EXPRESS PRINTING HOUSE, INC. and **AZIZ SHABANI,** Appellants, v. **HER HONOUR C. AIMESA REEVES**, Judge of the Debt Court, Montserrado County, and **BANK OF CREDIT COMMERCE INTERNATIONAL, (BCCI).**

APPELLEE'S APPEAL FROM THE DEBT COURT, MONTSERRADO COUNTY.

Heard: October 22, 1988. Decided: December 29, 1988.

1. If a party is not ready for trial the proper recourse is to file a motion for continuance, giving the legal reasons why the case may not be heard during the particular term of court.

2. Granting or denying a motion for continuance shall be done in keeping with law, in the discretion of the court.

3. A defendant shall be deemed to have abandoned a cause if he or she fails to file a motion for continuance and fails to appear after the sheriff makes return of a written assignment.

4. Where a defendant is deemed to have abandoned his or her cause, the court may proceed to hear plaintiff's side of the case and decide on it. If the plaintiff abandons his or her cause, the court may dismiss the case against the defendant and rule the plaintiff to cost.

5. A case may only be continued beyond the term for which it is filed and set for trial on a proper motion for continuance.

6. If a cause is not reached during a session, it is the duty of the court to continue such a case as a matter of course.

7. A foremost concern of an assigned judge is clearing his or her trial docket of pending cases.

8. If a defendant fails to appear or plead or proceed to trial, or if the court orders a default for any failure of defendant to proceed, a plaintiff may seek default judgment against such a defendant.

9. A petitioner for a writ of error must always show that his or her absence from court at the time of rendition of judgment was unavoidable due to no fault or neglect

on his or her part.

10. A writ of error is issued only to a party who has failed to take an appeal from a judgment or decree because, for good reason over which the party had no control, the party was prevented from appearing at the time of the rendition of judgment.

11. "Day in court" is the right and opportunity afforded a party to litigate his or her claims, seek relief, or defend his or her rights in a competent judicial tribunal.

12. A litigant has his or her day in court when he or she has been duly cited to appear and has been afforded the opportunity to appear and be heard.

13. A bill of costs is an itemized statement of costs and disbursements required to be filed by a party entitled to costs, a copy of which must be served on the adverse party.

14. Issue not raised in the trial court and passed upon by the trial court, cannot be raised at the appellate level for the first time to form a part of the appellate court's review.

15. Original jurisdiction of the Supreme Court is constitutionally and statutorily defined.

Co-defendant-in-error, Bank of Credit and Commerce International, plaintiff in the lower court, brought an action of debt by attachment, against plaintiff-in-error, defendant in the lower court. The record showed that there were several notices of assignments and motions for continuance filed and served in the case. A final notice of assignment of the case was served on plaintiff-in-error and his counsel, but they failed to appear. The trial court rendered a default judgment against plaintiff-in-error in their absence, but did not appoint a counsel to take the judgment on their behalf. Plaintiff-in-error filed a petition for issuance of a writ of error before the Justice in Chambers, which was denied. On appeal, the Court en banc held that plaintiff-in--error, having legally abandoned his case, was not entitled to a writ of error. The Court therefore denied the petition.

Alfred B. Flomo for plaintiff-in-error. H. Varney G. Sherman for defendant-in-error.

MR. JUSTICE BELLEH delivered the opinion of the Court

These proceedings have come to us following a ruling in Chambers. The history of this case, as we have been able to gather from the records certified to this Court, is as follows:

At the December, A. D.1985 Term of the Debt Court for Montserrado County, Bank of Credit & Commerce International (BCCI), co-defendant-in-error herein, filed a complaint in an action of debt against Aziz Shabani and Express Printing House of the City of Monrovia, Liberia, plaintiffs-in-error herein, praying that the debt court will "adjudge defendants liable to the plaintiff in the total sum of $103,476.32, representing defendants' indebtedness of $86,230.27 and attorney's fee of $17,246.05, and rule the costs of these proceedings against the defendants and grant unto plaintiff further relief as is just and equitable.

On July 29, 1986, the issues of law were disposed of ruling plaintiffs complaint to trial in its entirety along with count one of the answer and counts two, three and four of the reply. The records further reveal that after the law issues had been disposed of by the court below, several attempts were made by the court to hear the case on its merits, but the trial court was prevented from doing so because each time the case was assigned, defendants' counsel asked the court to have the case continued for one reason or the other. Finally, the trial court decided to have the case assigned on October 6, 1986 for trial on October 22, 1986 at the precise hour 10:00 a.m. According to the sheriff s returns, as indicated on the back of the notice of assignment dated October 6, 1986, the said notice of assignment was served on both counsels representing the parties, including Counselor Alfred B. Flomo, one of the counsels for defendants, who personally received and signed for the notice of assignment.

The records reveal further that despite the notice of assignment, both the management of Express Printing .House, Inc. and its counsel, Counselor Alfred B. Flomo, failed to appear and defend their interest, without any excuse. Consequently, the trial court rendered a judgment by default against defendants consistent with the prayer of the plaintiff, as contained in the complaint. It is noteworthy that the trial judge did not appoint a counsel to take the ruling on behalf of defendants' counsel at the rendition of final judgment. Thereafter, a bill of costs in the amount of $113,988.93, prepared by the clerk of the debt court, was served on both counsels, including Counselor Alfred B. Flomo, who personally taxed same on October 22, 1986 without any reservation. Thereafter, defendants filed a six-count petition for a writ of error in the Chambers of this Court, praying for the transmittal by the trial court of the complete records in the proceedings, on the ground that the "trial judge

had deprived them of their day in court." We hereunder quote count three of the petition for the benefit of this opinion:

Count 3. That to the utmost surprise, plaintiffs-in-error read a publication in the October 23' issue of the Daily Observer newspaper, informing the public that the trial court rendered final judgment against plaintiffs-in-error, awarding co-defendant-in-error a total sum of $103,476.32 plus 6% interest, without issuing and serving upon plaintiffs-in-error or their legal counsel a notice of assignment as provided by law so that they could have the opportunity to appear and defend their interest; neither did the trial judge appoint or deputize any lawyer to take the final judgment of plaintiffs-in-error and to enter exceptions thereto and announce an appeal to this Honorable Court. Therefore plaintiffs-in-error have been denied their day in court and deprived of the opportunity to defend their legal interest in the action of debt for which a writ of error will lie.

The Chambers Justice, after ordering the issuance of the alternative writ and the defendants-in-error, having been duly served and returned served by the Marshal of this Court, Codefendant-in-error BCCI filed a nine-count returns. In our opinion, Counts 1, 4, 5, 6, 7, 8 & 9 of the returns are not relevant to the final determination of the issues on which this case will be decided, therefore, we will focus our attention on counts 2 and 3 of the returns, which we hereunder quote:

COUNT 2. As to Count 2 of the petition, co-defendant-in-error, BCCI, says that same is a blatant misrepresentation of facts calculated to deceive and mislead this Honorable Court. A review of the records of the debt court (which this Honourable Court is invited to take judicial notice of) show that since pleadings rested in this case, plaintiffs-in-error, with intent to delay the trial of this case, on five occasions caused the continuance of the case before the debt court, or failed to be present in court, notwithstanding the fact that assignments were duly served on plaintiffs-in-error's counsel in the person of Counselor Alfred B. Flomo. The dates on which plaintiffs-in-error and/or their counsel caused continuance of the case are: first, on March 26, 1986; second, September 3, 1986; and third on September 24, 1986. And the days on which they absented themselves are June 18, 1986 and September 22, 1986. It is therefore false for plaintiffs-in-error to allege that co-defendant-in-error, BCCI, failed to appear upon a notice of assignment duly served.

Count 3. As to Count 3 of the petition, co-defendant-in-error, BCCI, denies that the court rendered final judgment in the case without issuing a notice of assignment. On

the contrary, the debt court on the 6th of October, 1986, issued a notice of assignment which was duly served on both plaintiffs-in error and defendant-in-error, BCCI, as defendants and plaintiff, respectively. Counselor Alfred B. Flomo, on whom the notice of assignment was served, signed for it, and the sheriff of the court who served same, duly made his returns on the 7th day of October, 1986; but plaintiffs-in-error failed to appear on the assigned date. A copy of the court's notice of assignment bearing the signature of counselor Alfred B. Flomo as well as the returns of the sheriff of the debt court endorsed on same is hereto attached and marked "R/2" to form an integral part of this returns."

The Justice in Chambers, after entertaining arguments pro et con on the petition and the returns, on the 13th day of January, 1987 denied the petition for the writ of error, affirmed the judgment of the trial court, and ordered the Clerk of this Court to send a mandate to the trial court to resume jurisdiction and enforce its judgment with costs against plaintiffs-in-error. Plaintiffs-in-error, not being satisfied with the ruling of the Chambers Justice, excepted to same and announced an appeal to this Court sitting en banc.

A careful perusal of the records certified to this Court on appeal reveal that there is one principal issue presented for our consideration and determination: whether or not the plaintiffs-in-error "had their day in court"?

Regarding the contention of plaintiffs-in-error that they have been denied their day in court by the trial court, thereby depriving them of the right of appeal, the records certified to this Court reveal that the debt court for Montserrado County on the 29th day of July, 1986 disposed of the law issues contained in the pleadings and ruled the case to trial on its merits. After several attempts, the case was finally assigned on October 6, 1986 for trial on October 22"d, 1986 at the hour of 10 a.m. The necessary notice of assignment were issued by the clerk of court, served and returned served by the sheriff's office of the said debt court and both parties, including Counselor Alfred B. Flomo, signed for and received the notice of assignment on the 7th day of October, A. D. 1986.

When the case was called for trial on October 22, 1986, pursuant to the notice of assignment, plaintiffs-in-error and their counsel failed to appear for the trial without any excuse and without filing a motion for continuance. Whereupon defendant--in-error, plaintiff in the trial court, prayed for the invocation of rule seven of the Revised Rules of Court and §42.1 of the Civil Procedure Law.

Rule Seven, of the Revised Rules of Courts, provides:

The issues of law having been disposed of in civil case, the clerk of court shall call the trial docket of those cases in order. Either of the parties not being ready for trial, shall file a motion for continuance, setting forth therein the legal reasons why the case might not be heard at the particular term of court; the granting or denying of which shall be done by the court in keeping with law, and in its discretion. A failure to file a motion for continuance or to appear for trial after returns by the Sheriff of a written assignment, shall be sufficient indication of the party's abandonment of a defense in the said case in which instance the Court may proceed to hear the plaintiff's side of the case and decide thereon, or dismiss the case against the defendant, and rule the plaintiff to cost, according to the party failing to appear. In no instance might a case be continued beyond the term for which it is filed and set down for trial, except upon a proper motion for continuance; provided however, that should the business of the court be such that a particular case is not reached during the session, such case or cases shall be continued as a matter of course. Clearing the trial docket by the disposition of cases, shall be the foremost concern of the judge assigned to preside over the term. (Our emphasis).

In addressing this issue, the Civil Procedure Law provides:

"If a defendant has failed to appear, plead, or proceed to trial, or if the court orders a default for any failure to proceed, the plaintiff may seek a default judgment against him." Civil Procedure Law, Rev. Code 1:42.1. (Emphasis ours).

Plaintiff/defendant-in error's application was granted by the trial court, and the sheriff after being ordered by court to call the defendants three times at the door of the court room, returned that defendants had been called three times at the door of the courtroom but failed to answer. The court entered a plea of "not liable" in favor of plaintiffs-in-error, and an "imperfect judgment by default" was eventually entered in favor of the plaintiff, to be made perfect after the plaintiff shall have proved its case against the defendants.

Plaintiff and its witness took the stand and testified as follow:

"Q. Plaintiff BCCI has sued these defendants in an action of debt for the total amount of $103,476.32, representing an indebtedness of $86,230.27 plus attorney's fee of $17,246.05. You are a witness for BCCI. Please tell us what you know about the case?"

A. Express Printing House was granted certain credit facilities by the bank in 1979 under a letter of arrangement dated April 10, 1979 and overdraft agreement dated April 10, 1979 and, subsequently, the bank observed that Express Printing House was misusing the credit facilities which were collateralized under assignment of lease dated the 10th of May 1979. The bank called for Express Printing House to arrest the situation of misusing the credit facilities in 1982. At this stage, Messrs. Express Printing House signed a fresh promissory note, which was also executed on 1 March, 1982. Mr. Aziz Shabani, the principal shareholder and authorized representative of Express Printing House also executed a personal continuing guarantee in favor of the bank on 1st March, 1982 to cover the then and future obligations of Express Printing House towards the Bank and also assigned a lease agreement for the property in May 1979. It was again observed in 1983 that Express Printing House started misusing the credit facilities again, and the bank called on Express Printing House in October 1983 to settle the indebtedness. Our records further reveal that Mr. Aziz Shabani is also obligated to the bank in his personal capacity and as a representative of his other business, Audio House. He signed a letter of intent on October 12, 1983, wherein Mr. Aziz Shabani proposed consolidation of liabilities of the three accounts, namely, Express Printing House, Audio House and Aziz Shabani, into one account in the name of Express Printing House. However, they failed to comply with the terms and conditions of the letter of intent dated October 12, 1983. Therefore, the bank refused to consolidate the above named accounts. Defendants also failed to settle their obligations to the bank, which as of October 25, 1985, stood at $86,230.27, according to the statement of account of Express Printing House. In the promissory note and the overdraft agreement of 1S t March, 1982, the defendants promised to pay 20% of the amount outstanding as attorney's fees should we have to take them to court to collect. Twenty percent of $86,230.27 is $17,246.05 and we are also claiming this as attorney's fees. That is all."

The second witness for the plaintiff took the stand and testified as follows:

"Under the letter of arrangement and overdraft agreement dated April 10, 1979 BCCI granted credit facilities to Express Printing House and it was collateralized by an assignment of lease dated May 10, 1979. Express Printing House enjoyed the credit facilities up to 1982 when, because no payment had been made by Express Printing House, BCCI required certain documents to be executed by Express Printing House, and its principal shareholder and managing director, Aziz Shabani. The documents executed on 1St March 1982 are as follows: promissory note, overdraft agreement, assignment of assets and personal continuance guarantee, all of which were to show

evidence of the indebtedness to secure said indebtedness. On October 12, 1983, by a letter of intent, Express Printing House acknowledged its balance to be $56,070.22 as at September 30, 1983. The letter of intent was not carried out for the consolidation of the three loans because Aziz Shabani did not comply with the conditions of said letter of intent. According to the statement of account which we have as of September 1983 thru October, 1985, when this action of debt was filed, Express Printing House is indebted to BCCI in the total amount of $86,230.77. So we asked the Maxwell & Maxwell Law Offices, our lawyers, to demand from Express Printing House the payment of this amount and although the letter of demand was sent under the signature of George Odoi, attorney-at-law, then of the Maxwell & Maxwell Law Offices, Express Printing House did not reply. BCCI then sued Express Printing House as principal debtor, and Aziz Shabani as guarantor. According to the promissory note, the assignment of lease and the overdraft agreement of 1 March 1983, Express Printing House promised to pay as attorney's fee, 20% of the amount we sued for if we have to collect an amount of the indebtedness through court. Twenty percent of $86,230.27 is $17,246.05 and so BCCI is claiming a total of $103,476.32. That is all."

Plaintiff having rested evidence, submitted the case to the court for its consideration and determination as the law directs. Whereupon the court on the 22n d day of October, A . D . 1986 ruled defendants liable in the action of debt by attachment in the total sum of $103,476.32 in favor of plaintiff.

Our statute on writ of error provides:

1. Application. A party against whom judgment has been taken, who has for good reason failed to make timely announcement of the taking of an appeal from such judgment, may within six months after its rendition, file with the Clerk of the Supreme Court an application for leave for a review by the Supreme Court by writ of error. Such an application shall contain the following:

(a) An assignment of error, similar in form and content to a bill of exceptions, which shall be verified by affidavit stating that the application has not been made for the mere purpose of harassment or delay;

(b) A statement why an appeal was not taken;

(c) An allegation that execution of the judgment has not been completed; and,

(d) A certificate of a counselor of the Supreme Court, or of any attorney of the circuit court if no counselor resides in the jurisdiction where the trial was held, that in the opinion of such counselor or attorney, real errors are assigned."

In Nigerian Ports Authority v. Brathwaite, 26 LLR 338 (1977) this Court held that a petitioner for a writ of error must always be able to show that his or her absence from court at the time of rendition of judgment was unavoidable due to no fault or neglect on his part. Also in the case, Cole v. Industrial Building Contractors, et al, 17 LLR 476 (1966), this Court held that a writ of error is issuable only to a party who has failed for good reason failed to take an appeal from a judgment, decree, or an order of a trial court. The term "good reason" means a disability or other cause over which the party had no control and which actually prevented the party from appearing before the trial court at the time of the rendition of the judgment, decree, or order in question.

According to authority, a "day in court" is defined as "the right and opportunity afforded a person to litigate his claims, seek relief, or defend his rights in a competent judicial tribunal." It is: "The time appointed for one whose rights are called judicially in question, or liable to be affected by judicial action, to appear in court and be heard in his own behalf. This phrase, as generally used, means not so much the time appointed for a hearing as the opportunity to present one's claims or rights in a proper forensic hearing before a competent tribunal". Further: "A litigant has his day in court when he has been duly cited to appear and has been afforded an opportunity to appear and heard." BLACK'S LAW DICTIONARY 357 (5 th ed).

In the instant case, counsel for plaintiffs-in-error has not denied that the case was assigned for trial on the 22n d day of October,1986, nor has he denied that the notice of assignment was ever served. The contention of Counsellor Alfred B. Flomo, counsel for plaintiffs-in-error, is that the signature appearing on the notice of assignment is not his genuine signature, in spite of the fact that the sheriff's returns shows that the notice of assignment was personally signed for and received, by him. In our opinion, this argument on the part of counsel for plaintiffs-in-error is baseless and without legal foundation, in that upon the rendition of final judgment by the trial court, a bill of costs in the total sum of $113,988.93 was prepared by the clerk of the debt court of Montserrado County and, according to the sheriff, said bill of costs was personally taxed by both counsels for the parties, including Counsellor Alfred B. Flomo, without any reservation.

A "bill of costs is an itemized statement of costs and disbursement to be filed by the party entitled to costs and a copy thereof served upon the adverse party."

BALLENTINE'S LAW DICTIONARY 135 (1' ed.).

Our Civil Procedure Law provides that "after final judgment, the clerk of court shall prepare a bill of costs which he should transmit to the attorneys for all parties. The judge shall approve the bill of costs agreed upon by the attorneys, or if they cannot agree, he shall settle the disputed items and approve the bill as settled." Civil Procedure Law, Rev. Code 1: 45.5, Taxation of Costs.

In other words, Counsellor Alfred B. Flomo, at the time of taxing the bill of costs, did not raise any issue in respect to the court's alleged failure to have notified him of the trial of the case, nor did he question the genuineness of his signature appearing on the notice of assignment or call upon the court to conduct an investigation regarding the signature appearing on the notice of assignment so as to enable the trial court to pass upon the issue. But instead, during argument before this Court, counsel vigorously argued that "his signature is nationally known and that the signature appearing on the notice of assignment of October 6, 1986 is not his."

Under the practice and procedure governing our appellate review, issues that are not raised in the court below to be passed upon by the trial court to form a basis for our appellate review can not be raised for the first time since the original jurisdiction of this Court is defined by the Constitution of Liberia. Therefore, since the contention of plaintiffs-in-error's counsel as regard to the signature appearing on the notice of assignment is not one of the issues over which this Court exercises original jurisdiction, we are of the opinion that the contention should not claim our judicial cognizance.

Counsel for plaintiffs-in-error failed to convince this Court further that his failure to appear at the trial was due to reason over which he had no control but, instead, he argued that he was in Nimba County in a criminal case when the bill of costs was served on him by the sheriff of the debt court. Under these circumstances, we are of the opinion that counsel of plaintiff-in-error neglected and failed to offer justifiable reasons for his absence at the time of rendition of judgment. Therefore, the learned Chambers Justice correctly denied the petition for a writ of error.

In view of the circumstances narrated in this opinion, couple with the laws cited, we are of the considered opinion that the ruling of our distinguished colleague, Justice Kpomakpor, presiding in Chambers, should be and the same is hereby affirmed with costs against plaintiffs-in-error. The Clerk of this Court is hereby ordered to send a mandate to the trial court to resume jurisdiction and enforce its judgment. And it is

so ordered.

Judgment affirmed.