THE MANAGEMENT OF INTERNATIONAL TRUST COMPANY, by and thru its President, **WILLIAM MERRIAM,** Petitioner/Appellant***, v.*** **THOMAS JARJAY, et al. and The BOARD OF GENERAL APPEALS, MINISTRY OF LABOUR,** Respondents/Appellees.

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

Heard: April 17-18, 1985. Decided: June 20, 1985.

1. It is the service of the notice of completion of appeal that confers jurisdiction on the Supreme Court over an appeal case.
2. Unless the notice of completion of appeal is timely served, the appellate court will refuse jurisdiction in a matter on appeal.
3. A failure to serve a notice of completion of appeal is ground for the dismissal of the appeal, even where the failure is due to the neglect of the clerk of the trial court.
4. A notice of completion of appeal issues only upon filing of the bill of exceptions and an approved appeal bond, and upon application made by the appellant to the clerk of the trial court.
5. A writ of mandamus will be issued if, after the filing of an appeal bond with the clerk of the trial court and a request for issuance of a notice of completion of appeal, the clerk refuses to comply with the request.
6. An affidavit is a written or printed declaration or statement of facts made voluntarily and confirmed by oath or affirmation by the party making it, taken before an officer having authority to administer such oath. Thus, an answering affidavit is not a pleading.
7. The Supreme Court has no authority to administer oath. As such, an answering affidavit can only be venued before an officer authorized to administer oaths, and not before the Supreme Court.
8. In order to be valid, an affidavit must contain the exact title of a case, either in the caption or in the body.
9. The function and scope of an answering or replying affidavit are limited by law to the refutation of factual allegations in the returns. A petitioner may not therefore use an

answering affidavit for reversal of the issues of law raised in the returns.

10. In order for a bond to be valid, the security for the bond must be valid at the time of the filing of the bond, or at least the security should become valid within sixty days after rendition of a final judgment as provided by law.
11. When the effective date of a security for an appeal bond is beyond the sixty days requirement for filing of the appeal bond, the appeal is rendered defective and subject to dismissal upon motion properly made.

The appellant appealed from the judgment of the Circuit Court for the Sixth Judicial Circuit, Montserrado County, dismissing appellant's petition and confirming the decision of the Board of General Appeals, Ministry of Labour, awarding appellees $97,084.90. The appellees had commenced an unfair labor practice suit in the Ministry of Labour in which they asserted claims for thirty minutes lunch period which they claimed they were entitled to but which the appellant allegedly did not provide. In addition, the appellee prayed the Ministry to award them overtime pay which they said they were entitled to. The hearing officer ruled that the appellant was liable to the appellee. From this ruling, appellant appealed to the Board of General Appeals which, after hearing the contentions of the parties, affirmed the ruling of the hearing officer with modifi-cation. The matter was then appealed to the Circuit Court, by the filing therewith of a petition for judicial review. The petition was dismissed and the decision of the Board of General Appeals confirmed by the ruling of the circuit court. A final appeal was taken therefrom to the Supreme Court.

At the call of the case, the appellees informed the Supreme Court that they had filed a motion to dismiss the appellant's appeal for reasons that: (a) the appeal bond and the notice of completion of appeal were filed beyond the sixty day period prescribed by law, and (b) the bank guarantee used as security to appellant's bond did not meet the requirements of the statute.

In its resistance to the motion to dismiss, appellant contended that as the trial judge who had rendered the judg-ment in the case in the circuit court was out of jurisdiction when the bond was prepared, the bond had to be mailed to him for his approval; that a copy of the bond was filed with the clerk of the trial court on the same date the bond was mailed to the trial judge for his approval; that the trial judge had approved the appeal bond *nunc pro tunc* to the date of mailing of the said bond; and that the issuance, service and filing date of the notice of completion of appeal should have been done *nunc pro tunc* to correspond with the

date of the bond, which was within the sixty day period stipulated by the statute. In addition, the appellant challenged the answering affidavit filed in response to appellant's resistance to the motion to dismiss.

The Supreme Court upheld the motion and dismissed the appeal, noting that it was the service of the notice of completion of appeal which confers jurisdiction on the Court, and that where, as in the instant case, the notice is not served within the sixty day period prescribed by the statute, the appeal is rendered dismissible even where such failure is due to the negligence of the clerk of the trial court. The Court observed that although the trial judge had approved the appeal bond *nunc pro tunc*, and copies of the bond had been filed with the clerk of the trial court on November 15, 1984, the date the appeal bond was mailed to the trial judge for his approval, yet the application for the notice of completion of appeal was not prepared until December 31, 1984, after the motion to dismiss had been filed, and a period of forty-six days after the filing of copies of the bond with the clerk of the trial court. The Court held that the late issuance of the notice of completion of appeal rendered the service of such notice defective and the appeal a fit subject for dismissal.

The Court also found the bank guarantee which was used as security to the appellant's bond to be defective. Firstly, the Court said, the statute provided for a bank certificate, not a bank guarantee; and secondly, the guarantee was to become effective on December 18, 1984 when the sixtieth day for completion of the appeal was December 9, 1984, the court noted that under those circumstances, although the bond was posted to the trial judge on November 15, 1984, there was no legal surety or security for the bond, since the security was to become effective only on December 18, 1984. The Court there-fore *dismissed* the appeal.

Philip A. Z. Banks, III, and *Nelson W. Broderick* appeared for the petitioner/appellant. *M. Fahnbulleh Jones* and *Gladys Johnson* appeared for the appellees\movants.

MR. JUSTICE MORRIS delivered the opinion of the Court.

This case emanated from the Labour Ministry whereat ap-pellees Thomas S. Jayjay et. al., complainants below, charged the appellant with unfair labor practice and sought recovery of thirty minutes lunch period and overtime pay which they alleged they were deprived of by appellant, contrary to the Labour Practices Law of Liberia. The Chief of Mines and Factory and the hearing officer heard the complaint and ruled in favour of the complainants. On appeal, the Board of General Appeals affirmed the ruling of the hearing officer. On July 10,

1984, the management of the International Trust Company petitioned the Board to reconsider its ruling, made on July 4, 1984. The petition was granted in part when the Board of General Appeals reconsidered its decision on the 17th day of August, A. D. 1984. In the new ruling, the Board held that only 47 of the 58 complainants were entitled to compensation. The management of International Trust Company, still being dissa-tisfied, again appealed from the decision of the Board of General Appeals, delivered on August 17, 1984. As required by the Labor Law of Liberia, appellant petitioned the judge presiding over the Civil Law Court of the Sixth Judicial Circuit, Montserrado County, for judicial review of the Board's decision. After hearing arguments *pro et con*, Judge J. Henric Pearson, then presiding over the Sixth Judicial Circuit Court of Montserrado County by assignment, confirmed and affirmed the decision of the Board of General Appeals with the amend-ment that the amount due the workers, appellees, in the sum of $97,084.90, be paid immediately with 6% interest and costs. Accordingly, the judge dismissed the petition. The Interna-tional Trust Company, the petitioner herein, again appealed to the People's Supreme Court from the judgment of Judge J. Henric Pearson. Hence this case is before us.

At the call of the case for hearing of the appeal the appellees informed us that they had filed a motion to dismiss the appeal because the appellant has failed to perfect its appeal. The appellees averred in the motion to dismiss that there was no approved appeal bond filed and that no notice of completion of appeal had been served on the appellees as required by our statute. They attached a certificate from the clerk of the trial court to this effect, and cited for reliance section the Civil procedure Law, Rev. Code 1: 51.16.

The petitioner/appellant filed a six-count resistance in which it alleged that after preparing its appeal bond, it was informed that Judge J. Henric Pearson, who tried the case, was in Grand Gedeh County on assignment. The appellant said that it therefore posted the appeal bond to him on November 15, 1984 for his approval. The appellant said that it also delivered copy of the postal receipt and the bond to the clerk of the trial court and the filing date of November 15, 1984 was placed thereon. It attached photocopies of the appeal bond and the receipt as exhibits "A" and "B". The appellant contended that since Judge J. Henric Pearson had approved the appeal bond *nunc pro tunc* to the date of mailing and which date constituted the"date of the filing of the appeal bond, the date of issuance and service of the notice of completion of the appeal should have been made to that effect, November 15, 1984.

The appellant also argued that despite the fact that a copy of the petitioner's/appellant's appeal bond and a copy of the postal receipt were filed with the clerk of court, yet said clerk

proceeded to issue to the respondents/appellees a certificate to the effect that no approved appeal bond had been filed with his office. The appellant denied the allegation that it had not completed its appeal; instead, it maintained that it had met the statutory requirements for perfecting its appeal because the effective date of approval of the appeal bond was the date of the postal receipt, November 15, 1984, which date was within the sixty days prescribed by statute. The appellant further contended that it had made every effort to comply with the appeal requirements of the law and that it could not be made to suffer on account of deliberate prejudice. It attached copies of the bond and the letter of guarantee.

In response to the appellant's resistance to the motion to dismiss, the appellees filed an answering affidavit in which they raised several issues. We however deem it necessary to quote only counts 3, 6 and 7:

> "3. That as to the entire resistance the same present no triable issues and therefore should be dismissed and the motion upheld for reason that no notice of completion of appeal had been issued and served on the respondents/ appellees or their counsel and returns served thereby placing the respondents/appellees under the jurisdiction of this Court and which notice of completion of appeal should have been served and returned served within sixty (60) days as of the date of the judgment in this case, which was October 10, 1984. The statutes and numerous opinions of this Court expressly state that where a notice of completion of appeal is not issued, served and returned served within sixty days from the date of rendition of final judgment, the case may be dismissed.
>
> "6. Respondents/appellees say that the petitioner/ appellant did not and has not made every effort to comply with the appeal requirements of the law, in that if, according to him, he has exerted all efforts, then he does not know all the efforts which should have been made because the law provides for relief where the clerk of court, the judge or any judicial officer fails to perform his duties prescribed by statutes, and that is proceeding by mandamus, which the appellant failed to take advantage of. For these legal and factual reasons, the respondents/ appellees pray that the resistance be denied and the motion upheld.
>
> "7. Respondents/appellees say that the petitioner/ appellant has filed this resistance merely as the last straw for a drowning man and because there is no legal justifi-cation for his failure to proceed to perfect his appeal. respondents/appellees request that the unmeritorious resistance be overruled for, even the letter of guarantee securing the bond was at the time of the mailing of the bond ineffective as the said bond became

effective as of December 18, 1984, when in fact the bond was allegedly filed (mailed) November 15, 1984. Respondents/appellees maintain that for a bond to be valid the security must be effective at the time of the filing of the bond. The security (letter of guarantee) proferted by the petitioner/appellant became effective days after the expiration of the statutory allotted time for filing the appeal bond. And because of this defect in the bond at the time of its alleged mailing (filing), said bond was not valid. The appeal should therefore be dismissed."

It is true that the service of the notice of completion of appeal confers jurisdiction of the Supreme Court over an appeal case. *Johnson et. al. v. Roberts,* 1 LLR 8 (1861); *McAuley v. Laland,* 1 LLR 254, (1894); *Moore v. Gross*, 2 LLR 45, 46 (1911). Unless the notice of completion of the appeal is timely served, the appellate court will refuse jurisdiction in the matter. Moreover, a failure to serve a notice of completion of appeal is ground for the dismissal of the appeal, even where such failure is due to the neglect of the clerk of the trial court. *Cole et. al. v. Larmie*, 25 LLR 450 (1977); *Marh v. Sinoe*, 27 LLR 320 (1978).

We also quote for the benefit of this opinion the letter of guarantee attached to the appeal bond as security, as provided by the Civil Procedure Law, Rev. Code 1: 63.1 (a), at page 266, captioned *Cash to the value of the bond; or cash deposited in the bank to the value of the bond as evidenced by a bank certificate:*

"The Peoples Civil Law Court

Montserrado County, R. L.

Temple of Justice

Monrovia, Liberia.

Re: OUR LETTER OF GUARANTEE N0. 035 BY ORDER AND FOR ACCOUNT OF THE <u>INTERNATIONAL TRUST COMPANY OF LIBERIA</u>

KNOW ALL MEN BY THESE PRESENTS: That we, Agricultural and Cooperative Development Bank, of the City of Monrovia, Republic of Liberia, hereby certify that we undertake to fully indemnify Thomas S. Jarjay et. al. and the Board of General Appeals, the above named appellees in an amount not exceeding ONE HUNDRED FORTY-FIVE THOUSAND SIX HUNDRED TWENTY-SEVEN DOLLARS AND THIRTY-FIVE CENTS ($145,627.35) out of monies now available and set aside in this bank for and in respect to all costs and injuries which the said appellees might suffer by reason of an appeal prayed for and granted the said appellant, in the event it is finally determined that the appellant is not entitled to recover in the said action of judicial review, and will

comply with the judgment of this Court or any other court to which the said action may be removed; otherwise these presents shall remain null and void.

This letter of guarantee is valid for one calendar year effective December 18, 1984. All demands justifying the claims must be accompanied by a statement duly signed by the presiding judge of the People's Civil Law Court, Montserrado County, R.L., Temple of Justice, Monrovia, Liberia, and presented to this office not later than December 18, 1985.

Very truly yours,

Sgd. Mohamed H. M. Tunis

MANAGER/CUSTOMER SERVICES

APPROVED:

Wilson K. Tarpeh

PRESIDENT"

Our statute refers to "bank certificate" (Rev. Code 1 :63.1), but the evidence attached for the deposit of the cash is termed as "Re our letter of guarantee No. 035" and nowhere is the phrase "bank certificate" used. Granted however, that the letter of guarantee serves as bank certificate as required by the sta-tute, the effective date of said security is December 18, 1984. Final judgment was rendered on October 10, 1984 and the last date for the filing of the appeal bond after the rendition of final judgment, the sixtieth day, was December 9, 1984; but the guarantee or security for the bond is effective December 18, 1984, 9 days after the expiration of the statutory time of 60 days. This means, even though the bond was posted on November 15, 1984 to the judge for his approval, yet there was no legal surety or security for the appeal bond mailed to Judge J. Henric Pearson for approval. We are deeply amazed as to the way and manner in which the counsel for the appellant had handled this appeal. We wonder if they did not read the guarantee or security attached to the bond, or if they did not take cognizance of the commencement and expiration of the statutory period of 60 days for the perfection of the appeal. For, if the counsel were careful and cognizance of the expiration of the 60 days, they definitely would not have attached a security that would not become effective until nine (9) days after the expiration of the time required by law to file such bond. We therefore wish to sound out this warning to all Counsellors defending party litigants before this Court to be vigilant and exercise more care and prudence in pursuing all procedural steps to confer jurisdiction of this Court over cases appealed to it.

With reference to appellant not applying to the Chambers Justice for the writ of mandamus to compel the clerk to issue the notice of completion of appeal, we note that the letter of application from Counsellor Phillip A. Z. Banks, III was written on December 31,

1984, after the motion to dismiss the appeal had already been filed. Our statute provides that after the filing of the bill of exceptions and the appeal bond, the clerk of the trial court, upon application of the appellant, shall issue the notice of the completion of the appeal. Rev. Code I:51.9. In the instant case, the application is dated the 31st of December, 1984, 22 days after the expiration of the required 60 days, and after the filing of the motion to dismiss the appeal. The Court says that a mandamus would only have been necessary if, after filing copy of the bond with the postal receipt with the clerk and making a request for the issuance of a notice of completion of appeal, the clerk of the trial court had denied issuance thereof.

During the arguments, appellant's counsel called the appellees' counsel to a point of order on the ground that the answering affidavit was not before court and therefore, the court should not give credence to it. After filing their answer-ing affidavit, the appellees also served copy on appellant. Yet, the appellant elected not to file any replying affidavit but rather to call appellees to a point of order and expect the Court to disregard the answering affidavit. An affidavit, according to Black's Law Dictionary, is a written or printed declaration or statement of facts made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before an officer having authority to administer such oath. BLACK'S LAW DICTIONARY 80 (4th ed.). In the face of this definition, we disagree with counsel for appellant when he contended that an answering affidavit is a pleading and therefore it should be venued before the court. This argument would only hold where the court was an authorized officer to administer such oath. In the instant case, the Supreme Court has no authority to administer such oath and therefore the answering affidavit can only be venued before the officer authorized to administer the oath. What this Court has consistently held is that the affidavit, to be valid, must contain the exact title of the cause, either in the caption or the body, which the appellees had complied with in this case. *Brown v. Allen*, 2 LLR 113, 114 (1913). Pleading, as defined by Blacks Law Dictionary at page 1311, is the peculiar science or system of rules and principles established in the common law according to which the pleadings or respon-sive allegations of litigating parties are framed, with a view to preserve technical propriety and to produce a proper issue. It is the process performed by the parties to a suit or action, in alternately presenting written statement of their contentions, each responsive to that which precedes, and each serving to narrow the field of controversy until there evolves a single point, affirmed on one side and denied on the other, called the "issue", upon which they then go to trial. BLACK'S LAW DICTIONARY 1311 (4th ed.).

In the case *Kontar v. Mouwaffak and Lewis*, 17 LLR 259 (1966), this Court held that an answering affidavit was limited to only issues of fact. We quote the relevant paragraph on page 265:

> "In the answering affidavit filed by Kontar, all the counts, with the exception of count 1, relate to legal issues and constitute a traversal of the returns. It is settled law that the function and scope of an answering affidavit are limited by law to the refutation of factual allegations in the returns and that a petitioner may not use an answering affidavit for traversal of issues of law raised in the returns. The word 'affidavit' itself signifies that its use is restricted to the judicial introduction of matters of fact and not questions of law."

From these definitions, we can safely say that while pleadings include both issues of law end fact, an affidavit, be it answering or replying, deals solely with factual issues and not with questions of law. Hence the difference.

As much as we would like to proceed with the hearing of the appeal, we have been

paralyzed by the negligent failure of the counsel for appellant to timely perfect the appeal. The filing of a valid bond includes the validity of the security for the bond at the time of the filing of the bond, or at least the security should become valid within the sixty days period after the rendition of final judgment as provided by statute. When the effective date of a security for an appeal is beyond the 60 days required for the filing of the appeal bond, the appeal will be defective and dismissible upon motion properly made. Therefore, since the effective date of the letter of guarantee which is the security offered in this case is nine (9) days above and beyond the 60 days required by statute, the appeal must crumble. Count 7 of the answering affidavit is sustained and the appeal dismissed. The post office receipt shows that the appeal bond was posted by the Tuan Wreh Law Firm, one of our reputable law firms. For this glaring negligence in not su-perintending the appellant's appeal, the Tuan Wreh Law Firm is fined in the sum of Five Hundred ($500.00) Dollars, to be paid within 48 hours from the date of the handing down of this opinion.

There was no replying affidavit filed.

In view of the facts and the controlling law cited, we hold that the motion being sound and supported by the statute ought to be and the same is hereby granted.

Motion to dismiss granted; appeal dismissed.