

EXPRESS PRINTING HOUSE, INC. & AZIZ SHAIBANI, Plaintiffs-In-Error, v.

HER HONOUR

C. AIMESA REEVES, Judge of the Debt Court for Montserrat County & **BANK OF CREDIT & COMMERCIAL INTERNATIONAL (BCCI)** Defendants-In-Error.

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

1. An answering affidavit which is served on an opposing party less than twenty-four hours prior to the hearing of the case will be stricken from the records and the issues raised therein will not be entertained by the Court.
2. While it is the mandate of the law that a lawyer be deputized for the purpose of taking the ruling for an absent party, and the trial judge fails to so appoint such counsel, yet if counsel for a party has been duly notified of the hearing of his case and has failed to attend said assignment, there is no need for the trial judge to appoint or designate another lawyer to take the ruling for the absent lawyer.
3. Error will not lie in favor of a person who has failed for good reasons to take an appeal from the judgment, decree or decision of the trial court.
4. Where a plaintiff-in-error alleges that he was deprived of his day in court by reason of not having been served with a notice of assignment for the hearing of the case, the defect is cured by his counsel taxing and signing the bill of costs of the court. In such a case, error will not lie.
5. Petitioner for a writ of error must always be able to show that due to no fault or neglect on his part, his absence from court at the time of rendition of judgment against him was unavoidable.

Plaintiffs-in-error filed a petition for a writ of error against the respondents, claiming that the co-respondent Debt Court Judge had rendered judgment against them without having to serve them with a notice of assignment for the hearing of the case. The records showed that the plaintiffs-in-error's counsel had been served with notice of assignment but had failed to attend the hearing. Whereupon, on the application of codefendant-in-error Bank of Credit and Commerce International (BCCI), the court had entered a default judgment against the plaintiffs-in-error. Final judgment had also been entered against the plaintiffs-in-error following the production of evidence by co-defendant-in-error Bank, BCCI. The trial judge did not deputize a lawyer to take the ruling for the absent counsel of the plaintiffs-in-error.

The Justice in Chambers denied the petition, noting that the records had not only shown that counsel for plaintiffs-in-error had been duly notified by assignment to be present for the hearing of the case, but that counsel had absented himself from the hearing. The Justice

observed that a party who is absent from a case must show that the absence was not due to any fault or neglect on his part and that the absence was unavoidable.

The Justice opined that while the law mandated the trial court to appoint or depute a lawyer to take the ruling or judgment for an absent party for the purpose of enabling him to take and perfect an appeal to the Supreme Court, yet where the absent party has been duly served with assignment and has failed to attend the trial, there exist no need for the trial judge to appoint or designate a lawyer for the absent party, and that the judge commits no error in not making such appointment.

The Justice ruled further that even if the act of the trial judge could be deemed an error, which the Justice noted was not the case, the subsequent taxing and signing of the bill of costs were considered to have cured the defect. The Justice therefore denied the petition and refused to issue the peremptory writ of error.

Appearances not indicated.

KPOMAKPOR, J., presiding in Chambers.

Plaintiffs-in-error were the defendants in an action of debt by attachment in the Debt Court for Montserrado County. When pleadings rested, the case was assigned for hearing on October 22, 1986. The plaintiff in the trial court, now co-defendant-in-error, obtained a default judgment against the defendants, now plaintiffs-in-error, who had failed to appear though duly cited.

The errors assigned in the petition are essentially the following: (1) That the co-defendant-in-error judge "without issuing and serving upon plaintiffs-in-error or their legal counsel a notice of assignment", rendered final judgment in the absence of plaintiffs in error and without deputizing any lawyer to take the final judgment, enter exceptions thereto and announce and appeal therefrom; and (2) that as a result of the failure of the trial judge to notify plaintiffs-in-error or their legal counsel of the date of the hearing of the action of debt, they were deprived of their day in court.

In its returns, the co-defendant-in-error, Bank of Credit & Commerce International (BCCI), averred: (1) That on five different occasions the case was assigned by the trial court but same had to be postponed at the request of plaintiffs-in-error, that is, March 26, 1986; June 18, 1986; September 3, 1986; September 22, 1986; and September 24, 1986, the last two dates being dates on which they were absent; (2) that on the contrary the trial court issued on October 22, 1986, a notice of assignment which was duly served on both parties; the copy for plaintiffs-in-error having been served on Counsellor Alfred B. Flomo, who acknowledged receipt of same; (3) that because plaintiffs-in-error received a copy of the notice of assignment but failed to appear, the trial judge was legally correct in permitting the codefendant in error to present its side of the case and subsequently rendered a default

judgment against plaintiffs- in-error (4) that a lawyer need not be appointed to take the ruling for an absent party against whom a default judgment has been rendered; and (5) that the writ of error has been filed for the only purpose of harassment and delay, in that, the counsel for plaintiffs in error having taxed and signed the bill of costs, error will not lie in their favour.

The issues raised by the parties are:

1. Whether or not error will lie in favor of an absent party against whom final judgment has been rendered even though said party taxed the bill of costs and signed same?
2. Whether or not the trial judge was under an obligation to designate another lawyer for the purpose of excepting to the final judgment and announcing an appeal therefrom on behalf of the plaintiffs in error who were cited but failed to appear?

We shall resolve these issues in their reverse order. The records in this case show that a notice of assignment was issued on the 22nd day of October, 1986, by the trial court, served on counsel for plaintiffs-in-error, who acknowledged receipt of same but failed to appear. The records also reveal that the counsel for the plaintiff in the trial court, now co-defendant-in-error, moved that court, in keeping with section 42.1 of the Civil Procedure Law, to permit him to present his side of the case. The request was granted and final judgment was rendered in favor of the plaintiff/co-defendant-in-error.

According to the records certified to this Court, the petition for a writ of error was filed on October 27, 1986; the returns thereto was filed on December 15, 1986; the notice of assignment from these Chambers for the hearing of the petition on the 22nd day of September, 1987, was issued on September 2, 1987. The records also show that an answering affidavit to the petition was filed on September 21, 1987.

In the answering affidavit, the plaintiffs-in-error alleged "that the purported signature appearing on the notice of assignment of October 6, 1986, upon which plaintiff induced the court below to render a default judgment against plaintiffs-in-error is not the genuine signature of Counsellor Alfred B. Flomo"

The plaintiffs-in-error also contended in the said answering affidavit that the signing of the bill of costs by counsel of plaintiffs in error, issued and served upon him by the trial court "was done in order to prevent plaintiffs-in-error from going to jail and to assess the accrued costs payable by plaintiffs-in-error to secure the issuance of the alternative writ of error. . ."

Although this answering affidavit was filed in the office of the Clerk of this Court on September 21, 1987, as stated earlier in this ruling, the plaintiffs in error neglected to serve a copy on either the Bank, co-defendant-in-error in these proceedings, or its legal counsel, until after the error was called for hearing on September 22, 1987, at 11:00 a.m.

In resisting the answering affidavit, the defendants-in-error moved the Court to strike it from the records on the ground that the answering affidavit, like all other returns, should have been served on the defendants in error twenty-four (24) hours before the case was called for hearing.

Counsellor Flomo, counsel for the plaintiffs-in-error, strongly defended the serving of the answering affidavit across the table after the case was called. We granted the application to have the answering affidavit stricken from the record, relying upon the rules governing procedure in this Court and the Civil procedure Law, Rev. Code 1: 16.6. We have therefore refrained from passing on the issues raised in the said answering affidavit in this ruling.

The plaintiffs-in-error contended that the trial judge committed a reversible error when she rendered final judgment in the case without first appointing a lawyer to take the initial steps on behalf of plaintiffs-in-error in perfecting their appeal. The co-defendant-in-error Bank, BCCI, argued before us that because plaintiffs-in-error were cited for the hearing but failed to appear, the trial judge was legally correct in not deputizing a lawyer to take the ruling on their behalf. The co-defendant in error Bank relied on the case of *Camer Liberia Corporation v. A. H Basma & Sons (Liberia) Inc.*, 32 LLR 100 (1984), decided May 11, 1984. A default judgment in the *Basma* case resulted when both the defendant, Basma & Sons (Liberia) Inc., and their legal counsel, refused to accept the notice of assignment for the trial of the case. This Court held that under such circumstances, there was no need for the trial court to designate a lawyer for the absent party.

The relevant statute on the appointing of a counselor lawyer for and on behalf of an absent lawyer provides:

"An appeal shall be taken at the time of rendition of the judgment by oral announcement in open court. Such announcement may be made by the party if he represents himself or by the attorney representing him, or, if such attorney is not present, by a deputy appointed by the court for this purpose." Civil Procedure Law, Rev. Code 1: 51.6. Interestingly, the plaintiffs-in-error in the *Basma* case did not cite this important section of the Code. The court also made no reference to it. Incidentally, while Counsellor Flomo cited some fourteen authorities in support of his case, section 51.6 was not among them. However, be that as it may, until this opinion of the Court is overruled, it stands as the law.

With respect to the other issue as to whether, given the facts and circumstances in the case at bar, error will lie, the codefendant-in-error Bank argued strenuously that error will not lie because the act of counsel for plaintiffs in error in taxing and signing the bill of costs, issued and served on him by the trial court, was an admission on his part that the final judgment rendered against his client was valid and enforceable.

During the argument before us, the learned counsel for the plaintiffs-in-error contended that because the herein mentioned bill of costs was presented to him while he was out of town, and "he did not want his client to be embarrassed", he signed it. According to him, the mere signing of the bill of costs did not adversely affect the rights of the plaintiffs-in-error. Of course, counsel for the Bank argued that since the taxing and signing of the bill of costs by counsel for the plaintiffs-in-error was done without reservation, the trial judge committed no traversable error in attempting to enforce her judgment.

While it is the mandate of the law that a lawyer be deputized for the purpose of taking the ruling for the absent party, which the co-defendant-in-error judge failed to do in the instant case, this Court says that even if the plaintiffs-in-error had been denied their day in court by the trial judge, which we say they were not, this act was subsequently cured by the taxing and signing of the bill of costs by the counsel of the plaintiffs-in-error. The excuse given by counsel for plaintiffs in error to the effect that he signed the bill of costs because he was out of the City of Monrovia when it was presented to him is untenable; therefore, the petition for a writ of error must fall.

In *Cole v. Industrial Building Contractors*, 17 LLR 476 (1966), text at 485, this Court held that error will lie in favour of a person . . . who has failed for good reasons to take an appeal from the judgment, decree or decision of a trial court. *See also* Civil Procedure Law, Rev. Code I: 16.24. Although under our law no one can be personally bound until he has had his day in court, under the facts and circumstances of this case, the plaintiffs-in-error have not, in our opinion, established grounds sufficient to entitle them to the issuance of a writ of error, the function of which is to review, scrutinize and correct any error of law committed in the proceedings and during the trial of a cause, Although it was the learned counsel for the plaintiffs-in-error who, due to lashes, failed to appear when duly cited to protect the interest of his clients, during his argument before this Bench, he advanced the incredible argument that his clients were denied their day in court.

The error statute provides that as a prerequisite for the issuance of the writ of error, the plaintiff in error must state that his application has not been made for the mere purpose of delay or harassment. Civil Procedure Law, Rev. Code 1: 16.24(a). In our opinion, this petition is void of the kind of merits which would warrant our granting of the writ.

In the case *Nigerian Ports Authority v. Brathwaite, et al.*, 26 LLR 338 (1977), this Court stated: "Petitioner for a writ of error must always be able to show that due to no fault or neglect on his part, his absence from court at the time of rendition of judgment against him was unavoidable." It is abundantly clear that the plaintiffs- in-error in these proceedings are not entitled to the benefit of the writ under the test of the *Nigerian Ports Authority case*. *See also Nelson et. al. v. Dennis et. al.*, 28 LLR 135 (1979).

In view of the foregoing, we have no choice but to deny the petition of plaintiffs-in-error and affirm the judgment of the trial court and the Clerk of this Court is hereby ordered to send a mandate to the court below, ordering it to resume jurisdiction and enforce its judgment. Costs ruled against plaintiffs in error. And it is so ordered.

Petition denied.