

**M. D. SINGBE**, Appellant, v. **JOHN POWELL**, Appellee.

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

Heard: April 27, 1983. Decided: July 6, 1983.

1. There is a time limit of ten days within which a party desiring to withdraw and amend may do so after service of a responsive pleading.
2. The defaulting party cannot benefit from his failure and neglect where an amended pleading is not filed within ten days after receipt of a responsive pleading.

Appellant, plaintiff below, filed a action of ejectment against the appellee in the Sixth Judicial Circuit Court, Montserrado County, to which an answer was duly filed by appellee in keeping with the relevant statute. Two months and twelve days after the filing of appellee's answer, appellant withdrew his complaint and filed an amended complaint. Appellee, answering, prayed the court for the dismissal of the complaint since it was filed beyond the statutory time of ten days. The lower court dismissed the amended complaint because of lateness in the filing of the same. On appeal, the Supreme Court agreed with the dismissal effected by the trial court, holding that the appellant should have withdrawn his original complaint and filed an amended pleading within ten days of the receipt of the answer. The appellant, the Court said, could not be permitted to benefit from his failure and neglect. The Court therefore affirmed the lower court's judgment.

J. Dossen Richards appeared for the Appellant. John A. Dennis appeared for the Appellee.

MR. JUSTICE SMITH delivered the opinion of the Court.

There is only one legal issue in this case upon which the appeal is based, and that is in respect of the time limit within which a complaint may be withdrawn with reservation and amended, especially where an answer has been filed thereto.

The plaintiff in the court below, appellant herein, filed his complaint in an action of ejectment against the appellee on the 18th day of January, 1979. He proferted his title deed with the complaint, but did not state the quantity of his property the defendant, appellee herein, had allegedly encroached upon and was occupying; consequently, the defendant attacked plaintiff on this point in his answer that was filed with the court and served on the plaintiff on the 24th day of January, 1979, that is to say, six days after the filing and service of the complaint. Appellant conceded the appellee's contention and filed a notice of withdrawal on the 5th day of April, 1979, that is to say, two months and twelve days after the filing and service of the appellee's answer, withdrawing the complaint and substituting it with an amended complaint.

The appellee, upon service of the amended complaint on him, filed an amended answer in which he prayed the court to dismiss the amended complaint for being filed out of the statutory time within which to amend.

His Honour Judge Johnnie N. Lewis, then presiding over the 1979 June Term of the People's Civil Law Court for the Sixth Judicial Circuit, Montserrado County, heard the law issues as raised in the pleadings which rested with the plaintiffs reply, and on the 20th day of August, 1979, ruled dismissing the complaint on the ground of late filing, holding that the amended complaint should have been filed within ten days after service of appellee's answer. It is from this ruling of the judge that the appellant appealed to this Court of last review.

When this case was called for argument, counsel for appellant contended and argued that the statute on amendment of pleadings provides that a pleading may be withdrawn and amended at any time before trial as long as doing so will not unreasonably delay the trial of the case. Counsel for appellee, on the other hand, strongly argued that the statute relied upon by counsel for appellant does set a time limit within which one may withdraw and amend his pleading. The relevant portion of our statute on which the parties relied and cited reads as follows:

"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 by:

"(a) Withdrawing it and any subsequent pleading made by him;

"(b) Paying all costs incurred by the opposing party in filing and serving pleadings subsequent to the withdrawn pleadings; and

"(c) Substituting an amended pleading.

"3. Amendment of pleading already filed in case of amendment of pleading to which it responds. If an amendment is made in a pleading after the service of a responsive pleading, an amendment may be made within ten days to the responsive pleading if such amendment is necessitated by the new matter added to the opposing pleading, and such amendment to the responsive pleading shall not affect the right of the party making it to make another amendment under paragraph 1 of this section" (emphasis ours). Civil Procedure Law, Rev. Code 1:9.10.

From the above quoted statute, it is quite clear that there is a time limit of ten days within which a party desiring to withdraw and amend may do so after service of a pleading to which it responds; there is no ambiguity in the statute on this point. It is, therefore, our holding that appellant having conceded the contention of the appellee as raised in the answer, and wishing to indicate in his complaint the quantity of his land he alleged the appellee was wrongfully occupying, for which he withdrew his first complaint after the filing and service of appellee's answer, the appellant should have filed and served his amended complaint

within ten days after service of said answer. The right to withdraw and amend a pleading at any time, insofar as it does not unreasonably delay trial, as provided by the statute quoted supra, does not in any way extend that right of a party to withdraw and re-file two months and twelve days, or at any time he wishes.

This Court, in interpreting the statute with respect to an unreasonable delay of a trial by reason of an amended pleading, said in the case *United States Trading Company v. King*, 14 LLR 579, 581-582 (1961), that:

"The criterion, therefore, which controls the right reserved to a pleader to amend a pleading at his option, is whether unreasonable delay to the trial is caused by an amendment. It is our considered opinion that the question of undue delay could possibly apply if, after all of the pleadings under the statutes had been exhausted, the ten days allowed for filing a responsive pleading to the one last filed had expired. The party intending to amend would be claiming an extraordinary right if the period of time allowed by him to amend had passed or lapsed, in which case the enjoyment of such a right could only be available by leave of court. Ordinarily, the right remains that of the party intending to amend; and no undue delay could be claimed where the time allowed him to amend had not expired, and his adversary had not filed a responsive pleading ...."

In the instant case, no reply had been filed when plaintiff withdrew his original complaint and filed an amended complaint.

Therefore, in doing so, plaintiff should have filed and served his amended complaint within ten days after service of the defendant's answer. Not having filed the amended complaint within ten days as required by the statute quoted supra, he cannot benefit from his said failure and neglect.

In view of the foregoing and the law cited supra, it is our holding that the ruling of the trial judge dismissing the appellant's amended complaint be, and the same is hereby, confirmed and affirmed with costs against the appellant. And it is hereby so ordered.

*Judgment affirmed*