

MOSES P. BARWROR and FLOMO BEHQUELLEH, Administrators of the Estate of Paramount Chief NOWAI LEEMUE, deceased, Petitioners, v. HIS HONOUR JOSEPH L. BARCHUE, Assigned Circuit Judge, Ninth Judicial Circuit, Bong County, and RICHARD K. FLOMO, Respondents.

Barwror et al v Barchue et al [2000] LRSC 30; 40 LLR 288 (2000) (21 December 2000)

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

Heard: November 6, 2000. Decided: December 21, 2000.

1. Certiorari is the wrong form of action and cannot lie to prevent a court from assuming jurisdiction which it did not acquire in keeping with law; the proper remedy is prohibition.
2. Certiorari is corrective and presupposes that the court has already acquired legal jurisdiction but has made errors in the conduct of the proceeding.
3. Certiorari reviews interlocutory judgments or intermediate orders, makes the correction, and remands the case with appropriate instructions.
4. Prohibition halts the proceedings of a lower tribunal and prevents it from further proceeding because it lacks the requisite jurisdiction.
5. A petitioner waives his right to challenge the jurisdiction of a court if he appears, is adequately represented by counsel, and actively participates in a trial regularly held.
6. A petition for a writ of certiorari must state the decision of the court which is alleged to be illegal and of which a review is sought.
7. A special proceeding is commenced by the filing of a petition and issuance of a citation.
8. The service of a citation and not the mere filing of a letter is required or deemed sufficient to place the respondents or defendants under the jurisdiction of the court.
9. A mere letter to a trial court was not sufficient to be characterized as a pleading or petition; however, once the writ or citation is served and the parties appear without raising any contest as to the court's jurisdiction over their persons, but proceed to actively participate in a full trial, they waive the right to raise such challenge, especially in the appellate court.
10. A challenge to the jurisdiction of a court over the person of a party must be raised at the time of service of the responsive pleading, and at the first appearance at the call of the case, rather than waiting until the case has ended; such act is an incurable blunder.
11. Only a challenge to the jurisdiction over the subject matter is never waived and can be raised at any stage of the case, even up to the final judgment of the Supreme Court.

Petitioners filed a petition for a writ of certiorari, contend-ing that the trial court had not acquired jurisdiction over their persons since it had taken jurisdiction of a case based solely on the filing of a letter rather than the filing of a petition and the proper exchange of

pleadings. The Justice in Chambers granted the writ, holding that actions are commenced by the filing of a complaint, or in the case of special proceedings, by the filing of a petition, which was not apparent in the trial court.

On appeal to the Supreme Court, the ruling of the Chambers Justice was reversed, holding that certiorari was not the right form of action to bring to challenge the jurisdiction of the lower court. Certiorari, the Court said, was designed to review interlocutory rulings of a lower court which had legally acquired jurisdiction over a matter. It opined that since the essence of the petition was a challenge to the jurisdiction of the lower court, the petitioners should have proceeded by prohibition rather than certiorari, as prohibition was the proper writ where the court lacked jurisdiction over the parties or subject matter of the case.

The Court also ruled that while it agreed with the Justice in Chambers that a mere letter was insufficient to commence a trial and to bring the parties under the jurisdiction of the court, yet where the defendants had failed to challenge the court's jurisdiction but had instead submitted itself to the jurisdiction of the court, were represented by counsel at the trial, and actively participated in the proceedings, they had waived their right to challenge the jurisdiction of the court over their persons. The Court noted that a challenge to the jurisdiction of the court over the person should be made at the time of service of the responsive pleadings, and not after the trial of the case, but especially not at the appellate level. It observed that only when the challenge is to the subject matter jurisdiction that the person asserting the challenge may do so at any time during the trial and even up to the Supreme Court. The Court therefore ordered that the lower court resumes jurisdiction over the case and proceed anew with the hearing on the merits.

Moses Kron Yangbe appeared for the petitioners. Richard K. Flomo appeared pro se for respondent.

MR. JUSTICE WRIGHT delivered the opinion of the Court.

This case is an appeal from a ruling of the Chambers Justice rendered on April 11, 1988, wherein certiorari was granted and the case ordered stricken, without prejudice, from the docket of the Ninth Judicial Circuit Court, sitting in its probate division, due to the lack of jurisdiction over the parties. For clarity of the events which occurred in the case, it is important to take recourse to the said ruling of the Chambers Justice, which we quote hereunder:

"Petitioners have filed this petition for a writ of certiorari. The petition contains seven counts. Count one carries the caption of the case; count two refers to the trial judge sustaining objections to questions asked by petitioners; count three contains allegations of the trial judge's denial of the request of petitioners to the court for subpoena to summon a witness; in count four the petitioners alleged that they had asked the court to commence argument at the close of the evidence on both sides, but that the court had denied the application and set a date convenient to the court for argument; count five states that documents marked by court and confirmed were rejected by the court and denied admission into evidence; count six has reference to the same documents and mentioned their rejection by the court; and count seven states that no pleadings were exchanged in the trial except for a letter and a writ of summons issued by the court.

From a careful study of the entire records, the issue or the count that is of importance to us for our review, and when decided will cover the whole petition, is count seven of petitioners' petition which states that no pleadings were exchanged in the trial court except a letter and a writ of summons.”

The Chambers Justice concluded that the matter concerned an estate and that all proceedings concerning estates are special proceedings and are commenced by filing a petition and issuance of a citation thereon. The Justice held that the trial judge committed error when he only brought the parties before him based on a letter, contrary to the statute which prescribes that the only way by which persons are to be brought under the jurisdiction of the court - i.e. by filing a petition. He concluded that by the proceedings not being commenced with the filing of a petition but merely the submission of a letter, the trial court did not acquire jurisdiction over the parties and that, as such, certiorari would lie.

We respectfully disagree with our distinguished predecessor. Contrary to his opinion, it is our view that certiorari does not lie and that it is the wrong form of action to prevent a court from assuming jurisdiction which it did not acquire in keeping with law. Rather, we are of the opinion that the proper remedy is prohibition. Certiorari is corrective and the presupposition is that the court has already acquired legal jurisdiction but has made an error in the conduct of the proceeding. Certiorari would then review that interlocutory judgment or intermediate order, make the correction and remand the case with the appropriate instructions.

Prohibition, on the other hand, halts the proceedings and prevents the court from any further proceeding because it lacks the requisite jurisdiction. Therefore, we are constrained to reverse the ruling of the Chambers Justice because the relief purported to be given is a dismissal of the case, which is not the office of certiorari but prohibition.

Additionally, we hold that petitioners waived their right to challenge the jurisdiction of the court below, in that they appeared, were adequately represented by counsel, joined issue with the respondent, and actively participated in a regular trial. Petitioners cross-examined Co-respondent Flomo and his witnesses, produced witnesses in their defense and, as with Co-respondent Flomo, rested evidence awaiting oral argument.

The records indicate that at the close of the entire evidence, petitioners' counsel opted to proceed immediately with oral arguments but the court decided to adjourn for the day and to reassign the arguments for another day. It was at this stage that petitioners brought their petition for certiorari.

The Chambers Justice granted the writ, but we have seen no error committed by the trial judge when he decided to suspend the trial on the day the parties rested evidence and to reassign the oral arguments for another day. The petition in certiorari must state the decision of the court which is alleged to be illegal and of which a review is sought. Civil Procedure Law, Rev. Code 1:16.23(6), 1 LCLR 147.

The Chambers Justice held that the trial court did acquire jurisdiction over the persons of the petitioners because the proceedings were commenced by the writing of a letter and a citation was issued thereon. Indeed, the parties to suits instituted in our courts are brought under the jurisdiction of the court based on the precept issued by the court - i.e. the writ of citation. All civil actions are commenced in our courts of record by filing a complaint or petition and issuance thereon of the appropriate writ. Civil Procedure Law, Rev. Code 1:3.31. The

Chambers Justice held, and correctly so, that the proceedings in the court below were special proceedings. The law controlling special proceedings provide that special proceedings are commenced by filing a petition and issuance of a citation thereon. Civil Procedure Law, Rev. Code 16.3, 1 LCLR 143. The Chambers Justice relied on section 18.1(a) of the Decedent Estate Law, rather than the Civil Procedure Law. Hence, we are in agreement with his position. In fact, there is no conflict between the provision of the Civil Procedure Law and the Decedents Estates Law. They are the same as to the requirement of a petition being filed. In the instant case, it was revealed that when Co-respondent Flomo submitted his letter to the trial court, the court issued a citation which was served on the petitioners. We hold that the service of the citation and not the filing of a mere letter, was sufficient to place the petitioners under the court's jurisdiction. Let us quickly indicate that we fully agree with the Chambers Justice that a mere letter to the trial court was not sufficient to be characterized as a pleading or petition. However, once the writ or citation was served and the parties appeared without raising any contest as to the court's jurisdiction over their persons, but proceeded to actively participate in a full trial, they waived their right to raise such challenge especially, at the stage of the proceedings at which they did.

Under the statute controlling, a challenge to the jurisdiction of the court over the person of a party must be raised at the time of service of the responsive pleading (and at the first appearance when the case is called). But to wait until the trial has ended is an incurable legal blunder. Only a challenge to jurisdiction over the subject matter is never waived and can be raised at any stage, even up to final judgment in the Supreme Court. Civil Procedure Law, Rev. Code 1:11.2(1)(b) and 11.2(6), 1 LCLR 118-119.

In conclusion, we hold that the Chambers Justice erred when, in entering his ruling, he relied solely on count seven of the petition, which stated that no pleadings were exchanged since he had failed to take into account the fact that the petitioners had submitted to the court's jurisdiction and participated in the trial up to the stage where the parties rested evidence. As petitioners indicated in count four of their petition, their only point of dissatisfaction with the judge was when he denied petitioners' request to proceed immediately with oral arguments the same day following the resting of evidence, but instead decided to reschedule the arguments for another day. That is a clear admission that the only motive of petitioners was to delay the conclusion of the case by the trial court by the filing of the petition for certiorari. Such petition should not have been entertained. The only thing to have been done in the circumstances, and which we shall now do in this opinion, is to remand the case and have the parties continue with the trial. However, considering the length of time from the last hearing, and also that the judge who heard the evidence at the trial is no longer a judge and is not in this jurisdiction, the appropriate course is that the presiding judge, whoever he/she may be, when the mandate is received in the trial court should, in resuming jurisdiction over the case, commence the trial anew. In carrying out this mandate, the trial judge should give the same priority on the docket. That is, the court shall retain jurisdiction over the subject matter and the parties and start the hearing anew up to completion, and thereafter enter its ruling consistent with the evidence adduced and the law controlling.

Wherefore, and in view of the foregoing, it is the ruling of this Court that the Chambers Justice erred and that his ruling is accordingly reversed and set aside. We herein rule that certiorari did not lie and as such the petition, being grossly unmeritorious and merely designed to delay the conclusion or resolution of the case, hereby denied, the certiorari proceedings dismissed, and the case remanded for a new trial. Accordingly, the appeal from

the Chambers Justice ruling is granted, the peremptory writ is refused, and the alternative writ is quashed.

The Clerk of this Court is hereby ordered to send a mandate to the Ninth Judicial Circuit Court, sitting in its probate division ordering the judge presiding therein to resume jurisdiction over the case and give priority to the same on the docket of the court. The court hereby is further ordered to retain jurisdiction of the case and the parties, conduct a new hearing on the merits, make a determination without delay, and let the law take its course. Costs of these proceedings are ruled against petitioners since their petition was unmeritorious and purposely intended to only delay and baffle the case. And it is hereby so ordered.

Petition for certiorari denied.