

THE LIBERIA TRADING AND DEVELOPMENT BANK (TRADEVCO),
by and thru its Chief Executive Officer, DR. STEFANO PELLEGRINO, Petitioner,
v. **HIS HONOUR JOHN H. MATHIES**, Judge Debt Court of Montserrado
County, and **CAVALLA RUBBER CORPORATION**, by and thru its Chairman,
BARON BRACHT and/or its Director, B. SPEEKAERT, or by and thru His
Excellency, Ambassador SYLVESTER M. GRIGSBY, Acting Minister of Foreign
Affairs, Ministry of Foreign Affairs Monrovia, Liberia, Respondents.

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

Heard: April 12, 1999. Decided: June 4, 1999.

1. The party filing the last pleading is entitled to move the court first on any legal defect in the pleadings of his adversary.
2. A party is not permitted to move the court with reference to any legal defect in the pleadings of his adversary to which the attention of the court has not been previously called by some regular pleading.
3. At any time before trial any party may, insofar as it does not unreasonably delay trial, once amend any pleading made by him.
4. The definite and specific function of a writ of certiorari is to review the records and correct prejudicial errors of a lower court during the pendency of a case.
5. The office of the common law writ of certiorari is to bring before the court for inspection the record of the proceedings of an inferior tribunal in order that the superior court may determine, from the face of the record, whether the inferior court has exceeded its jurisdiction or has proceeded according to the essential requirements of the law.

These proceedings emanate from an action of debt filed in the debt Court for Montserrado County by petitioner, Liberia Trading and Development Bank, TRADEVCO. The trial court dismissed the action and petitioner appealed to the Supreme Court. The appeal was dismissed because of a defective appeal bond. The decision of the Court was reconfirmed in three subsequent opinions upon petitions for re-argument.

When the fifth decision was rendered and a mandate sent to the court below to resume jurisdiction and re-commence the debt action, Co-respondent Cavalla Rubber

Corporation withdrew its answer and served a notice of withdrawal on petitioner. When respondents obtained a notice of assignment for the court to hear arguments on law issues, petitioner, without filing a reply, moved the court to strike respondent's answer. The motion was heard and denied, whereupon petitioner applied to the Justice in Chambers for a writ of certiorari. From a ruling denying the application, petitioner appealed to the Supreme Court *en banc*.

The Supreme Court affirmed the last pleader rule that the party who pleads last is entitled to move the court first on any defect in the pleadings of his adversary, and ordered the recall of the portion of the opinion in *United States Trading Company v. Redundant Workers of United States Trading Company*, 38 LLR 422 (1997), which held that it is not a precondition for attacking an amended pleading that the attacker must file a responsive pleading to the amended pleading. The Supreme Court also held that a pleading may once be amended at any stage of the proceedings before the case is tried; and that certiorari cannot be granted where the petitioner concedes that the ruling sought to be reviewed by the petition is based upon the statute and opinions of the Supreme Court. Accordingly, the Supreme Court *affirmed* the ruling of the Justice in Chambers, quashed the alternative writ quashed and *denied* the peremptory writ.

J. Emmanuel Wureh and Stephen B. Dunbar, Jr. of Dunbar Law Firm appeared for petitioner. *Jerome Korkoya and N. Oswald Tweb* of Brumskine and Associates appeared for respondents.

MADAM CHIEF JUSTICE SCOTT delivered the opinion of the Court.

The history of this case in this court is interesting. This action first appeared before this court on appeal from the Debt Court for Montserrado County's ruling to dismiss petitioner's action of debt against respondents for a debt of US\$8,965,322.52. This court dismissed the appeal of appellant Liberia Trading and Development Bank (TRADEVCO) on the ground, substantially, of a fatally defective bond during the March, A. D. 1995 Term. This decision was reconfirmed in three consecutive opinions upon consecutive petitions for re-argument.

The fifth decision rendered February 7, 1997 by this court was a decision without opinion and a mandate was sent to the court below to resume jurisdiction and recommence the debt action. The action recommenced with each side filing several motions and the court rendered rulings on these motions. On April 30, 1997, co-respondents Cavalla Rubber Corporation herein withdrew their answer and simultaneously filed an amended answer and served same on counsel for the

petitioners herein. Respondents obtained a notice of assignment for May 5, 1997 for the court to hear arguments of law issues. Petitioners filed a motion to strike without filing a reply. On May 2, 1997, petitioners filed a motion to strike co-respondent Cavalla Rubber Corporation's amended answer. This motion was denied after which petitioners fled to the then Chambers Justice, His Honour Pei Edward Gausi. On May 13, 1997 the Chambers Justice ordered the issuance of the alternative writ of certiorari and same was served on co-respondents.

The petition for a writ of certiorari was heard by Mr. Justice Elwood L. Jangaba presiding in Chambers and on February 23, 1999 the said Chambers Justice ruled denying the petition, as follows.

"... in consonance with settled universal principles of law, and in furtherance of justice, it is our ruling that the petition for certiorari should be, and the same is hereby denied, the alternative writ quashed and the peremptory writ denied without prejudice to the petitioner to file a responsive pleading *nunc pro tunc*, if it so desires..."

Petitioners took an appeal from this ruling to this Court sitting *en banc*.

One of the contentions this court must now decide was occasioned by petitioner's filing of a motion to strike co-respondent CRC's amended answer without the filing of an amended reply. The Debt Court for Montserrado County denied this motion to strike on the basis of the last pleader rule. The debt court ruled that movant/petitioner did not file an amended reply and therefore the last pleading filed is the amended answer filed by co-respondent CRC.

During arguments before the Chambers Justice, petitioner argued that it was optional to file an amended reply. In other words it was not mandatory that petitioner's reply be with-drawn and an amended reply filed as a mandatory requirement or precondition to the filing of a motion to strike. The Chambers Justice ruled upholding the ruling of the judge of the debt court denying petitioner's motion to strike on the basis of the last pleader rule with the option that if petitioner desires, petitioner could file an amended reply.

The first issue is: is it a mandatory requirement that the party who files the last pleading has the right to file a motion to strike? This court answers this question in the affirmative. We herewith confirm and affirm previous decisions of this Court upholding the last pleader rule. *Gould and Dunn v. Gould*, 1 LLR 389 (1903). The party filing the last pleading is entitled to move the court first on any legal defect in the

pleadings of his adversary. *Id.*, at 390. Also "... this Court... is of the opinion that the party who pleads last had the right legally to motion the court to dismiss." *Horace v. Harris*, 9 LLR 372 (1947). The rule has been stated as follows:

(a) Under our practice the party filing the last pleading is entitled to move the court first on any legal defect in the pleading of his adversary.

(b) A party is not permitted to move the court with reference to any legal defect in the pleadings of his adversary to which the attention of the court will not have been previously called by some regular pleadings.

Additionally, in the case *Cassell v. Campbell*, 24 LLR 239 (1975), this Court held that the party filing the last pleading is entitled to move the court first on any legal defect in his adversary's pleading. And more recently we said, in the case *Tulay v. the Salvation Army (Liberia) Inc.*, 39 LLR 387 (1999), that "... the party filing the last pleading is entitled to move the Court first on any legal defect in the pleading of his adversary". See also *Horace v. Harris*, 9LLR 372 (1947).

Hence, it is the opinion of this Court that the Chambers Justice properly and correctly upheld the decision of the lower court.

Petitioners in arguing and discussing the last pleader rule and opinions rendered by this Court on this rule asserted that this Court, by implication, had recalled the *Cassell v. Campbell Ibid*, in an opinion delivered on behalf of this Court by then Associate Justice J. Emmanuel Wureh in the case *United States Trading Company v. USTC Redundant Workers*, 38 LLR 422 (1997). This Court held:

"... we hold that it is NOT a pre-condition for attacking an amended pleading on the ground of failure to comply with statutory requirement that the attacker must file a responsive pleading to the amended pleading..."

Petitioners in their argument, both oral and written, praying for the recall of *Cassell v. Campbell*, 24 LLR239 (1975) asserted that the opinions in "... *Gould v. Gould*, 1 LLR 389 (1903), *Horace v. Harris*, 9 LLR 372 (1947); *Cassell v. Campbell*, 24 LLR 239 (1975), and *United States Trading Company v. USTC Redundant Workers*, 38 LLR 422 (1997), are unclear, if not a confusing pattern in our jurisprudence."

We disagree with this argument of petitioners in part. *Gould v. Gould*, 1LLR 389 (1903), *Horace v. Harris*, 9 LLR 372 (1947), and *Cassell v. Campbell*, 24 LLR 239 (1975),

are consistent on the last pleader rule. The holding on the last pleader rule in each of these cases was reconfirmed by this Court in an opinion rendered on January 21, 1999 in the case *Tulay v. the Salvation Army (Liberia) Inc.*, 39 LLR 387 (1999). We agree in part that a confusion exists ONLY in this Court's decision rendered in July 1997 on behalf of the Court by then Associate Justice Emmanuel Wureh in the case *USTC v. Redundant Workers of USTC*, 38 LLR 422 (1997).

After close scrutiny of this Court's opinion in the *United States Trading Company v. United States Trading Company Redundant Workers. Id.*, we hold that it was an inadvertence that this Court conveyed confusing and irreconcilable holdings on the last pleader rule. The relevant portions of this opinion which presents lack of clarity is as follows: "We hold that it is NOT a pre-condition for attacking an amended pleading on the ground of failure to comply with statutory requirement that the attacker must file a responsive pleading to the amended pleading..." which as compared to a completely contrary holding in the paragraph immediately proceeding the quotation above of the opinion and which instead upholds and affirms the last pleader rule: "...we are in agreement with respondents' submission that it is the practice in our jurisdiction that the party who is entitled to plead is the one who has the right against any defect in the pleading to which he is entitled to respond..."

It is crystal clear that this conflict was an inadvertence. This Court will never intentionally render an opinion which is unclear and perhaps self contradictory. Hence, we hereby order the recall of the portion of the opinion in *United States Trading Company v. Redundant Workers of United States Trading Company*, 38 LLR 422 (1997), which reads: "...we hold that it is not a precondition for attacking an amended pleading on the ground of failure to comply with statutory requirement that the attacker must file a responsive pleading to the amended pleading..."

We shall now discuss the second issue which flows out of the contentions of petitioner herein.

At what stage during a trial is a party not permitted or barred from withdrawing and amending a pleading?

It is common legal knowledge that an action has three stages pre-trial, trial and post trial. The pre-trial stage includes the commencement of the action and the determination of pre-trial motions which include summary judgement, motion to dismiss, motion to strike, disposition of law issues, etc.

The trial stage includes the presentation of oral and written evidence before a judge, or the judge and jury, and the obtaining of a verdict in the case of a jury trial.

Finally, the post trial stage includes the filing and determination of motion for new trial. The Civil Procedure Law provides:

"1. Amendment of pleading permitted.

"At any time before trial any party may, insofar as it does not unreasonably delay trial, once amend any pleading made by him..." Civil Procedure Law, Rev. Code 1:9.10,

The records in this case reveal that the court had not begun to receive evidence whether written or oral. Hence we hold that respondents herein and the court below properly and legally permitted the said amendment of the pleadings of respondents. Even an inspection of the records to determine whether evidence had been adduced prior to the appeal to this Court in the debt court reveal the negative. In this action's first appearance before this court, the review was an appeal from the ruling of the judge of the lower court dismissing petitioner's action on a pre-trial motion to dismiss filed by respondents. No evidence has been adduced in this case since its filing in the Debt Court for Montserrado on September 24, 1994. Succinctly put, for the past almost five (5) years and more than six (6) opinions, the merits of this action has yet to be delved into or examined.

Therefore, it is our view that respondents properly filed their amended answer. As far as the records reveal, petitioners were not prevented from subsequently filing an amended reply and or complaint. This court affirms and upholds all its previous decisions in a long line of cases which hold that "a pleading may once be amended at any stage of the proceedings before the case is tried" *Cassell v. Campbell*, 24 LLR 239 (1975); *USTC v. King*, 14 LLR 579 (1961); *Davis v. Ernest J. Yancy et al.*, 10 LLR 89 (1949).

The final issue for this court to decide is, will certiorari lie in this action? Our answer to this question is a resounding no. Petitioners' counsel in their written argument praying for the issuance of a peremptory writ of certiorari contends that "the debt court judge, relying on *Cassell v. Campbell*, 24 LLR 239 (1975), denied petitioner's motion to strike because petitioner did not file a responsive pleading to co-respondent CRC's amended answer along with its motion to strike..."

Petitioner's petition for a writ of certiorari assert that the ruling of co-respondent debt court judge was erroneous and materially prejudicial to petitioner.

For certiorari to lie, it must be shown and proven upon review that the interlocutory ruling of the lower court judge is irregular and illegal. But contrary to this, petitioner has conceded that the ruling of the debt court judge was based upon precedent laid down by this court specifically in *Cassell v. Campbell*, recorded in 24 LLR 239 (1975). Clearly if the judge's ruling is based upon law and opinions of this Court, then the ruling is regular, legal, proper, and correct.

This Court is of the view that if petitioners' counsels concede that the ruling of the co-respondent is based on statute and case law, then petitioner's real request is its displeasure that the ruling is not favorable and has fled to this Court under the cover of the remedial process of certiorari actually believing this Court will reverse the ruling of the debt court judge. We hold that this is a misuse of the writ of certiorari, all intended to further delay the trial of this case. The continuous review of this action of debt in piecemeal will no longer be tolerated by this Court. Our review has revealed no prejudicial error or irregularities committed by the judge of the debt court.

This Court has that "the definite and specific function of a writ of certiorari is to review the records and correct prejudicial errors of a lower court during the pendency of a case." *Vandervoorde v. Mzia*, 12 LLR 323, 326 (1956). The Court has also held that "The writ of certiorari is for the purpose of correcting errors committed by a subordinate court or other body while a matter is pending, when such errors materially prejudice or injure the rights of a party." *William v. Clarke*, 2 LLR 130 (1913). In *Tay et al. v. Saad & Cooper*, 13 LLR 135, 141 (1958), this Court recognized that the office of the common law writ of certiorari is to bring before the Court for inspection the record of the proceedings of an inferior tribunal in order that the superior court may determine from the face of the record whether the inferior court has exceeded its jurisdiction or has not proceeded according to the essential requirements of the law. 10 AM. JUR.2nd., *Certiorari*, § 3.

This Court concludes that the ruling of the debt court is based on law and hence this ruling is not prejudicial, erroneous, irregular, or illegal.

It is the opinion of this Court that the ruling of the Chambers Justice which is legal, just and correct in upholding the ruling of the judge of the Debt Court for Montserrado County should not be disturbed. Hence we affirm and confirm the

ruling of the Chambers Justice, the alternative writ quashed and the peremptory writ denied. The judge of the Debt Court for Montserrado County is hereby ordered to resume jurisdiction and to proceed as provided for by law. Costs are assessed against petitioners. And it is hereby so ordered.

Petition denied; ruling affirmed.