

**GLADYS M. VINCENT-HARDING**, Petitioner, *v.* **HIS HONOUR EUGENE HILTON**, Presiding Judge, Sixth Judicial Circuit, Montserrado County, Sitting in its September Term, A. D. 1983, and **C. J. E. HARDING**, Respondents.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE DENYING ISSUANCE OF  
THE WRIT OF PROHIBITION.

Heard: April 10. 1984. Decided: May 10. 1984.

1. Averments in a pleading to which 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.
2. An answering affidavit may only be filed to traverse issues that are raised in a resistance to a motion and not the returns to a petition.
3. Witnesses must be duly summoned and evidenced by the sheriff's return before the case is ready for hearing, except in criminal cases when a bystander may have knowledge of the matter at issue and be required to testify.
4. No postponement of a hearing will be allowed unless it can be shown to the satisfaction of the court that due diligence has been employed to secure attendance of the witness.
5. A failure to file a motion for continuance or to appear for trial after returns by the sheriff of a written assignment shall be sufficient indication of the party's abandonment of the case, and the court may proceed with the case.
6. Prohibition will lie only in cases of manifest necessities and after a fruitless application for relief to the inferior tribunals.
7. A judge cannot finish the performance of a duty entered upon by his predecessor where the duty involves the exercise of judgment and the application of legal knowledge and judicial deliberation of facts known only to his predecessor.
8. A motion for new trial is granted or denied at the discretion of a succeeding judge when he is furnished with the information which enables him fairly and intelligently to pass upon the questions presented by the motion.

The petitioner is the defendant in a divorce action in the court below. When the case was assigned, her counsels proceeded as the law directs for the service and returns of a subpoena for her appearance to testify. Predicated upon the returns to the effect that she could not be served because of her absence from the jurisdiction of the court, a motion for continuance was filed. The motion

for continuance notwithstanding, the respondent judge proceeded with the case in the absence of the defendant. After the return of the verdict by the jury, but prior to the rendition of final judgment, the petitioner sought a writ of prohibition against the trial judge.

The Chambers Justice issued the alternative writ, which stayed the proceedings and prevented the trial judge from rendering the final judgment in the matter. The respondents in their returns attached the petition for improper verification. Upon the hearing of the petition, the Chambers Justice squashed the writ and dismissed the petition. The petitioner appealed to the full bench of the court. The Court upheld the ruling of the Justice in Chambers, and ordered the trial judge to resume jurisdiction in this case and proceed to render final judgement in accordance with the evidence adduced at the trial during the 1983 September Term of the trial court.

*Julia P. Gibson* and *Charles Dunbar* for the petitioner. *The Tubman Law Firm* for the respondents.

MR. JUSTICE YANGBE delivered the opinion of Court.

The petitioner in these proceedings, Gladys M. Vincent-Harding, is a defendant in an action of divorce for incompatibility of temper, filed in the Sixth Judicial Circuit, Montserrado County, by co-respondent, Professor C. J. E. Harding. There are only two controverted counts in the petition which are summarized as follows:

"That a notice of assignment was issued and served on her counsels for trial of said case on the 2nd day of November, A. D. 1983, and that upon its receipt, her counsels proceeded as the law directs for the service and returns of a subpoena for her appearance as defendant-principal to testify in her own behalf and because of its returns, a motion for continuance was filed on the ground that she being defendant-principal, she is to testify and produce evidence to the effect that plaintiff's complaint is false in its entirety with said subpoena and its returns proferted with said motion. Yet, contrary to all rules, statute and procedures that should be observed at all times, the co-respondent judge proceeded with the case under the application of Rule 7 of the Circuit Court Rules, for which prohibition will lie.

Petitioner further avers that the co-respondent judge further proceeded illegally and contrarily to all rules, statute and procedures that should be observed at all times and for which prohibition will lie; in that, the respondents observed and acknowledged the filing and service of the motion for continuance that it was mandatorily required to have assigned said motion for disposition which they did not do, nor did they allow movant the opportunity to be informed of the purported resistance under their applied Rule 7 and to be heard."

For the sake of brevity, we will discuss and pass upon the issues summarized above together with only the legal and factual effect of the twelve-count returns that are pertinent for the fair determination of this case, without stating the returns verbatim.

In count one (1) of the returns the entire petition was attacked for improper verification for reason

that the affidavit, attached thereto, is not signed by the petitioner herself in accordance with Civil Procedure Law, Rev. Code 1:9.4.

During the arguments before us, counsel for petitioner argued that the contention of improper verification should have been raised in an answering affidavit. Failure on part of counsel for petitioner to do so constitutes a waiver.

However, in section 9.8 (3), *idem*, it is stated that:

"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 statute controlling special proceedings requires only the petition and the returns, and except where there is a motion filed, there is no room for an answering affidavit. Therefore, any contention, legal or factual, raised in the returns, shall be considered denied in the absence of a responsive pleading and, during the argument, the petitioner may argue the effect of the denial with the relevant law citations.

On page 36, part 1 of the Revised Rules of the Supreme Court of Liberia under motions, it is noted that an answering affidavit may only be filed to traverse issues that are raised in a resistance to a motion, and not the returns to a petition. The petitioner has argued that although the petition was not verified by the petitioner herself due to a manifest necessity. Counsel for petitioner cited for reliance *Kanawaty v. King et al.*, 14 LLR, 241 (1960). It is admitted that at the time of the service of the writ of subpoena, the petitioner was not within the Republic of Liberia; therefore it is clear that she could not have signed the affidavit attached to the petition. However, the circumstances that existed in the case cited above, which justified the exception to the rule, does not obtain in this case in that the lower court has jurisdiction and did not proceed by the wrong rule. Later in this opinion, we will again allude to the question of manifest necessity.

Apart from what we have mentioned herein above, the argument of counsel for petitioner is illogical, in that the petition was assailed in the returns for improper verification, and there is no other pleading required by statute to be filed by a respondent to answer or traverse the respondent's own returns. Therefore, assuming that answering affidavit is applicable to the returns to a petition, it is but reasonable that it is the petitioner who should have filed an answering affidavit to the returns, and not respondents.

Revised Rule 17 of the Circuit Courts Rules requires that:

“Witnesses for either side must be duly summoned and evidence thereof must in every case be shown by the sheriff's returns before the case is ready for hearing (except in criminal cases when and where a bystander might have knowledge of the matter at issue and be required to testify); and no postponement of the hearing will be allowed unless it can be shown to the satisfaction of the court

that due diligence had been employed to secure attendance of the witness or witnesses”.

Contrary to the portion of the Rule quoted above, counsel for petitioner obtained the subpoena for his client, the defendant in the parent action of divorce pending in the court below, after receipt of the notice of assignment for jury trial on November 2, 1983. The failure of the petitioner to have applied for, and have the subpoena issued and returned prior to the date of the trial of the case, in our opinion, certainly gives color to the contention that the motion for continuance was not filed in good faith, but was filed merely to delay justice.

In *Dennis v. Republic et al.*, reported in 7 LLR 212 (1941), the defendant was convicted of embezzlement in the trial court, whereupon a motion for enforcement of the final judgment was filed by the county attorney. Prior to a decision on the motion by the trial judge, the defendant in the trial court fled to the Supreme Court for a writ of prohibition. Consequently, this court held that prohibition will lie only in cases of manifest necessities, and after a fruitless application for relief to the inferior tribunals. In the case at bar, a verdict was returned by a trial jury but no judgement had been rendered. Therefore, in our opinion, the lower court had not been exhausted to warrant the prohibition proceedings. Moreover, there is adequate remedy by way of a regular appeal.

Other provisions of the statute on the question of adequate remedy are contained in the Civil Procedure Law, Rev. Code 1: 13.1, 13.2, 13.3, and 13.4. Under these provisions, since according to the returns of the sheriff to the writ of subpoena petitioner was not within the Republic of Liberia and counsel for petitioner having alleged in the first motion for continuance that the testimony of the petitioner is indispensable in the main action of divorce, counsel for petitioner should have applied for deposition as provided by section 13.3, (2), (3) and (4) *supra*. The negligent failure on the part of the petitioner to take advantage of the remedy provided by statute is another clear indication of attempts to delay the trial and final determination of this case.

It is also contended in counts 4 and 5 of the returns that during the 1983 September Term of the court below, the petitioner filed another motion for continuance on the identical ground, promising that petitioner would be in Liberia to participate in the trial during the next term, that is, A. D. 1983 September Term, and after resistance thereto, the motion was granted. Respondents therefore argued that the filing of another motion during the 1983 September Term of Court on the very same ground, was again not done in good faith, and was intended to baffle and defeat justice. We are in accord with this argument, considering the attending circumstances and facts in this case.

We will now ascertain whether the trial court, having jurisdiction over subject matter and party, proceeded by the wrong rules as contended by petitioner.

Under Circuit Court Revised Rule 7, it is recorded as follows:

"The issues of law, having been disposed of in civil cases, the clerk of court shall call the trial docket of these cases in order. Either of the parties not being ready for trial, shall file a motion for continuance, setting forth therein the legal reasons why the case might not be heard at the particular

term of court, the granting or denying of which shall be done by the court in keeping with law, and in its discretion. A failure to file a motion for continuance or to appear for trial after returns by the sheriff of a written assignment shall be sufficient indication of the party's abandonment of a defense in the said case, in which instance the court may proceed to hear the plaintiff's side of the case and decide thereon or, dismiss the case against the defendant, and rule the plaintiff to cost, according to the party failing to appear"

A motion is not an independent action but, rather, an application to court for a relief incidental to the main suit. Civil Procedure Law, Rev. Code 1:10.1(1). Our practice in this jurisdiction permits a party to either resist a motion in writing and serve copy of the resistance on his opponent prior to the date set forth for hearing or trial of the main suit, or upon call of the case dictate his resistance on the minutes of court, at which time the court has the right to proceed and determine the issue tendered in the motion and resistance without further notice. Therefore, we hold that the trial court did not proceed by the wrong rule when it applied Rule 7 of the circuit court quoted *supra*.

Under the Revised Rule 17 regulating the moral and un-ethical conduct of lawyers in this jurisdiction, as found on page 4, it is the duty of the lawyer to be punctual in his attendance at court, and to be prompt and faithful in answering all assignments received by him notifying the time for hearing of his client's case. It is also the responsibility of the lawyers to the public, especially to his profession, to avoid tardiness in the performance of his professional duty. In this case, during the argument at this bar, one of the counsels who opened the argument for the petitioner frankly admitted that one of her colleagues for the petitioner who attended the trial of the case in the court below, as per the notice of assignment, arrived in court late, just at the time the jury returned from the room of deliberations to render its verdict.

Therefore, in our opinion, the application of the Revised Rule 7 of the circuit court and the absence of another notice of assignment to the counsel for petitioner for ruling on the motion for continuance and trial were in conformation with practice and law. It is obvious that the question of jurisdiction over the subject matter, territory and person does not exist. Therefore, prohibition will not lie.

As has been observed earlier in this opinion, the jury had already returned a verdict, leaving a final judgment to be rendered by the trial judge, but he was prevented from doing so in consequence of the service of the alternative writ of prohibition. Consequently, the then trial judge has completely lost jurisdiction by influxion of time, and is now serving in another circuit by assignment. However, there is presently a judge presiding over the Sixth Judicial Circuit, Montserrado County, where the main case out of which these proceedings grew is pending. The crucial issue which has presented itself is whether the current judge of the lower court, who did not preside over the main case of divorce, has trial jurisdiction in the case to proceed and render final judgment based upon the verdict? Our answer to this query is in the affirmative and here is the authority:

“As a general rule, a judge cannot finish the performance of a duty entered upon by his predecessor where the duty involves the exercise of judgment and the application of legal knowledge and judicial

deliberation of facts known only to his predecessor. At common law if a motion for new trial was pending when a successor judge took office, a new trial was usually granted as a matter of course, at least in cases where examination or weighing of evidence or credibility of witnesses was involved. Under modern practice, a new trial is not in such cases granted as a matter of course, but is granted or denied at the discretion of the succeeding judge when he is furnished with the information either by stenographic notes or otherwise which enables him fairly and intelligently to pass upon the questions presented by the motion."

Therefore, in view of the above, we hold that the ruling of the Justice in Chambers be, and the same is affirmed and confirmed. Accordingly, the Clerk of this Court is ordered to send a mandate to the court of first instant, ordering the judge therein to immediately resume jurisdiction in this case and proceed to render final judgment in accordance with evidence adduced at the trial during the 1983 September term of the trial court. Costs are to be paid by the petitioner. And it is so ordered.

*Petition denied.*