MOSES K. WEEFUR, Appellant, v. **HIS HONOUR JESSE BANKS**, **JR.**, Assigned Circuit Judge, Sixth Judicial Circuit, and **FANNIE COLE-WEEFUR**, Appellees.

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

Argued: October 31, 1988. Decided: December 29, 1988.

1. Certiorari is a writ to review the record and correct prejudicial errors during the pendency of a case.

2. Certiorari will not lie where a petitioner fails to establish that the trial judge did not have jurisdiction or is proceeding contrary to rules that should be observed at all times.

3. There are primarily two classes of cases where certiorari will lie: (a) whenever it is shown that the inferior court has exceeded its jurisdiction and (b) whenever it is shown that the inferior court or tribunal has proceeded illegally, and no appeal is allowed or otherwise provided for reviewing the proceedings in question.

4. Certiorari is not available to a party to present questions which might have been reviewed by appeal, writ of error, motion for a new trial or other appropriate proceeding available to a party either in the appellate court or in the lower court where the action was taken against the party.

5. At every stage of a proceeding, a court must disregard any error or defect in the proceeding that does not affect the substantial rights of parties.

6. The Civil Procedure Law requires that all pleadings be construed to do substantial justice.

7. The writ of certiorari will not be granted where adequate relief can be obtained through a regular appeal.

Appellant filed for divorce. Appellee Fannie Cole-Weefur petitioned the court for alimony pendente lite and attorney's fees. Appellant filed, withdrew, and then filed amended returns to the petition. In response to appellant's returns, appellee filed an "answering affidavit," instead of a reply. Appellant objected to the combination of appellee's request for alimony pendente lite and attorney's fees in one petition, as well as to the "answering affidavit," which was not provided for under the Civil Procedure

Law in the circuit court. The trial judge overruled appellants objections, and appellant filed a petition for a writ of certiorari before the Chambers Justice, which was denied. On appeal to the Supreme Court, it held that certiorari will not lie where a petitioner failed to establish that the trial judge neither has jurisdiction nor is proceeding contrary to rules that should be observed at all times. Affirmed.

S. Edward Carlor and Roger K Martin for appellant. J. Laveli Supuwood and Francis Y. S. Garlawolo appellees.

MR. JUSTICE KPOMAKPOR delivered the opinion of the court.

This cause emanated from the Chambers of our distinguished brother, Justice Junius, who heard the petition for certiorari on August 9, 1988, and made a ruling, denying the issuance of the peremptory writ.

The petitioner filed a seven-count petition for certiorari of which we shall quote from two and three:

2. That upon the service of the writ of summons with copy of petitioner's petition for alimony pendente lite, returns were filed and, prior to filing a reply, said returns were withdrawn and amended returns filed; but that strangely enough, instead of filing a reply, petitioner for alimony pendente lite filed a so-called 'Answering Affidavit,' a paper quite unknown both in law and in practice at the circuit court level in this jurisdiction.

3. That counsel fees or suit money cannot legally be combined and pleaded in the petition for alimony pendente lite because same are two (2) and distinct causes of action.

As her returns to the petition, Co-respondent Fannie Cole-Weefur filed a resistance of eight counts. We shall quote from count one and four of said returns:

1. As to count 2 of the petition, the answering affidavit was filed to contradict respondent's (now petitioner) returns. Such an affidavit is not barred (sic) by any statute or law such to give ground for a writ of certiorari.

4. Further to count 3 of the petition, respondents maintain that liability for legal fees shifts to him and combining legal fees and alimony pendente lite in on suit is legally

permissible to avoid duplicity of suits for economics, simplicity and the fair administration of justice.

At the call of the case for hearing, appellant's counsel in arguing his side maintained the view that a petition for counsel fee, or suit money, and alimony pendente lite cannot legally be combined and pleaded, because both claims are separate and distinct causes of action. The second contention raised by appellant and which we can pass upon now was that when the petition for alimony pendente lite was filed in the trial court, and respondent filed his amended returns, the appellee should have filed a reply and not an answering affidavit, as appellee did in the instant case. The argument of appellant is that an answering affidavit is only cognizable in this Court and not in the lower courts, including the circuit courts.

The appellant raised several other issues in his brief which goes into the merits of the petition before the trial judge, but we are precluded from passing on them, since he fled to this Court on certiorari after the trial judge had only ruled on the issues of law raised in the petition.

During the argument before us, counsel for appellant strenuously contended that combining the claims of alimony and counsel fees is primarily illegal and harmful because the award would be astronomical and excessive. Of course, when asked whether or not appellee was entitled to alimony, he replied in the affirmative, but added that he was only objecting to the combining of the claims, and not necessarily to the claims themselves. Appellant relied upon § 16.5 of the Civil Procedure Law. The section states:

"There shall be a petition, which shall comply with the rules of a complaint in an action, and a returns if there is an adverse party. There may be such other pleadings as are authorized in an action. . . ."

Appellant failed to state any harm or disadvantage suffered by him as a result of combining the claims of alimony and counsel fees, except that the sum of the claims would be high, he said. To the mind of this Court, this argument is void of simple logic. One does not have to be a mathematician to know that when one adds two figures, one will obviously get a sum greater than either figure. He also failed to show any harm he would suffer as a result of appellee's filing an "answering affidavit" rather than a reply. On this point, counsel of appellant was also asked during the argument before this Court whether the combining of the claims and the filing of an answering affidavit instead of a reply subjected him to any harm which he would not

have otherwise suffered. His reply was in the negative, but he contended that appellee should have followed the procedure extant in this jurisdiction. The learned counsel for the appellant also conceded, in answering a question put to him, that these two issues have never been raised in this jurisdiction and therefore have not been passed upon by this Court. Whether or not this conclusion reached by the counsel is correct is not relevant here.

Appellee on the other hand argued before this bench that certiorari will not lie to review an interlocutory ruling. She also contended that there was no law prohibiting a petitioner from either combining these claims or filing an answering affidavit after the respondent has filed his returns.

The fundamental issue presented by the parties is, whether certiorari is the proper remedy where the petitioner failed to establish that the trial judge neither has jurisdiction nor is proceedings contrary to rules that should be observed at all times. We wonder what really was the motive of appellant in filing their petition for certiorari when he admitted in effect that the employment of certiorari in this case will result into the case being brought before this Court in piece-meal, instead of on one appeal.

In Ericsson v. Ghoussalny, 19 LLR 197 (1969), this Court, citing Vandevoode v. Morris, 12 LLR 323 (1956), held that certiorari is a writ to review the record and correct prejudicial errors of a lower court during the pendency of a case. Whilst this case is still pending in the lower court, it is our opinion that the ruling made by the respondent judge is a proper subject for review on appeal. Therefore certiorari will not lie.

In Union National Bank, SAC v. Koroma et al., 21 LLR 582 (1972), this Court held, citing 10 AM. JUR., Certiorari, § 5, that there are primarily two classes of cases in which the common law writ of certiorari will lie: first, whenever it is shown that the inferior court or tribunal has exceeded its jurisdiction; second, whenever it is shown that the inferior court or tribunal has proceeded illegally, and no appeal is allowed or other rode provided for reviewing its proceedings. In the instant case, the trial judge neither exceeded his jurisdiction nor proceeded by wrong rules.

In the Union National Bank, SAC case, supra, this Court, quoting from United States v. Dickinson, 213 U.S. 92 (1909), held that:

"Certiorari cannot be employed to present questions which, in the particular case, might have been reviewed by appeal, writ of error, motion for a new trial, or other appropriate proceedings available to the party either in the appellate court or in the court in which the action against him was taken providing such court had jurisdiction, of him and the subject matter of the action or proceeding," See also Bailey v. Kandakai, 21 LLR 556 (1972).

It is our view, then, that appellant, by his own admission, suffered no harm for which he is entitled to remedy. The Civil Procedure Law provides: ". . . The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Civil Procedure Law, Rev. Code 1:1.5.

Therefore, the argument of appellant that he prefers two separate suits for two claims, vis-a-vis a single action, defies common logic, because the cost of prosecuting these two claims separately would unquestionably far exceed that of one action. Instead of being a detriment to appellant, the procedure adopted in the lower court was beneficial not only to him but to both appellee and the state, since indeed it averted the ugly result of a multiplicity of suits, inconvenience, and expense. The procedure adopted in the trial court satisfied the requirement of the code that all pleadings be construed to do substantial justice. Civil Procedure Law, Rev. Code 1:9.12

The Domestic Relations Law provides that when an action of divorce is brought by one spouse, the court may direct the husband pendente lite to provide suitably for the support of the wife. Domestic Relations Law, Rev. Code 9:9.3. This law also provides that the trial court may direct the husband. . ." to pay such sums of money to enable the wife to carry on or defend the action, as in the court's discretion...." Id. at §9.4, Counsellor fees and expenses. As a matter of fact, §9.3, supra, also empowers the trial judge to "combine in one lump sum any amount payable to the wife under §9.4." (Our emphasis). If the judge may combine alimony pendente lite with counsel fees, the petitioner should not be heard complaining that the claims of both alimony pendente lite and counsel fees, or suit money as it is sometimes referred to, should not be combined in one petition, especially when the petitioner concedes that the combining of the claims has in no way adversely affected him..

Moreover, we do not find the ruling of the lower court prejudicial so as to warrant the granting of the writ of certiorari. See also, Williams v. Horton, 13 LLR 444 (1960). Also, the writ will not be granted where adequate relief can be obtained

through a regular appeal. Amechi v. Smallwood, 23 LLR 3 (1974), and Raymond Concrete Pile Co. v. Perry, 13 LLR 522 (1960)

We have examined the record before us and the ruling of our distinguished colleague, which is the subject of this opinion. His ruling in our opinion is in agreement with the law in all of its aspects. The said ruling is, therefore, affirmed, and the Clerk of this Court is hereby ordered to send a mandate to the lower court ordering it to resume jurisdiction over the case and proceed to trial on the merits at its earliest convenience. Costs are hereby ruled against the appellant. And it is hereby ordered.

Petition denied.