

CITY PLUMBING AND CONSTRUCTION SERVICES, INC., by and thru its President, WILLIAM T. BRUCE, SR., of the City of Monrovia, Liberia, Plaintiff-In-Error, v. **HIS HONOUR FRANCIS N. PUPO, SR.**, Judge, Debt Court, Montserrado County, and **BLACKWOOD HODGE (LIBERIA), INC.**, thru its General Manager, Defendants-In-Error.

PETITION FOR A WRIT OF ERROR TO THE DEBT COURT FOR
MONTSERRADO COUNTY.

Decided June 24, 1983.

1. It is the duty of counsel in an action in which the defendant did not appear as per assignment, to inspect the writ and the sheriff's returns thereon, make application for writ of re-summons or summons by publication as the case may be, and exhaust all other procedural aspects before making application for judgment by default.
2. A writ of error will be granted where a defendant has not been duly summoned as the law directs.

Judgment by default was rendered against the plaintiff-in-error in the lower court without the said plaintiff-in-error being served with a writ of summons to file an answer or formal appearance, or to appear for trial. The sheriff's returns showed that the summons had not been served on the plaintiff-in-error, and that without inspecting the summons, the counsel for plaintiff therein, co-defendant-in-error herein, applied for judgment by default, which was granted by the trial court.

On a petition for a writ of error, the same was granted. The Justice in Chambers held that as the sheriff's returns showed that the plaintiff-in-error was never served with summons, a writ of error was the proper remedy to correct the error. The Justice noted that counsel for plaintiff in the trial court had a duty to firstly inspect the returns of the sheriff before applying for judgment by default. The Justice therefore granted the petition and ordered the peremptory writ issued. The Justice also directed that the plaintiff-in-error be allowed to file an answer nunc pro tunc that the issues of law be disposed of, and that the trial proceeds anew with the hearing of the case and render judgment according to the evidence.

Joseph M Kennedy for Plaintiff-In-Error and J. K Burphy for the Defendant-In-Error.

SMITH J., presiding in Chambers.

The contention of the plaintiff-in-error, according to its petition, is that the co-respondent judge heard and decided a debt action instituted against plaintiff-in-error without plaintiff-in-error being duly summoned to appear and defend the action.

The defendants-in-error filed returns and argued that the action of an officer of court should not prejudice the interest of a party litigant, in that if the writ of summons was not served on

the plaintiff-in-error, the trial court should have denied the co-defendant-in-error's application for default judgment, which was made perfect after the presentation of evidence by the codefendant-in-error.

Taking recourse to the sheriff's returns to the writ of summons, we found the following at the back of said writ:

"SHERIFF'S RETURNS" "On the 18th day of May, A. D. 1982, court's bailiff, Benjamin Johnson, carried a writ of summons, together with all necessary documents, to have same served on the within named defendant but from the date of issuance of the writ, the bailiff has tried to locate the defendant, but was informed that the defendant company has been closed down for the past four months. Therefore, the writ was not served on the defendant as the bailiff reported. I now make this as my official returns to the clerk of this Honourable court this 28 th day of May, A. D. 1982. William R. Slocum, Sheriff, People's Debt Court Mont. Co. R. L."

From the returns of the sheriff quoted supra, it is quite clear that the defendant was not summoned to appear and defend the case. It is surprising to observe that counsel for co-defendant -in-error, plaintiff in the debt action, who should have inspected the sheriff's returns when he appeared in court for the hearing of the case to ascertain whether or not the defendant had been duly summoned, sought to put the blame on the court. It was duty of the counsel to inspect the writ, and if he discovered that it was not served, to apply to the court for a writ of resummons, and, as the case may be, to further apply for summons by publication, so as to exhaust all the procedural aspects of the law before making the application for a default judgment. Civil Procedure Law, Rev. Code 1: 3.35, 3.40, and 3.41.

The defendant not having been duly summoned as the law directs, it is our opinion that the petition for a writ of error should be, and the same is hereby granted, with costs against the Co-respondent Blackwood Hodge (Liberia) Inc.

The Clerk of this Court is hereby ordered to send a mandate to the trial court, commanding the judge therein presiding to resume jurisdiction over the case, set aside the judgment, and proceed to serve the writ of summons and the complaint on the defendant therein, so as to enable it to file an answer nunc pro tunc; and after the pleadings are rested, to hear the case, beginning with disposition of the legal issues, as may be raised in the pleadings, and to render judgment according to the evidence. And it is hereby so ordered.

Petition granted