the property.

In count three of their motion to intervene, movants contended that the respondents, heirs of Jesse R. Cooper, had unilaterally, and without any authority from either the Estates of Augustus W. Cooper and Edward A. Cooper, leased or assigned the said property and rents therefrom to a stranger, thereby alienating and denying the movants of their interests and rights in the property, and that any judgment rendered in the main case would adversely affect their rights and interests in and to the said property. Hence, they should be allowed to intervene as a matter of right so as to protect their rights and interests.

The respondents, on August 28, 1997, filed their resistance to intervenors' motion to intervene, along with their reply to the intervenors' returns, raising several legal and other issues in denial of movants' right to intervene.

On October 15, 1997, the court handed down its ruling on the motion to intervene and denied same, first on ground that it was untimely filed in that it should have been filed along with the pleadings in the main suit so that they

could all be heard and decided together, and secondly, that because of the unreasonable delay, it had prejudiced the rights of the respondents.

The court further held that the resistance to the motion contained factual issues which should have been traversed by way of an answering affidavit denying that the movants and their lawyers had knowledge of the pendency of the action and that they should have moved to intervene at the same time pleadings in the main suit were being filed. The court said that movants not having responded in an answering affidavit to the allegations in the resistance, they were deemed to have admitted or conceded the said allegations.

The respondents also contended in their resistance that the movants/intervenors did not state in the motion any of the grounds mentioned in section 5.61 et seq. of the Civil Procedure Law, Rev. Code 1, for intervention; that the said movants did not meet the sequence in section 5.61 (a) because there was no statutory right to intervene; and that the requirements under section 5.61(b) had not been met by movants in that respondents had never purported in the matter to represent movants and that movants would therefore never be bound by any judgment in favor of or against respondents who were petitioners in the main suit. Further, respondents contended that they had not asked the court to distribute or dispose of the property, but rather had merely asked the court to remove certain persons who were trespassing on their property and that said persons had not challenged respondents' right to remove them from said property or shown any color of right to be on the property.

The court, in its ruling, held that the movants, in failing to contradict the allegations in an answering affidavit, had conceded or admitted to the said allegations, thereby

leaving the court no choice but to sustain the said count of the resistance to the motion.

Finally, the court ruled that if movants have any cause of action, they had the right to institute an independent action and assert their rights to the property. The court therefore denied the motion to intervene, stating that "accordingly, the action of recover possession of real property will be heard on the merits *without the participation* of the movants/intervenors." (Emphasis supplied).

When the above ruling was handed down on October 15, 1997, both movants/intervenors and their counsel were absent. The minutes of court reflect the court having appointed Counsellor Joseph H. Constance to take the ruling on behalf of the movants/intervenors. According to the records, the appointed counsel is said to have only excepted to this ruling without announcing an appeal therefrom.

The trial in the main suit was commenced on Tuesday, October 28, 1997 and continued on October 31, 1997 and November 3, 1997, with the presence and participation of both counsels and their respective clients. When the case resumed on November 4, 1997, only the petitioners and their counsel were present, the respondents and their counsel being absent. At the request of petitioners, the court proceeded with the trial, wherein the second witness for petitioners took the stand, testified, and was examined and discharged. The petitioners then rested evidence and submitted their case without argument. The court suspended the trial pending final judgment to be given the following Friday, November 7, 1997. The case was called on Friday, November 14, 1997 and final judgment as handed down in open court with only petitioners and their lawyer in court.

In its final judgment, the court held the two

respondents, Helal Fawaz and Abdul R. Shaheen, liable to petitioners in the total sum of US\$18,000.00 for the period of eighteen months at the rate of US\$500.00 per month per store from May 1996 to October 30, 1997, plus six percent interest thereon. Petitioners were awarded possession of the premises and respondents ordered evicted. Costs were ruled against the respondents.

However, on November 8, 1997 the intervenors (i.e. The Augustus W. Cooper Heirs) filed a seven (7) count petition for a writ of error growing out of the trial court's denial, on October 15, 1997, of their motion to intervene. The petitioners in the main suit filed their returns in the Supreme Court as defendants-in-error on January 6, 1998. Then on April 29, 1998, they filed a "motion for relief" which they amended on May 4, 1998.

In the amended motion for relief, defendants-in-error contended that because of the petition for writ of error, filed by intervenors/plaintiffs-in-error on November 8, 1997, the trial court's final judgment of November 14, 1997 had not been and could not be enforced, and relying on that, the plaintiffs-in-error had negligently failed to superintend the transcription of the trial court's records to the Supreme Court for appellate review. The defendants-in-error further contended that the plaintiffs-in-error had refused to pay the clerk of the trial court to have the records photocopied and forwarded to the Supreme Court, which negligent behavior of plaintiffs-in-error has rendered and is working prejudice and injury to the interests of the defendants-in-error.

In resisting the amended motion for relief, the plaintiffs-in-error contended that there was no statute or rule of court which provided for such motions as that filed by defendants-in-error wherein they seek the dismissal of the petition for writ of error without a hearing on the merits.

The plaintiffs-in-error also denied negligently failing to superintend the transaction of the records from the trial court to the Supreme Court, and they proferted a receipt from the filing clerk of the Civil Law Court dated Wednesday, April 29, 1998, which they attached to the resistance as evidence of payment of \$5,900.00 for transcription of the records to the Supreme Court.

Both parties filed and later amended their respective briefs, following the amendment also of their petition and returns. In the amended petition, the plaintiffs-in-error contended, first, that the court proceeded to rule on their motion to intervene without issuing and serving on them or their counsel any notice of assignment. Secondly, that although the minutes of court show that the trial judge appointed Counsellor Joseph H. Constance to take the ruling for plaintiffs-in-error's counsel, said records made are fictitious, false and misleading in that Counsellor Constance was neither physically present in court nor did he consent to or have knowledge of, such appointment. To support such denial, Counsellor Constance executed a sworn affidavit. Plaintiffs-in-error therefore asserted that they were denied their day in court and the opportunity to except to the ruling and to appeal from the said adverse ruling denying their motion to intervene, for which they said error will lie.

Further, plaintiffs-in-error contended that the court erred when it ruled that their motion was not timely filed, in that as soon as they obtained knowledge of the main action of summary proceedings to recover possession of real property, they promptly filed their motion to intervene within a reasonable time. They contended that they, not being parties to the main suit, could not have been expected to file a motion to intervene simultaneous with the pleadings in the main suit.

Finally, plaintiffs-in-error contended that the judge erred when he ruled that there was no valid ground stated in the motion to intervene. They reaffirmed their claim to co-ownership of the subject property with defendants-in-error, from which property the defendants-in-error, by their action of summary proceeding to recover possession of real property, sought to exclude them, and therefore their claim had a common question of law and of fact as any judgment without their participation, placing defendants-in-error in possession, will work injury to their interests and rights.

In their eleven-count returns, defendants-in-error contended that error will not lie because plaintiff-in-error had filed an answer along with their motion to intervene in the trial court which is still pending, and therefore the ruling on the motion is interlocutory; hence not appealable. In this regard, defendants-in-error asserted that the ruling of the court denying plaintiffs-in-error's motion to intervene is not a final judgment as to movants/ plaintiffs-in-error, especially in view of the fact that the judge ordered them to institute an independent action to assert their rights.

Further, defendants-in-error contended that the petition for a writ of error should be denied because plaintiffs-in-error did not fully comply with the mandatory requirements of the statute in that they did not pay accrued costs as a precondition for issuance of the writ of error; secondly, they said, the affidavit is defective because it does not state that the application has not been made for the mere purpose of delay or harassment and that the execution of the judgment has not been completed.

Defendants-in-error further contended that error should be denied because in the absence of a party or his counsel when the court makes a ruling, the court must designate a lawyer to take the ruling for the absent party or counsel and

this requirement was satisfied in the instant case when the court appointed Counsellor Joseph H. Constance to take the ruling for the absent lawyer for plaintiffs-in-error and Counsellor Constance excepted to said ruling without announcing an appeal since the ruling was interlocutory. Defendants-in-error discounted the affidavit signed by Counsellor Constance as being totally false, in that the said Counsellor Constance was physically present in court when the ruling was rendered and this is evidenced by a sworn affidavit executed by the clerk of the trial court who took the minutes of court out that day.

It was the further contended by defendants-in-error that the motion to intervene was not filed in a timely manner because both the counsel and Co-plaintiff-in-error Counsellor Eugene A. Cooper were aware of the pendency of the summary proceeding to recover possession of real property and they both took part in the preparation of all the pleadings in that case. As such, they said, the motion to intervene should have been filed simul-taneously with the returns and the motion to dismiss.

From all that have been so lengthily narrated above, and the records in the case file, the single most important issue on which this whole case rests is whether or not the trial court's ruling denying intervenor's motion to intervene was a final judgment from which an appeal would lie, or merely an interlocutory ruling from which no appeal can be taken. The answer to this question will determine whether error will lie.

Defendants-in-error have strenuously contended that the trial Court's ruling of October 15,1998, denying intervenors' motion to intervene was merely interlocutory and not final since the judge did not pass upon the answer filed by intervenor. On the contrary, plaintiffs-in-error contended that the ruling was a final judgment as to them,

the intervenors, because the judgment specifically excluded them from any further participation in the case in which they sought to intervene.

Recourse to the ruling revealed that the judge held as follows: "Finally it is the ruling of the court that the motion to intervene be and the same is hereby overruled and accordingly, the action to recover possession of real property will be heard on the merit without the participation of the movants/intervenors. And it is hereby so ordered." (Emphasis supplied).

The Judge was clear that following that denial of their motion to intervene, the movants/intervenors would have no further part to play in the main suit in which they sought to intervene. If this is not final, then that term needs redefining.

This Court, speaking thru Mr. Justice Horace, in the case *Hunter v. Hunter*, said: "As a general rule, the face of the judgment is the test of its finality The fact that other proceedings of the court may be necessary to carry into effect the rights of the parties, or that other matters may be reserved for consideration, the decision of which one way or another have the effect of altering the decree by which the rights of the parties have been declared, does not necessarily prevent the decree from being considered final, unless there is some further judicial action contemplated by the court." *Hunter v. Hunter*. 22 LLR 87 (1973), text at 98

The judge ruled denying the motion to intervene and ordering the case proceeded with, with the exclusion of the movants/ intervenors from any further participation. Therefore, there was no further judicial action contemplated by the court as to the movants/intervenors and, hence, the ruling was a final judgment as to them. Accordingly, we so hold and declare that as to the movants/intervenors, the ruling was final, and from which

an appeal would lie.

This Court has also held that "A final judgment is one which disposes of the case, either by dismissing it before a hearing is had upon the merit, or after trial by rendering judgment either in favor of plaintiff or defendant." Further, in the same case, and on an issue identical to this, the Court said that the ruling denying the motion to intervene was appealable "because it was by the granting of the motion to intervene that would have made petitioner/intervenor a party to the damages suit and once denied, she had no more standing as a party in the case. Hence, the denial of the motion, therefore, puts finality to petitioners/intervenor's side of the case; and since intervention is a matter of right, she would have appealed from the ruling despite the judge labeling said ruling as interlocutory." *Insurance Company of Africa v. Koroma and Dennis*, 31 LLR 528 (1983), decided December 21, 1983.

This Court therefore determines and declares that the court's ruling of October 15, 1997, denying intervenors motion to intervene was a final judgment as to intervenors, both in its form and effect, and therefore it was appealable. Having so found and held, the Court now turns to the main question of whether error would lie or not. To this, we must determine what is the basis of error. Our statute provides that:

"A party against whom judgment has been taken who has for good reason failed to make a timely announcement of the taking of an appeal from such judgment, may within six months after its rendition file with the Clerk of the Supreme Court an application for leave for a review by the Supreme Court by writ of error." Civil Procedure Law, Rev. Code 1:16-24(1).

In the instant case, judgment was rendered denying intervenors' motion to intervene and specifically barring

them from any further participation in the case. A lawyer was designated to take the ruling for intervenors (even though this is open to debate and doubt, but argued); said lawyer excepted to the ruling but did not announce any appeal therefrom. This was careless and negligent on part of the court appointed lawyer, and this will be addressed later in this opinion. Because of the negligence of said appointed counsel, there exists good reason why intervenors should seek error.

On the subject of good reason, the plaintiffs-in-error complained in their amended petition that the court proceeded to hand down its ruling on intervenors' motion to intervene without issuing any notice of assignment. In their returns the defendants-in-error did not deny this allegation or try to prove that an assignment was issued; rather, they justified the failure of the court to issue an assignment by saying that whatever defect may have existed was cured when the court appointed a counsel to take the ruling on behalf of intervenors' counsel. This Court does not agree with that reasoning. No court of record should conduct any proceeding, however minute, without issuing a notice of assignment, except the parties acquiesce therein.

However, the Court observes that the court's appointment was inadequate, in that the designated counsel did not fulfill the purpose for the appointment. He was to have excepted to the ruling and appealed therefrom since it had the effect of a final judgment as to the intervenors because the judge ordered that the case be proceeded with, without any further participation of the intervenors.

Before leaving this subject, the Court wishes to observe that the carelessness of lawyers appointed by the court to take rulings for absent colleagues is costly to the parties. The court's own duty ends when a counsel who is present is designated to take a ruling for an absent lawyer. The

purpose of that provision is to preserve the right of the absent counsel or party to appeal and have an adverse judgment reviewed. This Court sends out the warning to all lawyers to be more careful and conscientious when deputized to take rulings for their colleagues as any neglect to fully perform the duty associated with said appointment will be severely punished.

For these reasons, we hold that error will lie to review the ruling of the court below, especially where the application was fled within the six months time limit prescribed by statute.

A very serious matter has been presented in this case which cannot escape our attention and action; that relates to the appointment of Counsellor Joseph H. Constance by Judge Timothy Z. Swope to take the ruling for the absent parties of their counsel. Defendants-in-error claim and insist that Counsellor Constance was personally and physically present in Court on October 15, 1997, and that upon being appointed he accepted that appointment to take the ruling for the absent intervenors' counsel, Counsellor Nigba. To support their contention, Defendants-in-error have proferted a sworn affidavit signed by Jacob F. Nyumah, the typist who took the minutes in court that day, wherein he confirms the presence in court of Counsellor Constance on that day.

On the other hand, plaintiffs-in-error have maintained their denial of the above and have categorically stated that no lawyer was appointed and that the court records showing such appointment are all falsified. They have proferted a sworn affidavit signed by Counsellor Constance confirming that he was never in that court on that day and that he was never appointed to take the ruling in question and had no knowledge of this matter.

This is a very serious matter; both Counsellor Constance on the one hand, and Judge Swope and Mr. Jacob Nyumah, on the other hand, cannot be all correct at the same time. Someone is not telling the truth. And since this Court cannot take evidence, a committee will be set up by this Court to investigate this claim and counter-claim, and submit their report and recommendations to this Court within the time specified in the mandate to the committee.

Another point worthy of our comment is that the judge in his ruling said that the intervenors should file an independent action to protect their rights and interests because there is no valid ground stated in the motion to intervene. The court relied on the case *Wayne v. Cooper*, 21 LLR 50 (1972), which held that:

"A person *entitled to intervene* in an action for the protection of his rights may elect to institute his own action in lieu thereof." (Emphasis supplied).

Note that this Court, in the cited case, started out with the premise that the person is already entitled to intervene but that he also has a choice to decline intervention and institute his own suit. The right to intervene or to bring another suit is in the person and the fact that he chooses one option does not negate his right to the other. Therefore, it was misapplication of that law when the trial court ruled that if movants had any cause of action, they had the right to bring an independent action.

Another point worthy of comment is that the trial court in its ruling held that issues raised by defendants-in-error in their resistance to the motion to intervene were deemed admitted by plaintiffs-in-error/intervenors by virtue of their failure to refute them in an answering affidavit. The court relied on section 9.8(3) of the Civil Procedure Law, Rev. Code 1. That provision states:

"Averments in a pleading to which a responsive

pleading is required are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required shall be taken as denied or avoided."

The question is whether a responsive pleading was required after the resistance to the motion was filed by defendants-in-error/respondents in the motion to intervene.

In the case of a motion, the only papers filed are the motion and a resistance thereto. Civil Procedure Law, Rev. Code 1: 10.6 No further pleadings are required and therefore averments in the resistance are taken as denied or avoided. Motions are not the kinds of pleadings which require the three-stage filing, such as complaint, answer and reply; rather, motions fall under the second part of Section 9.8(3), *supra*.

The trial judge ruled that intervenors should have filed an answering affidavit denying or refuting respondents' allegations, made in the resistance. This was a reversible error. First of all, answering affidavits are not provided for as part of the pleadings under the Civil Procedure Law; rather, it is provided for in the Rules of Court and not even under the Circuit Court Rules but only under the Supreme Court Rules. See Rule II, *Revised Supreme Court Rules*. This case being at the circuit court level, no answering affidavit was required, and in fact, none was even permissible.

The most important aspect of the trial court's ruling on intervenors' motion to intervene was that the motion was not timely filed in that it should have been filed simultaneously with the pleadings in the main suit. The court did not go into the merits of the motion. The question is, what is timeliness? What does the statutes say as to when a motion to intervene should be filed? The controlling statute states:

“1. *In general. Upon timely application*, any person shall be allowed to intervene in an action: " Civil Procedure Law, Rev. Code 1: 5.61. (Emphasis supplied)

The court relied on section 5.61, *supra*, which is titled: INTERVENTION AS OF RIGHT. This Court notes that the prevailing theme is that the application must be timely but there is no definition of what constitutes timeliness. Section 5.61 is different from the section 5.62, in that the latter, "PERMISSIVE INTERVENTION", has a catch. This latter section provides that: "In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. " Civil Procedure Law, Rev. Code 1: 5.62(2). This section grants the court discretion as to whether or not to grant intervention. However, it is observed that section 5.1 orders intervention as a matter of right; in this case, the court does not have any discretion so long as the applicant shows his right to intervene.

Therefore, since this Court has determined that the trial court, under section 5.61 on which it relied to rule, does not have any discretion to decide whether or not to grant intervention, this Court now holds that it was erroneous for the trial court to have held that the motion to intervene should have been filed at the same time the original pleadings in the main suit were filed. The only requirement under the law (5.61) is that the intervenor must establish his right to intervene and he will be admitted as a party in addition to the original parties.

Accordingly, the ruling of the trial court has to be and is hereby reversed and set aside for being erroneous, and the trial court is hereby ordered to rehear the motion to intervene on its merits and allow intervenors to establish their right to intervene to protect their rights and interests in the subject property. Should they establish their right to

intervene, then the court shall proceed to dispose of the law issues raised in the intervenors' answer and the respondents' reply thereto, and then, and only then, should the court proceed to trial of the facts in the case. Accordingly, we herewith declare the first trial is a nullity.

Even when the court ruled on the motion to dismiss filed by the original respondents, and ruled the case to trial on August 5, 1997, it said that the case would be tried during the next term of court, meaning the September Term of court. Then on August 18, 1997, the law issues were ruled on, in which the court ruled all the pleadings to trial, since they contained mixed issues of law and facts. It was on the same day, August 18, 1997, that intervenors filed their motion to intervene. The September Term, 1997, of the court, was not to begin and did not begin until September 15, 1997, meaning that the court had between three and four weeks within which to dispose of the motion to intervene before assigning the case for trial, assuming that this case would have been a first to be called when the September Term commenced, which was not likely. It was therefore reversible error when the motion to intervene was not entertained on its merits because of untimely filing. Hence, the said ruling is hereby reversed.

Finally, it is to be remembered that when this case was called in the Supreme Court, the Court decided to consolidate hearing the defendants-in-error's motion for relief along with the petition for the writ of error and the returns thereto. Thus, the issues raised in said motion must also be addressed.

Defendants-in-error complained in their motion for relief that the plaintiffs-in-error were bent on baffling justice and delaying the main case, in that they filed their error proceedings and took no further action; that they made no effort to have the records from the trial court

transcribed and forwarded to this Court; that they failed and neglected to superintend and ensure appellate review of the ruling of the trial court; and that this was working prejudice to the interests of defendants-in-error.

In resistance to this motion, the plaintiffs-in-error contended that they were not negligent and had not failed to have the records transcribed for transmission from the trial court to the Supreme Court. Plaintiffs-in-error proferted a receipt from the filing clerk of the Civil Law Court as evidence that they had paid \$5,900.00 as clerical fees for the transcription of the records. However, during oral arguments before this Court, counsel for plaintiffs-in-error contended that the responsibility was not on the appealing party but on the clerk of the trial court to have the records transcribed. How irresponsible.

This Court will not and does not take kindly to the careless and willful neglect of lawyers whose only intent is to baffle and frustrate the just and timely disposition of cases. The Court observes that the defendants-in-error's motion for relief is dated April 29,1998, and the payment receipt of plaintiffs-in-error is also dated April 29, 1998; it appears and is highly likely, obvious and logical, that after the motion was filed the plaintiffs-in-error ran to the Civil Law Court and made the payment.

This Court now declares that it is the full responsibility of the appealing party not only to superintend but in fact to ensure the timely transcription and forwarding of the trial court's records to the appellate court. In order to give effect to this holding, this Court now and hereafter adopts the rule and makes it a requirement that within ten days after service of the notice of completion of appeal, the appellant must obtain a certificate from the Clerk of the Supreme Court that the trial court's records have been received by the said Clerk. Both parties shall then file their respective

briefs within five days thereafter, that is to say, within fifteen days after issuance and service of the notice of completion of appeal. Violation of this requirement shall render the counsel concerned liable in contempt of this Court.

Wherefore, and in view of all that has been said, this Court now rules that the trial court's ruling on intervenors' motion to intervene, being erroneous, the same is hereby reversed and set aside and the parties ordered to return to the trial court for rehearing of the motion to intervene on its merits. Consequent upon this, the final judgment rendered by the trial court is hereby set aside and the entire case remanded to the trial court for a new trial, commencing with the disposition of the motion to intervene, then the law issues in all the pleadings, and then trial of the facts. Accordingly, the petition for writ of error is hereby granted and the judgment reversed.

The Clerk of this Court is hereby ordered to send a mandate to the Civil Law Court for the Sixth Judicial Circuit, Mont-serrado County, commanding the judge presiding therein to resume jurisdiction over the case and commence a new trial beginning with the disposition of the motion to intervene. Costs are to abide final determination of the case. And it is hereby so ordered.

Petition granted; judgment reversed.