WAJDI (NADJI) GEMAYEL, Plaintiff-In-Error, *v.* HIS HONOUR VARNEY D. COOPER, SR., Assigned Judge over the Civil Law Court, Sixth Judicial Circuit, Montserrado County, and CLAUDIUS E. COOPER, Defendants-In-Error.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE DENYING THE PETITION FOR A WRIT OF ERROR.

Heard: December 2, 1997. Decided: January 22, 1998.

1. A party desiring to rebut allegations raised in the returns must file an answering affidavit, or to allegations in an answering affidavit, a replying affidavit.
2. The failure of a plaintiff-in-error to refute the contentions raised by the defendant-in-error shall be deemed an admission of the claims asserted therein.
3. Issues not raised in the pleadings cannot be argued on appeal or considered by the Supreme Court and contained in the brief filed with the Court.
4. A brief is not a pleading but, rather, merely a written argument by counsel, required to be filed with the appellate court stating why the trial court acted correctly, in the case of the appellee's brief, or incorrectly, in the case of the appellant's brief, containing the facts of the case, the issues for review, and the arguments with authorities, a conclusion and the relief sought, the content and form of which is usually prescribed by the rules of court.
5. A counsel can physically represent a party, as counsel, to prepare pleadings and present arguments in court, but he is not a party to the suit.

6. In order for counsel for a party to be substituted for that party, even where he is already counsel, he must specifically be authorized by the principal to be an agent, the two being separate and distinct roles.
7. The Supreme Court may pass only on those issues it deems meritorious or properly presented. Accordingly, the Court need not pass on every issue raised in the bill of exceptions or in the briefs.
8. Where a jurisdictional issue is raised, the court may choose to ignore the other issues raised and address itself to only the jurisdictional issue.

The trial court, at the request of the co-defendant-in-error, entered judgment by default against the plaintiff-in-error in an action for cancellation of a lease agreement in which the plaintiff-in-error had failed to appear or file an answer after being summoned by publication by newspapers on four separate occasions and service thereof as prescribed by the statute governing service by publication. The court thereafter conducted an *ex parte* trial and rendered judgment therein. The trial was conducted five days after the fourth publication. Plaintiff-in-error discovered that the trial had been conducted and judgment rendered when on the tenth day following the last publication, his counsel sought to file the answer in response to the bill in equity for cancellation. Plaintiff-in-error therefore sought redress by filing an application for a writ of error, alleging that he had not had his day in court and that the trial court had erred in holding a trial of the case on August 5, 1997, five days after the last publication, when such trial should not have been conducted before August 11, 1997, since in fact he, plaintiff-in-error, was required by law to file his answer within ten days after the last publication of the complaint.

The Supreme Court denied the application stating: (a) that the plaintiff-in-error was without the bailiwick of the Republic and therefore could not have brought the error proceedings except by an attorney-in-fact; (b) that the person alleged to be plaintiff-in-error's attorney-in-fact did not possess a power of attorney from the plaintiff-in-error and therefore did not have the capacity to sue; (c) that the plaintiff-in-error had failed to refute the allegation regarding his absence from the country or the capacity of his alleged representative to sue or defend in his behalf, which failure the Court deemed as an admission of the truthfulness of the claims of the defendants-in-error. Under the circumstances, the Court said, it could not go into the issue of whether a defendant summoned by publication had a period of ten days from the past publication to file an answer or returns. The Court therefore *denied* the application for the writ of error, *quashed* the alternative writ and *denied* the peremptory writ.

Roger K.. Martin appeared for plaintiff-in-error. *Farmere G. Stubblefield* appeared for defendants-in-error.

MR. JUSTICE WRIGHT delivered the opinion of the Court.

These error proceedings seek to have this Court review a final judgment in an *ex parte* trial wherein the co-defendant-in-error, Claudius E. Cooper, on may 30, 1997, sued out an action for the cancellation of a certain lease agreement. The records show that the plaintiff-in error, defendant below, could not be personally served with the summons because he was, and still is, out of the country. The trial court granted defendant-in-error's application for service of the summons by publication. In keeping with law, the

summons and complaint were published four times in the Inquirer Newspaper, the fourth publication being on July 31, 1997.

On August 5, 1997, the plaintiff, co-defendant-in-error herein, obtained judgment by default against the plaintiff-in-error. On August 11, 1997, counsel for plaintiff-in-error attempted to file his returns to the petition for cancellation when he discovered that final judgment had been entered since August 5, 1997. Whereupon, he filed the instant application for a writ of error on August 12, 1997.

In the seven-count application, the plaintiff-in-error raised one basic issue, and that is, what is the time available to a defendant who has been served with summons by publication to file his answer or returns? Plaintiff-in error contended that he had ten days after the fourth or last publication to file an answer and, therefore, the trial judge erred when he conducted the trial and rendered judgment five days after the last publication, that is, on August 5,1997, instead of waiting until August 11th, since August 10th was a Sunday. Plaintiff-in-error therefore asserted that he did not have his day in court.

Plaintiff-in-error also averred in count two of his applica-tion that because he was, and still is out of the country, he was not aware of the action taken by Co-defendant-in-error, Claudius E. Cooper, until he read it on page two of the Inquirer Newspaper on July 31, 1997. Moreover, he said, his represen-tative in Monrovia, Liberia, in person of Mr. Tony T. Hage, was also not present in Monrovia throughout the period of the publication.

The defendants-in-error filed their returns or resistance to the application raising several legal issues: First, that in the application for the writ of error, the applicant is Wajdi (Najdi) Gemayel who is out of the country even though he claims that his representative in Monrovia is Tony T. Hage.

Defendants-in-error contended that Tony T. Hage should have been the proper person to file these error proceedings for and on behalf of his absent principal, Gemayel, because there must be some agent or representative or attorney-in-fact for Gemayel for the purposes of the court being able to enforce its judgment in favour of or against him.

The contention of the defendants-in-error, therefore, is that where the principal (Gemayel) is out of the country, only his representative (Tony T. Hage) has capacity to sue; and that since Gemayel was out of the country, he could not sue for himself.

Secondly, defendants-in-error asserted that Tony T. Hage, the alleged agent for Gemayel in Liberia lacked standing to sue because he did not have a power of attorney and therefore, could not act in a representative capacity. Defendants-in-error contended further that the subject matter of a suit being real property, all transactions had to be in writing in order to prevent fraud and perjury under the statute of frauds.

Thirdly, defendants-in-error attacked the application for inconsistency in its allegations, in that wherein it was claimed in count one that Gemayel was not served with and did not receive any publication of the cancellation proceedings, yet in count two he admitted that on July 31, 1997, he (Gemayel) read in the Inquirer Newspaper the publication of the cancel-lation proceedings against him.

Fourth, defendants-in-error attacked the truthfulness of plaintiff-in-error's allegation in count two of the application that Gemayel's agent, Tony T. Hage, was not in the country throughout the period of the publication, and asserted that the plaintiff-in-error had failed to prove same by any evidence showing when Mr. Hage had left the country and returned and where he had gone, such evidence being his passport, plane ticket, etc, none of which was

present.

Responding to the main issue in the application, i.e. that an absent defendant served by publication has ten days within which to file an answer, defendants-in-error said that that issue was inapplicable and that more importantly, Gemayel, for himself lacked the capacity to raise the issue, as also was Tony T. Hage, since Gemayel was out of the country, and since Tony Hage, as agent for Gemayel, did not have a power of attorney.

This Court observes that as to these technical legal issues raised in the returns by defendant-in-error, the plaintiff-in-error did not respond by denial or refutation, by way of an answering affidavit, but elected to address them in his brief *Rule II, Part 1(b). Revised Supreme Court Rules, page 37.* It is the usual procedure permissible in the Supreme Court to file answering and/or reply affidavits to rebut issues raised in the returns or answering affidavit. See the case *Borbor v. Gillatey,* 25 LLR 124 (1976), at 127.

With respect to the issue of the power of attorney in favor of Tony T Hage, plaintiff-in-error could have withdrawn and amended his application to profert the authority upon which Tony T. Hage held himself out as representative of Gemayel or upon which Gemayel claimed Tony T. Hage was his representative in Monrovia. Civil Procedure Law, Rev. Code 1: 9.10; also the case *Nasser v. Gray*, 26 LLR 115 (1977), text at 127-128; also *Rule III. Part (a), Supreme Court Rules, page 33.* Because of the failure of plaintiff-in-error to respond to and refute the contentions raised by defendants-in-error, the claims contained in the returns are deemed admitted. Civil Procedure Law, Rev. Code 1: 9.8(3); *Liberian Oil Refining Company v. Mahmoud,* 21 LLR 201 (1974); *Tucker v. Brownell*, 24 LLR 333 (1975), text at 338-339.

The Court says that the above issues could not have

been raised by plaintiff-in-error in the application and that is why a response was required.

The position of the Court is even enhanced by the fact that counsel for plaintiff-in-error proferted, along with his brief, a letter which he said evidenced the disapproval of co-lessors of co-defendant-in-error in the institution of the cancellation of the lease agreement to which all of them were signatories. In the letter, they alleged that they had not authorized the co-defendant-in-error to institute any proceedings on their behalf. Of course, the letter begs the question if one co-lessor cannot sue for all the lessors without authority of all, how can another co-lessor speak for the others without authority in disavowing the action of the first co-lessor? This comment, however, is made only in passing.

Issues not raised in the pleadings cannot be considered by court and cannot be argued in the brief for the first time, especially as this would deprive the opposing counsel of the opportunity to traverse the issue raised. See the case *Gallina Blanca, S.A. v. Nestle Products, Ltd.*, 25 LLR 116 (1976), text at 119. A brief is not a pleading but rather merely a written argument by counsel required to be filed with the appellate court stating why the trial court acted correctly (appellee's brief) or incorrectly (appellant's brief); the contents and form are usually prescribed by the Rules of Court and contain statement of issues presented for review; statement of the case(facts), an argument with authorities, and a conclusion stating the precise relief sought. BLACK LAW DICTIONARY 192 (6th ed. (1990).

Hence, the Court cannot pass on the issues raised in the brief of plaintiff-in-error, except perhaps that which relates to how many days an absent defendant or respondent, who has been sued and summoned by publication and has not appeared up to last publication, has to file an answer or

returns after the last publication.

It is the contention of defendants-in-error that the Court cannot even pass on that issue because it is not properly before the Court, in that the person raising the issue does not have the legal capacity to raise any issue in the proceedings. The defendants-in-error contention is, firstly, that the principal, Mr. Gemayel, being out of the country, i.e., without the bailiwick of the Court, cannot act for himself but must do so through another who is in Liberia in order for the court to exercise *in personam* jurisdiction over him for the purpose of serving and receiving process, and also for the purpose of enforcing the court's judgment for or against him; and secondly, that Mr. Tony T. Hage, the alleged representative of Mr. Gemayel in Liberia, does not have a power of attorney in keeping with law and thus cannot act for Mr. Gemayel. The defendants-in-error have relied on section 5.11(3) of the Civil Procedure Law, Rev. Code 1, *Capacity of Parties Person acting in representative capacity.*

Not only did plaintiff-in-error fail to deny the assertions made by the defendants-in-error but, more importantly, he tacitly conceded same, in that, even the very caption in the application represents that Gemayel is in Monrovia, Liberia, when in fact and indeed he is out of the country. Besides this being mis-leading, it shows that counsel for plaintiff-in-error realized that his client must be within the bailiwick of the Court to act for himself. But since he knew his client was not in Liberia, the application, in its caption, should have reflected the true whereabouts of the plaintiff-in-error or should have been filed by and thru his representative in Liberia. None of these having been done, this Court is constrained to agree with the position of the defendants-in-error, and cannot therefore entertain any papers filed or arguments presented in the present case with regard to the party respondent in the cancellation proceeding in the court

below or the error proceedings in this Court.

Counsel for plaintiff-in-error has apparently misunderstood the difference between his representation of Gemayel as counsel, under section 1.8 of the Civil Procedure Law, Rev. Code 1, and the capacity of Gemayel, as a party to sue and be sued personally or by and thru a representative, under section 5.11(1)(3) of the Civil Procedure Law, Rev. Code 1. The counsel certainly can physically represent Gemayel *as counsel* to prepare pleadings and present arguments in court, *but he is not the party to the suit*. If he must substitute for Gemayel as the party, even though he is already counsel, Gemayel must specifically authorize him (though counsel) to be an agent (the party), which are both separate and distinct roles.

Because of the above, it is our holding that these error proceedings, not being properly before this Court due to lack of legal capacity in both Gemayel and Tony T. Hage, must be dis-missed, especially as the plaintiff-in-error failed and neglected to traverse these and the other issues raised by the defendants-in-error in their returns, in an answering affidavit, or to with-draw and amend the application. The Court stops short of going any further to pass on the issues raised in the brief of plaintiff-in-error because of the above stated reasons, as it has always been the practice of this Court to pass upon only those issues it deems meritorious or *properly presented*. It need not pass on every issue raised in a bill of exceptions or in the brief. This Court is, in the instant case, acting in keeping with practice and precedent in deciding to ignore the other issues raised and to address itself only to the jurisdictional question. *Lamco J. V. Operating Company v. Verdier*, 26 LLR 445 (1978), text at 448.

WHEREFORE, and in view of the foregoing laws, facts, and circumstances, it is our holding that the application should be and is hereby denied. The alternative writ is quashed, the peremptory writ is denied, and these error proceedings are dis-missed, with costs against the plaintiff-in-error. Accordingly, the judgment of the trial court, subject of these error proceed-ings, is hereby affirmed and ordered enforced. The Clerk of Court is hereby ordered to send a mandate to the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, commanding the judge presiding therein to resume jurisdiction over the case and to enforce its judgment. Costs are assessed against plaintiff-in-error. And it is hereby so ordered.

Application denied.