

A. H. BASMA & SONS LIBERIA INC, Appellant, by and thru its Managing Director, MOHAMED BASMA, Petitioner/Appellant, *v.* **HIS HONOUR FRANCIS N. PUPO, SR.**, Judge, People's Debt Court, and **G. H. DARYANI CO. LTD.**, represented by its Director, G. H. DARYANI, Respondents/Appellees.

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

Heard: April 26, 1984. Decided: May 10, 1984.

1. A litigant has his day in court when he has been duly cited to appear, and has been afforded the opportunity to appear and to be heard.
2. The court need not find a party in contempt for the purpose of compelling him to appear in court in his own behalf.
3. The fact that a party refuses to receive and sign a notice of assignment does not make service of the notice defective.
4. A party's refusal to receive and sign the notice of assignment is essentially a waiver of the opportunity afforded to have his day in court.
5. Once the defendant in the trial court has waived his rights to an opportunity to appear and be heard by refusal to sign the notice of assignment, the court is no longer under any legal obligation to secure the participation of the defendant in any part of the trial, including the taking and prosecution of an appeal.
6. If a default or imperfect judgment is entered because of the absence of a defendant, then it logically follows that at the perfection of such judgment the presence of the defendant is

not required, directly or indirectly.

7. Prohibition will not lie to prevent the enforcement of a valid judgment.

8. Partial payment by the defendant of the amount of the judgment in the trial court is a concession to the legal soundness of the judgment and a waiver of the right of defendant to seek the strong arm of the Supreme Court to avoid payment of the residue.

In 1982, the appellee/plaintiff filed an action of debt in the People's Debt Court for Montserrado County against the appellant/defendant for an outstanding amount of \$58,593.63 owed the former. The defendant, represented by the P. Amos George Law Firm, filed an answer and subsequently filed a motion for continuance on June 9, 1982, praying for continuance to the September Term of court due to the absence of defendant's principal witness from the country. In the answer, defendant did not deny indebtedness. Instead, it claimed that the plaintiff had accepted an "extra financing period of eleven and fifteen months and a 10% collection fee," making it a grand total of \$64,452.99 actually owed.

On December 6, 1982, an assignment was issued from the trial court and served upon both parties for the disposition of the motion for continuance. The defendant's counsel of record, P. Amos George Law Firm, noted on its copy of the assignment that the firm no longer represented Basma & Sons and that the court officer should deliver the assignment directly to the defendant. This notice was returned to the court. On December 13, 1982, a second assignment was issued for trial on the 16th of December, 1982 and delivered directly to the defendant company. The defendant's representative refused to accept the assignment, maintaining that the principle witness was still out of the country and the defendant was represented by the P. Amos George Law Firm. The case was called on December 16, 1982 as assigned, whereupon the motion for continuance was heard and denied, and an imperfect judgment was rendered on behalf of plaintiff in the amount of \$64,452.99 plus 6% interest. The counsel appointed for defendant by the court noted exceptions and announced an

appeal. On January 4, 1983, after the defendant had failed to take necessary steps to perfect its appeal, the plaintiff appeared in the trial court and prayed for enforcement of the judgment, which was accordingly issued and served on the defendant, who thereupon and in partial satisfaction of its obligation, issued a check in favor of plaintiff in the amount of \$5,212.20. Interestingly, the defendant subsequently filed a writ of prohibition before the Justice in Chambers on the ground that it had been denied its day in court by the trial judge. The justice in Chambers denied the writ and the full bench *confirmed*.

P. Amos George for the petitioner/appellant and *H. Varney G. Sherman* for the respondent/appellee.

MR. JUSTICE KOROMA delivered the opinion of the Court

A. H. Basma and Sons (Liberia) Inc., was sued in the People's Debt Court of Montserrado County by G. H. Daryani & Co. Ltd. in 1982 for the sum of \$58,593.63, representing the face value of four (4) matured bills of exchange which A. H. Basma & Sons (Liberia) Inc., claimed that G. H. Daryani & Co. Ltd. had accepted plus annual interest, extra financing period of eleven and fifteen months, and a 10% collection fee making a grand total of \$64,452.99 indebtedness of defendant to the plaintiff. The defendant, upon being brought under the jurisdiction of the trial court by a writ of summons, filed a seven-count answer and joined issues with the plaintiff. On December 6, 1982, an assignment was issued from the trial court and served upon the parties for the disposition of a motion for continuance filed by the defendant. On seeing the assignment, the P. Amos George Law Firm, counsel of record for the defendant, noted on said notice of assignment that they no longer represented Basma & Sons and therefore the officer of the court should take the notice of assignment to Mr. Basma. Prior to this assignment for the disposition of the motion for continuance, issues of law raised in the pleadings had been argued and passed upon on May 26, 1982. We may note here that the motion for continuance which was filed on June 9, 1982 prayed for the continuance of the case to the September Term of court due to the absence of Mr. Basma, a

principle witness whose testimony the defendant claimed was indispensable to a fair and just determination of the case. This notice of assignment was returned to the court. On the 13th day of December 1982, a second assignment was issued for trial on the 16th day of December 1982. This assignment was carried directly to the defendant company whose representative, according to the returns of the sheriff, refused to sign stating that the defendant himself was out of the country and that P. Amos George was still representing them in the case. When the case was called for hearing on December 16, 1982 and the absence of the defendant noted, the plaintiff prayed for the application of the rule controlling, whereupon the motion for continuance was heard and denied, an imperfect judgment entered against the defendant, and the plaintiff afforded the opportunity to establish its side of the case. The trial was concluded on the 23rd day of December, at which time the trial court entered its final judgment adjudging the defendant liable and awarding the plaintiff \$64,452.99 plus 6% interest. The court appointed counsel noted exceptions on behalf of the defendant and announced an appeal to this forum for review and final determination.

On January 4, 1983, or eleven days after the rendition of final judgment, the plaintiff appeared in the trial court and prayed for the enforcement of its judgment because the defendant had failed and neglected to take the primary jurisdictional step, that of filing an approved bill of exceptions to perfect an appeal to the Supreme Court. The submission was noted; a bill of cost ordered issued and served on the defendant who failed to settle same. In consequence of this failure on the part of the defendant, an execution was prayed for, issued and served on the defendant. The defendant thereupon, in partial satisfaction of the judgment, issued check #1664, dated January 7, 1983 in the sum of \$5,212.20, drawn on the Chase Manhattan Bank. Following this obvious acquiescence and acknowledgment on part of the defendant of the legitimacy of the plaintiff's claim and the soundness of the court's judgment, the said defendant subsequently filed a petition for a writ of prohibition, basically contending that it had been denied its day in court by the trial judge. Our distinguished colleague, who heard this petition in chambers, quashed the alternative writ and denied the

petition with cost against the petitioner. The petitioner has appealed from this ruling, whereupon this case has found its way to this forum for review and final determination upon a four-count brief filed by the petitioner.

The question that now claims our judicial attention in the settlement of this case, and which arise out of the facts and legal arguments presented at this bar are:

(1) What is meant by one's day in court?

(2) Was the defendant/petitioner denied its day in court in the instant case?

(3) Will prohibition lie?

In his argument before this Court, the counsel for defendant has maintained that the trial court violated the rules that should be observed at all times when it proceeded with the trial without citing the defendant and its counsel in contempt for their refusal to sign the assignment duly served upon them. Further, that the Chambers Justice upholding this act of the trial judge violated the law and rule that should be observed at all times. In support of this contention, he has referred us to Rule IV, Part 6 (d) of the Supreme Court Rules, at 39-40 and *Kontar v. Moumaffak and Dennis*, 18 LLR 267 (1968). Recourse to these citations reveals that they are in no way applicable nor do they support the argument of the defendant/petitioner. For Rule IV part 6 (d) is a Supreme Court Rule applicable to the hearing of cases before the Supreme Court and not the circuit courts or any other inferior court. The citation in 18 LLR 267 reads thus:

"When service of notice of assignment of a case for trial is defective, and a trial is thereafter held, pursuant to such defective notice, without the presence of the lawyer so served, or his client, the party is deemed to have been deprived of his day in court and a writ of error will be issued for review on appeal of the record in the case."

The above citation of law is not applicable to the case and issues before us. There is no showing from the records before us that the service of the two notices of assignment was defective. A party's refusal to sign for a notice of assignment cannot make such a service defective. In fact, a party's refusal to sign and receive its copy of a notice of assignment is indicative of effective service. In the instant case, the counsel for the defendant had bridged one of the cardinal rules of a lawyer's duty in its final analysis when he refused to sign the assignment at that moment, especially so when there is no record to show that he had withdrawn from representing the defendant prior to this point. *The Code of Moral and Professional Ethics*, Rule 30, p. 9.

Although the act on the part of defendant's counsel in refusing to sign the notice of assignment at this point was wrong, the court could not afford to compound said wrong by compelling the said counsel to represent a party in a civil action. Hence to afford the defendant its day in court, the second assignment was issued and carried to the defendant company requiring it to appear for the hearing. The company's refusal to sign for and receive its copy of the notice of assignment, couple with the defendant's assertion to the court officer that "P. A. George Law Firm is still representing us" in this case, leave us with the impression that there was a coordinated attempt and effort on the part of the defendant and its counsel to delay and baffle justice.

A party's day in court is the time appointed for one whose rights are judicially questioned, or liable to be affected by judicial action, to appear in court and be heard in his own behalf. A litigant has his day in court when he has been duly cited to appear and has been afforded an opportunity to appear and to be heard. BLACK'S LAW DICTIONARY 474 (4th ed. 1951). To afford a person an opportunity to appear and be heard in his own behalf does not suggest that such a person must be attached in contempt to compel his/her appearance. Hence, under both the common and statutory laws there is no provision for finding a party and/or his counsel in contempt for refusing to appear and be heard on his/her own behalf.

Based upon the foregoing legal citations, the facts as herein above explained where the trial court afforded the defendant and its counsel every opportunity to appear and be heard, and the obvious fact that both the defendant and its counsel waived every opportunity afforded them by their refusal to sign the notice of assignment and attend upon the trial, bring up to the definite judicial conclusion that the defendant was never denied but rather afforded its legal day in court.

A writ of prohibition is the proper remedial process to restrain an inferior court from taking action in a case beyond its jurisdiction; or having jurisdiction the court has attempted to proceed by rule different from those which ought to be observed at all times. *Parker v. Worrell*, 2 LLR 525 (1925).

Prohibition, like all other prerogative writs, is to be used with great caution and forbearance, for the furtherance of justice and to secure order and regularity in judicial proceedings and, therefore, should be used only in cases of extreme necessity. The prerequisites for the issuance of a writ of prohibition have been declared in a number of cases. The relator must show that some court officer or person is about to exercise judicial or quasi-judicial power, that the exercise of such power is unauthorized by law and that it will result in injury for which there is no other adequate remedy. Every one of these elements is essential and, if the relator fails to establish any one of them, the writ should be denied. 63 AM JUR 2d., *Prohibition*, at 230.

In the instant case there is no showing in the petition, as filed in the Chambers of this Court, that the trial court was exercising some power unauthorized by law which would result in injury to the petitioner for which there is no other adequate remedy. The contention of the petitioner that it was not informed as to the announcement of an appeal in its behalf until after the expiration of statutory time to file a bill of exceptions has no legal foundation to warrant the granting of the writ of prohibition. For a legal obligation to perform an act is

created and exists only when the legal rights accrue upon the party for whom the act is to be performed. Following the entry of default judgment in the instant case, after the defendant in the court below had already waived the rights afforded it to appear and be heard by its refusal to sign the notice of assignment, the court was no longer under any legal obligation to secure the participation of the defendant in any part of the trial, including the taking and prosecution of an appeal to this forum. The appointment of a counsel to take the judgment for a defendant in default was void *ab initio* and could not vitiate the legality of the default judgment. If a default or imperfect judgment is entered because of the absence of a defendant, then it logically follows that at the perfection of such judgment it is not required for the defendant to be present, directly or indirectly. Hence, the petitioner in this case has no legal claim on the trial court in its bid to secure the primary jurisdictional step for an appeal to this forum, all such claims having vanished in the hurricane of waiver.

Wherefore, and in view of the foregoing, the trial court not having exceeded its jurisdiction, debt action being cognizable before it, and it not having proceeded by any wrong rule, prohibition will not lie to restrain the enforcement of a valid judgement. *Kanawaty et al. v. King* 14 LLR 241 (1960) and *Carter v. Massaquoi et al.*, 24 LLR 511 (1976). Further, the payment of the cost of the trial court and partial payment of the amount of judgment by the defendant is a concession of the legal soundness of the judgment in the court below and a waiver of the right of the petitioner to seek the strong arm of this Court to restrain the payment of the residue. The ruling of the Chambers Justice is therefore confirmed. And it is hereby so ordered.

Petition denied.