HIS HONOUR HALL W. BADIO, Resident Circuit Judge, Sixth Judicial Circuit, and **EL NASR EXPORT AND IMPORT CORP.**, represented by its Manager, **MOHAMMED TAHA AHIVIED,** Respondents/Appellants, v. **THE LIBERIA INDUSTRIAL DEVELOPMENT CORPORATION,** represented by its President, MR. LEROY E. FRANCIS, Petitioner/Appellee.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE GRANTING THE WRIT OF PROHIBITION.

Heard May 17, 1988. Decided July 29, 1988.

1. If a defendant fails to appear, plead, or proceed to trial, the plaintiff may seek a default judgment against him.

2. Summons must be directed to the ministerial officer of the court in which the action is brought, and, except as otherwise provided by law, service of all process shall be made by the ministerial officer of the court which issued the process or by his deputy.

3. Where a party alleges that service of process was not made on him and challenges the returns of the sheriff as to such service, the proper court for the court is to order an investigation to determine whether the party was actually served.

4. A judgment in personam is void where the court lacks jurisdiction over the persons involved.

5. Ordinarily the returns of the sheriff as to service of process are assumed to be correct and courts take jurisdiction over the parties where the returns show that service was duly made. However, the presumption is refutable and not necessarily decisive.

Petitioner Liberia Industrial Development Corporation sought a writ of prohibition to prevent the trial court enforcing a default judgment brought against it, contending that the judgment of the trial court was void because the petitioner has not been served either with a writ of summons to give the trial court jurisdiction over its person or with a notice of assignment to attend the trial or receive the judgment in the case filed against the petitioner for the foreclosure of a chattel mortgage executed by it in favour of the Co-respondent El Nasr Export and Import Corporation.

Prior to the filing of the petition, the case had been earlier heard and an appeal announced from the final judgment of the trial court. The appeal had been heard by the Supreme Court which had confirmed the judgment and remanded the case to the trial court for enforcement of its judgment. However, before the judgment could be enforced, petitioner filed a bill of information. The information was granted, the judgment of the trial court reversed, and a new trial ordered.

It was in respect of the judgment of the second trial that petitioner filed the instant petition. In the petition, the petitioner challenged the legality of the trial court's judgment, contending that the same was null and void since the assignment had not been served on it, in that at the time the sheriff claimed to have effected service on petitioner's authorized representative, the said representative was out of the country in self-imposed political exile.

The Justice in Chambers heard and granted the petition, sustained the petitioner's contention that the action was barred by the statute of limitations and ordered the foreclosure action dismissed. On appeal to the Bench en banc, the ruling of the Chambers Justice was affirmed with the modification that the mandate sent to the lower court be vacated and declared null and void without prejudice to the interest of the parties. The Court held that given the dispute as to whether or not the notice of assignment had been served, the Chambers Justice should have ordered an investigation into the matter, noting that while ordinarily the sheriff returns are assumed to be correct, the assumption is not decisive but is subject to rebuttal upon a proper showing that the returns are incorrect. Under the circumstances, the Court said, it could not affirm the ruling of the Justice in Chambers in total. It therefore modified the ruling, concluding that the judgment of the trial court be reversed, that the petitioner be served with process and allowed to respond within ten days of the date of service, and that an appropriate trial be held in keeping with law, but with the proviso that the petitioner be precluded from raising the affirmative defense of the statute of limitations.

B. Mulbah Togbah, in association with E. Winfred Smallwood appeared for respondents/appellants. A. Cadmus Moore, Sr. of the Steele & Steele Law Firm appeared for petitioner/appellee.

MR. JUSTICE KPOMAKPOR delivered the opinion of the Court.

This is an appeal taken by El Nasr Export and Import Corporation, co-respondent/co-appellant, from the ruling of Mr. Justice Elwood Jangaba, Justice

presiding in Chambers during the March Term, A. D. 1986, in connection with a petition for a writ of prohibition filed by the Liberia Industrial Development Corporation, represented by its president, Mr. Leroy E. Francis, petitioner/appellee, growing out of a bill in equity for foreclosure of chattel and leasehold mortgages executed by the parties, pursuant to a payment agreement entered into December 14, 1972, covering two consignments of rice from Egypt to appellee in Liberia.

Co-Respondent El Nasr Export and Import Corporation, now co-appellant, filed a bill in equity for foreclosure of mortgages against petitioner, now appellee, in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, sitting in its December Term, 1979 to foreclose the mortgages aforesaid, predicated upon petitioner's default in making the payments as provided for by their contract. After a final judgment by default was entered in favour Co-respondent El Nasr Export and Import Corporation, Liberia Industrial Development Corporation announced an appeal therefrom to this Honourable Court. That appeal was later dismissed by this Court in its March Term, A. D. 1982. A mandate was accordingly sent to the trial court for enforcement. of the judgment It was at that juncture that petitioner/appellee filed a bill of information raising the issue of non-service of the precept in the foreclosure proceedings upon it. This Court heard and sustained the bill of information, set aside its earlier judgment, and remanded the case to the trial court with instructions that the judgment of the aforesaid court be reversed and that a writ of summons, together with a copy of the petition in the foreclosure proceedings, be properly served on the petitioner.

In obedience to this Courts instruction, the summons was duly served. At a hearing held on the 22" d day of November, A. D. 1984, the trial judge again dismissed the petition for foreclosure without prejudice. Consequently, on September 5, 1985, Co-respondent El Nasr Export and Import Corporation refiled its petition praying for the foreclosure of the mortgages. In the new proceedings, the co-respondent and again obtained a default judgment against petitioner. The usual bill of costs was ordered issued to be served upon the respondent therein, now petitioner, but before the order could be executed, petitioner filed in the Chambers of the then presiding Justice of this Court, Mr. Justice Jangaba, an application for the issuance of the alternative writ of prohibition, praying that the prohibition be made absolute in the event the respondents failed to give good cause why the writ should not be granted. On June 17, 1986, Mr. Justice Jangaba granted the petition. Co-respondent El Nasr Export and Import Corporation, being dissatisfied with the ruling, has appealed to this Court en banc.

The primary contention of the petitioner in prohibition was that the trial judge could not and did not render a valid judgment in the foreclosure of the chattel and leasehold mortgages because (1) at no time did that court issue and serve on petitioner or its legal counsel any notice or notices of assignment for the hearing of the matter, and (2) no notice of assignment was served upon it for the rendition of final judgment. Respondents, on the other hand, contended that the petition should be denied because it was verified by counsel for the petitioner and not by the petitioner itself. Respondents further contended that the notice of assignment was served on Counsellor McFarland on behalf of petitioner but that the said counsel refused to attend the hearing.

We note that the petition filed before the Justice in Chambers was once withdrawn and substituted with an amended petition, filed on May 20, 1986, wherein petitioner raised a new issue. It now denied even being served with a writ of summons and asserted that because of this fact the trial court never acquired in personam jurisdiction over it. Moreover, petitioner now also challenged the returns made by the sheriff to the service of the summons in the foreclosure proceedings, stating that as the writ of summons was never served on petitioner the returns should be dismissed. Petitioner further raised in the amended petition a new and additional defense which was that the action was 'barred by the seven-year statute of limitations, since the co-respondent had said that the right of action accrued November 10, 1973, but chose to institute the current action on September 5, 1985. (Emphasis ours).

In their amended returns filed May 21, 1986, respondents averred that because the case had already been assigned for hearing, it was late for petitioner to amend its petition. Finally, respondents denied the averment that no summons had been served on the petitioner and maintained that proper jurisdiction was acquired over the person of petitioner.

In the brief argued before us, the respondents contended that the Justice in Chambers committed reversible errors when he (1) failed to dismiss the prohibition proceedings which petitioner had amended after it had been assigned but before hearing commenced and wherein petitioner had raised the defense of the statute of limitations for the first time; (2) erroneously reached the conclusion that petitioner was not served with the writ of summons by the trial court and that such being the case, the court had never acquired jurisdiction over the petitioner; and (3) sua sponte raised, on behalf of the petitioner, the defense of undue delay.

In resisting the contentions raised by the respondents, stated above, the petitioner strenuously argued that the ruling of the Justice in Chambers should be sustained because: (1) the trial court never have acquired jurisdiction over petitioner since at the time of the purported service, petitioner's president, upon whom service was alleged to have been made, was out of the bailiwick of the Republic of Liberia, and hence, any judgment rendered by the trial court was void ab initio; (2) the action was barred by the statute of limitations; and (3) a motion with respect jurisdiction may be interposed at any time before the rendition of final judgment.

From the foregoing contentions raised by the parties, the Court sees the following issues raised for its consideration:

1. Whether or not the defense of the statute of limitations was timely raised by petitioner in its amended petition?

2. Whether or not our colleague, the Chambers Justice raised issues in his ruling which were not raised by either of the parties?

3.Whether prohibition was the proper remedy?

4. Whether or not, given the facts and circumstances of this case, the trial court acquired in personam jurisdiction over petitioner so as to render a valid the judgment.

Taking the questions in the reverse order, let us determine the legal issue as to whether or not, given the facts and circumstances of this case, the trial court acquired in personam jurisdiction of petitioner as could have enabled it to render a valid judgment in the foreclosure proceedings. Our Civil Procedure Law provides that if a defendant fails to appear, plead, or proceed to trial, the plaintiff may seek a default judgment against him. Civil Procedure Law, Rev. Code 1: 42.1. According to the respondents, the trial court did obtain jurisdiction over the person of petitioner herein because a writ of summons was issued and served upon it through its authorized representative and returned served.

In granting the peremptory writ of prohibition applied for by petitioner, Mr. Justice Jangaba held that the petitioner/appellee was never served with summons because, according to him, "the fact that a bailiff testified to serving said summons does not ipso facto prove actual service; in the absence of other corroborating evidence of said service, especially when, as in this case, a bailiff from another court is used to give testimony that he personally served it on petitioner." Mr. Justice Jangaba stressed that

when the proper ministerial officer of an inferior tribunal does not serve the precepts upon the party (petitioner in the instant case), this Court will refuse jurisdiction. He cited the case of Melton v. Republic, 2 LLR 25 (1909) in support of his holding. Another cane cited by Mr. Justice Jangaba to support his ruling was Schilling & Company v. Dennis, 16 LLR 164 (1965), which held that no valid judgment can be rendered against a person over whom the court has no jurisdiction. Our former colleague considered as false the testimony of the bailiff from the debt court to the effect that he served the summons on the person of petitioner's authorized representative. He concluded that as such the appellee was never brought under the jurisdiction of the court.

The Civil Procedure Law provides that the summons shall be directed to the ministerial officer of the court in which the action is brought and that except as otherwise provided by law, service of all process shall be made by the ministerial officer of the court which issued the processor bar his deputy. See Civil Procedure Law, Rev. Code 1: 3.33 and 3.36. (Emphases supplied).

While we agree with Justice Jangaba that only the ministerial officer of a court may legally serve the precepts of that court, we wonder however, given the facts and circumstances of this case, whether our colleague was actually convinced that the petitioner was never served with summons in the triad. court.

On page 5 of his ruling, for instance, our former distinguished colleague reasoned, in declaring that appellee was never served with summons in the foreclosure proceedings that: "We feel convinced that no reasonable party can receive summons for a suit involving allegations of indebtedness to the tune of $165,000.00, which puts both his valuable real and personal properties in jeopardy, without attempting to appear and defend his interest." This statement of our colleague evidences, or at least suggests, that he did in fact entertain some doubts as to whether the petitioner was actually served with summons in the trial court. If he did, such a doubt was based upon sound grounds.

Reverting to the petition, we note that the initial contention of the petitioner in its petition for prohibition was that at no time did the trial court issue and serve on it or its legal counsel any notice of assignment for the hearing of the matter in the foreclosure proceedings. It also contended then, as we earlier stated, that the trial court failed to serve on it or its legal counsel a notice of assignment for the rendition of final judgment. It was only in its amended petition that petitioner raised for the first time the issue of never being served with the writ of summons by the trial court.

The Chambers Justice had opined that no reasonable man will receive summons for a suit regarding his indebtedness to the tune of $165,000.00, which puts both his valuable real and personal properties in jeopardy, without attempting to appear and defend his interest." While this reasoning makes a lot of sense, we do not find it completely persuasive, not even if taken in the light most favourable to the petitioner.

In its own brief, at page 3, petitioner stated the following:

"During the alleged period when Appellant El Nasr Export and Import Corporation was alleged to have filed its alleged first action in December, 1979, against appellee, Liberia Industrial Development Corporation and allegedly served it on its president, Mr. Leroy E. Francis, Mr. Leroy E. Francis was out of the bailiwick of the Republic of Liberia at that time for political reasons, vis-a-vis, Mr Leroy E. Francis, being a member of the 49th Legislature and one of those Legislators whose names were being mentioned with respect to the confiscation of their properties, which properties were in fact confiscated, he had to seek refuge out of Liberia for the time being." (Emphases supplied).

Appellee continued:

"This fact was well known to appellant E1 Nasr, and upon which basis appellant took advantage of the situation by instituting fictitious litigations, fully aware that Mr. Francis was in a self-imposed exile for political reasons and therefore could not be present to defend his property rights." (Emphases supplied).

Although Justice Jangaba believed that when a man was confronted in the early 80's, as was the case of Mr. Francis, with the choice of coming out to defend his property, on one hand, or evade service of summons and losing his properties, on the other, he would readily come forward and be served with precepts, we are of the firm opinion that to the contrary most people would prefer evading the service even if it meant abandoning their property. From the passages we have quoted from petitioner's own brief and other facts of this case, we believe that Mr. Francis may have chosen to go into hiding, call it self-imposed exile if you will, rather than make himself available for service of summons. We also believe that when confronted with this frustrating situation, which was created by unforeseen circumstances, the sheriff of the Civil Law Court decided to resort to what we may call "the end justifies the means" type of service. In view of these circumstances, we are of the opinion that the most equitable course which our colleague should have pursued was to order an investigation to determine whether appellee was actually served. It has always been the practice in this

jurisdiction that a judgment in personam is void where the court lacks jurisdiction over the persons involved. See 49 C.J.S., Judgments, § 19. In this regard, the respondents in their brief suggested that an investigation was the appropriate solution available out of the dilemma, since our distinguished colleague was not sure that the appellee was or was not served with the summons by the bailiff from the Civil Law Court. The respondents cited Goba v. Dennis, 19 LLR 459 (1970) to support their contention. Under this hypothesis and reasoning, therefore, we cannot harmonize our opinion with the ruling of the Chambers Justice when he undertook to bar this action under statute of limitations and ordered the matter dismissed.

Adverting now to the issue of whether prohibition was the appropriate remedy, our colleague held, citing the Civil Procedure Law, Rev. Code 1: 16.21 and Fazzah v. National Economy Committee, 8 LLR 85 (1943), that prohibition is the proper remedy to restrain a trial court from enforcing its judgment where jurisdiction is lacking. See also Cooper v. Alamendine, 20 LLR 416 (1971), Seton v. Youwah, 20 LLR 674 (1971), and Tubman v. Murdock, 4 LLR 179 (1934).

Since we have reached the conclusion in this opinion that from all the facts and circumstances considered, it is not crystal clear that appellee was or was not served with summons and that for this reason it was incumbent upon our colleague to order an investigation, we cannot affirm the ruling of our distinguished colleague. Ordinarily, it is assumed that the returns of the ministerial officer to service of process are correct, and that courts take jurisdiction over parties where the returns show that the process was duly served upon said parties. However, this presumption is refutable and not necessarily decisive. Freeman v. Kini, 23 LLR 413 (1974) . In the case at bar, the returns of the sheriff showed that the petitioner was duly served, but the petitioner maintained in its petition that its president, upon whom service was allegedly made, was out of the bailiwick of the
Republic of Liberia, and further that the returns to the summons was delusive in that the said precept was not properly served by a ministerial officer of the Sixth Judicial Circuit Court.

It is our view that the issue of whether or not petitioner was brought under the jurisdiction of the court by proper service of process should have been investigated, especially when the ruling of our colleague clearly indicated that he was not satisfied that the returns was genuine. The trial court should therefore have been ordered by our colleague to investigate the matter so as to ascertain the truth regarding the service of the summons.

As stated earlier in this opinion, even the petitioner suggested in its brief that an investigation was the proper course for the Chambers Justice to adopt. It is our holding therefore that in view of what we have said, and in order that transparent justice is meted out to the parties concerned, the ruling of our former colleague, Mr. Justice Jangaba, granting the prohibition, be affirmed with modification. The mandate thereon sent to the lower court is vacated and declared null and void without prejudice to the rights of any of the parties whose interest was affected thereby, either in law or equity, growing out of the chattel mortgage foreclosure proceedings.

The Clerk of this Court is ordered to send a mandate to the trial court to resume jurisdiction over the foreclosure proceedings, and to issue and serve on the petitioner the appropriate summons, to be responded to by petitioner within ten (10) days after the receipt of the summons, as it is generally done in such cases. Thereafter, the case is to be determined in keeping with law. We hold also that because of the peculiar circumstances surrounding this matter, the plea of the statute of limitations shall not be available to the petitioner. Additionally, because of our holding herein that petitioner be served with summons so that it will file its returns or answer, in the trial court, we need not decide the other issues raised herein. Costs of these proceedings are to abide the final determination of the case.

Petition granted; ruling affirmed with modification.