RAFIC BITAR, Appellant, *v.* H. S. SIDHU and K. S. SIDHU, Appellees.

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

Heard: April 2, 1981. Decided: July 29, 1981.

1. The action to which *lis pendens* relates should be pending in court when the doctrine is invoked.
2. To render an action dismissible for want of jurisdiction, there must be another action between the same parties, involving the identical subject matter which is pending in another court within the Republic of Liberia.
3. One relying on the doctrine of *lis pendens* must set up in his pleadings facts sufficient to give him cause for relief under the doctrine.
4. Where one relies on the filing of a notice of the pendency of an action, he must specifically set it forth in his pleadings, but where a *lis pendens* has been actually filed in proper time, and the complaint fails to aver filing notice, it has been held that the complaint may be amended to aver such filing.
5. In pleading *lis pendens* notice, it has been held not essential that it should be in terms averred that process was served before complainant acquired an interest in the property involved in the pending litigation, although such fact must be proved.
6. The party who invokes the doctrine of *lis pendens* must prove by relevant record the existence of another action between the same parties, involving the same subject that is pending in another court within the Republic of Liberia.
7. Where a notice of assignment is reportedly served on counsel for a party and the counsel fails to appear in keeping with the notice, before proceeding with the case, the court should have recourse to the records in the case, apart from the signed notice of assignment, with the view to ascertaining if the lawyer actually represents the party for whom he allegedly signed the notice, in order that miscarriage of justice may be avoided
8. Representation in court at any stage is vital and an opportunity should be accorded every litigant to be heard in person, by counsel of record, or both.

M. Fahnbulleh Jones appeared for appellant. *Rogers Steele* and *John A. Dennis* appeared for appellees.

JUSTICE YANGBE delivered the opinion of the Court.

On the 31st of July 1974, appellees and appellant entered into a lease agreement, appellant as lessor and appellees as lessees, for appellant's premises situated on United Nations Drive, within the proximity of the General Market, in the City

of Monrovia, for a period of five calendar years certain and with a five (5) year optional period. The agreement commenced on the 10th of January 1975, and terminating on the 30th of January 1980, for a valuable consideration of five thousand dollars ($5,000.00) per annum.

On the 29th day of February 1980, appellant filed an action of ejectment against appellees to recover possession of the premises referred to above and venued the suit in the 1980 March Term of the Civil Law Court, Sixth Judicial Circuit, Montserrado County.

Appellees filed an answer together with a motion to dismiss, raising, among other things, the issue of *lis pendens*, in other words, that there was another action pending in court, between the same parties and for the same subject property. The two suits relied upon by the appellees to support the doctrine were injunction proceedings and an action for specific performance of a contract filed against the appellant, and which were venued in the June 1980 Term, respectively.

The motion to dismiss was sustained and the action was abated, to which exceptions were noted, and appeal announced and perfected.

Appellant filed only a one-count bill of exceptions for our consideration and final adjudication of the case, which reads thus:

> "Plaintiff says that Your Honour, after hearing arguments *pro et con* on the issues of law raised in the pleadings, dismissed plaintiff's action of ejectment on the ground of *lis pendens*, with costs ......"

Appellant contended before this Bench, with emphasis, that the court below erroneously applied the doctrine of *lis pendens* when it dismissed the action of ejectment, because in his opinion, the action of ejectment was first filed in the March 1980 Term of the trial court, and that the returns of the sheriff to the writ of re-summons clearly showed that appellees were summoned on the 31st of March 1980 and the answer together with the motion to dismiss was filed by the appellees on the 3rd of April 1980. The action of injunction and specific performance of a contract are venued in the 1980 June Term of the same tribunal and obviously these two

actions are subsequent to the ejectment action. Appellant challenged appellees to deny the truthfulness of these allegations. However, there is no denial on the part of appellees but rather they admitted.

Notwithstanding, counsel for appellees argued that, although the injunction and specific performance of a contract were subsequent to the ejectment suit, yet, when the motion to dismiss was heard and decided by the court below, the specific performance of a contract and the action of injunction, involving the same subject matter and the same parties were already filed, but undecided; therefore, the court below vas bound to take judicial notice of its own records. Hence, the doctrine of *lis pendens* was timely invoked by appellees and that the court did not err in dismissing the case. In support of this contention, counsel for appellees cited the Civil Procedure Law, Rev. Code, 1: 11.2(d) and *Phelps v. Williams,* 3LLR 54 (1928).

In *Phelps v. Williams*, cited by appellees, this Court was dealing with the doctrine of *res judicata*, but the issue at bar is about *lis pendens.* The former deals with the same action, involving the same parties and subject matter, which has already been decided, whereas the latter has reference to a prior suit between the same parties and for the same subject matter which is pending in another court. The court could not take judicial notice of records in cases that were not filed and pending prior to the action of ejectment and at the time the motion to dismiss was filed. The action to which *lis pendens* relates should be pending in court when the doctrine is invoked. Consequently, in our opinion, *Phelps v. Williams, supra*, is not applicable to the issue involved in this case.

The Civil Procedure Law, Rev. Code, 1: 11.2(d), also cited by counsel for appellees, briefly provided that to render an action dismissible for want of jurisdiction, there must be another action between the same parties, involving identical subject matter which is pending in another court within the Republic of Liberia. Therefore, we have to resort to common law authority for clarification.

In 54 C.J.S., *lis pendens,* §57, it is stated, as follows:

"One relying on the doctrine of *lis pendens* must set up in

his pleadings facts sufficient to give him cause for relief under the doctrine. Where one relies on the filing of a notice of the pendency of an action, he must specifically set it forth in his pleadings, but where a *lis pendens* has been actually filed in proper time, and the complaint fails to aver filing notice, it has been held that the complaint may be amended to aver such filing. In pleading *lis pendens* notice, it has been held not to be essential that it should be in terms averred that process was served before complainant acquired an interest in the property involved in the pending litigation, although such fact must be proven."

Another provision of the statute is found in Civil Procedure Law, Rev. Code, 1: 7.92; *Kru and Wolo v. Tarpeh and Doe*, 19 LLR 472 (1970).

In keeping with the authorities quoted *supra*, and in our opinion, it is encumbent upon the movant, who invokes the doctrine of *lis pendens*, to prove by relevant records the existence of another action between the same parties, involving the same subject that is pending in another court within the Republic of Liberia. There was no showing to this effect when the motion to dismiss was filed on the 3rd of April 1980. Therefore, the trial judge erred in dismissing the case on this ground.

There is an irreconcilable conflict between the short count bill of exceptions and the argument of counsel for appellant before this Court that we wish to observe in passing. Appellant averred in the bill of exceptions, *inter alia*, that after hearing arguments *pro et con* on the issues of law raised in the pleadings, the lower court dismissed the case. Yet, counsel for appellant contended that he was not cited to appear when the motion to dismiss was granted; and that it was the deputized attorney who excepted and announced the appeal for appellant.

For some reasons not revealed by the records certified for our review, the complaint and other accompanying documents are only signed by Counsellor J. Emmanuel R. Berry for appellant; yet, the notice of assignment served for disposition of the law issues bears the name and signature of Counsellor M.

Fahnbulleh Jones as if he were counsel of record for appellant. Nevertheless, Counsellor Jones appeared in this Court and represented the appellant. In answer to a question from the Bench during arguments here, Counsellor Jones explained that he did not represent the appellant in the trial court and that he inadvertently signed the notice of assignment for arguments on the issues of law.

Perhaps, if Counsellor Jones had gone to court as per the notice of assignment, which according to him, was acknowledged by him inadvertently, and had explained, certainly the court would not have assumed that counsel for appellant had notice of the disposition of the issues of law on that date. It is the failure of Counsellor Jones to appear and rectify the error that virtually occasioned the non-appearance of counsel for appellant in the lower court, who would have either conceded the legal efficacy of the motion to dismiss or spread his resistance thereto on the minutes of court in keeping with our practice.

In our view, when a notice of assignment is reportedly served on counsel for a party, and the counsel fails to appear in keeping with the notice, the court should take recourse to the records in the case in order to ascertain whether the lawyer actually represents the party on whose behalf he allegedly signed the notice. This will help avoid the miscarriage of justice.

Representation in court at any stage is vital and an opportunity should be accorded every litigant to be heard in person, by counsel of record, or both.

The trial court therefore erred when it proceeded with the case in the absence of counsel for appellant without affording him opportunity to be heard as prescribed by law.

Counsel for appellees contended that there was no resistance interposed to the motion to dismiss; and that in the absence of a resistance, the court did not therefore err when it granted the motion. He cited for reliance *Clark v. Barbour,* 2 LLR 15 (1909), Syl. 1, 2 and 3, which read as follows:

> "1. Courts will only decide upon issues joined between the parties and specially set forth in their pleadings.
>
> 2. Matter of defense not set up in defendant's plea shall

not be allowed.

3. Notice should be given by one party to the other of all matters of fact or law relied upon in prosecuting an action."

The facts and circumstances cited in this case, in our opinion, are not applicable to the issues involved in the instant case, in that, in *Clark v. Barbour*, this Court noted that many points that were argued dehors the records; whereas in the case at bar, there is absence of a resistance to the motion because the real counsel for appellant was not notified of the date the motion was granted.

In view of the facts, circumstances and the law cited above, the judgment of the trial court is reversed, and the case remanded for hearing *de novo*, beginning with the disposition of the issues of law, as indicated in this opinion. Costs to abide final determination of the case. And it is so ordered.

Judgment reversed.