

FODAY KAMARA BUTCHERY, represented by its Proprietor, FODAY KAMARA, Petitioner/Appellee, v. **HIS HONOUR FRANCIS N. PUPO, Sr.**, Judge, Debt Court, Montserrado County, **WILLIAM A. SLOCUM**, Sheriff, Debt Court, Montserrado County, and **THE LIBERIA BANK for DEVELOPMENT AND INVESTMENT (LBDI)**, by and thru its President, DAVID K. VINTON, Respondents/ Appellants.

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

Heard: April 3, 1989. Decided: July 14, 1989.

1. Real property which is mortgaged shall not be sold pursuant to an execution issued upon a judgment recovered for all or part of the mortgage debt... The mortgaged realty can only be reached by foreclosure proceeding.
2. Where the debt is evidenced by both a promissory note and the mortgage agreement, the two instruments being separate agreements in law, the mortgagee may elect to recover the debt by suing on the promissory note in an action of debt; but the judgment obtained therefrom cannot be satisfied by execution against the mortgaged property.
3. At an execution sale, the sheriff is required to file a notice of that sale in the office of the clerk of the probate court of that circuit and placard same in conspicuous places for the benefit of the public, including service upon the judgment debtor.
4. Legal technicalities should be avoided in judicial proceedings, if possible; but the courts cannot ignore in a case applicable requirements made mandatory by statute and precedent.
5. An execution shall specify the date of the judgment, the court in which it was entered, the amount of the judgment, and the amount due thereon.
6. A writ of prohibition not only prevents whatever remains to be done by the court against which the writ is directed, but gives complete relief by undoing what has been illegally or erroneously done.

In an action of debt by attachment, the Debt Court for Montserrado County, on application of the plaintiff entered judgment by default against the defendant, permitted the plaintiff to present its evidence, and rendered final judgment against the defendant based on the said evidence. Subsequently, a writ of execution was issued, commanding the seizure and sale of the lands, goods and chattels of Foday Kamara Butchery until the sum of \$22,395.33 was realized; and that if said sum could not be realized, or if the sheriff could not find any goods, lands and chattels to be seized and sold, he should have the body of Foday Kamara arrested and brought before the court to be dealt with according to law. Prior to the service of the writ of execution, the defendant filed a motion to vacate the said writ. He later withdrew the motion, and instead filed a motion for relief from judgment, alleging that at the time of the

issuance of the writ of execution on June 20, 1984, the total amount owed the plaintiff in the court below was \$7,108.33, and that the court inadvertently issued the writ in the amount of \$22,395.33 without considering earlier payments made to the bank.

While the said motion was pending, the defendant's properties, both real and personal, were auctioned at a public sale on August 2, 1984 by the sheriff of the Debt Court for Montserrado County. The sale was allegedly done contrary to law.

The defendant in the court below, now petitioner/appellee applied to the Justice in Chambers and obtained a writ of prohibition against the co-respondent judge of the debt court to restrain him from proceeding further with the said execution. The petitioner applied for the writ of prohibition on the grounds that there was no publication of notice for the sale in the newspapers; that the auctioned property was mortgaged property, which the law forbids from sale by execution; that contrary to the provisions of the law there was no filing of the notice of execution with the clerk of the probate court; that the writ of execution itself was outside the requirements of the law, in that it failed to specify the date of the judgment, the amount involved in the judgment, a description of the mortgaged property, and it contained no caution against its sale; that only half the auctioned price of \$21,100.00 was paid, contrary to law; and finally, that the co-respondent judge, being without legal authority to issue a writ of execution for the sale of mortgaged real property, the sheriff consequently had no title and/or possession to sell the property involved to anyone.

The petition having been granted and the peremptory writ of prohibition issued, the respondents appealed there-from to the Supreme Court for a final determination. Following arguments *pro et con*, the Court affirmed the ruling of the Chambers Justice and ruled appellants to costs.

George E. Henries and Elijah Garnet for the petitioner/ appellee. *Joseph Williamson and Joseph Findley* for respondents/ appellants.

MR. CHIEF JUSTICE GBALAZEH delivered the opinion of the Court.

On June 6, 1985, the Justice in Chambers ruled granting the peremptory writ of prohibition to the petitioner/appellee and ordered the writ issued: "restraining the respondent judge from further going into the case out of which this proceeding had grown; and the issuance and service of the writ of execution and the sale of the property, subject of this proceeding, are hereby declared a legal nullity and invalid. The Clerk of this Court should send a mandate to the lower court ordering the presiding judge to execute this mandate and repossess petitioner of his property. Costs against respondents."

It is from this ruling in Chambers that the respondents appealed to the full bench for a final review. We have accordingly reviewed the records and heard arguments on both sides.

We gather that respondents/appellants filed an action of debt by attachment against the petitioner/appellee in the Debt Court for Montserrado County. Judgment by default was rendered against appellee on May 15, 1984, in the amount of \$19,924.42 (Nineteen Thousand Nine Hundred Twenty Four Dollars and Forty Two Cents). A writ of execution was prayed for and issued against the appellee which reads as follows:

"REPUBLIC OF LIBERIA, TO WILLIAM A. SLOCUM, ESQSHERIFF, DEBT COURT FOR MONTSERRADO COUNTY, GREETINGS:

YOU ARE HEREBY COMMANDED to seize and expose for sale the lands, goods and chattels of Foday Kamara Butchery, defendant, and if the sum realized therefrom be not sufficient then seize his real property until you shall have raised the sum of \$22,395.33, and if you cannot find any lands, goods and chattels of the said defendant, you are hereby commanded to arrest his body and bring him/her before any judge of competent jurisdiction to be dealt with according to the law unless he will pay the said sum of money or show property to seize and sell for the same. And upon receiving from said sale, or otherwise, said sum of money, you are further commanded to pay over to the above named plaintiff the sum of money necessary to satisfy the judgment therein; and reserve unto yourself the said cost and expenses and you will make known to this Honorable Court at the next term thereof to be held on the 12th day of June, A. D. 1984, your doings and proceedings under this Court's orders. AND HAVE YOU THERE THIS WRIT.

GIVEN under my hand and Seal of this Honorable Court, this 1st day of June, A. D. 1984.

Sgd. Peter T. Nma

CLERK, DEBT COURT

FOR MONTSERRADO COUNTY"

The appellee then filed a motion to vacate the said writ of execution, but he later withdrew the said motion to vacate, and instead filed another motion for relief from judgment alleging that at the time of the issuance of the writ of execution on June 20, 1984, the total amount then due the co-respondent bank was \$7,108.53, and that the court inadvertently issued the writ in the amount of \$22,395.33 without considering earlier payments to the bank.

Notwithstanding the pendency of the said motion for relief from judgment, petitioner/appellee's property, both real and personal, were auctioned at a public sale by the Sheriff of the Debt Court for Montserrado County on August 2, 1984, allegedly contrary to law. Hence, appellee petitioned the Justice in Chambers for a writ of prohibition against the co-respondent/ appellant Debt Court Judge to restrain him from proceeding further with the said execution. The Chambers Justice granted the writ and ruled as quoted herein *supra*.

Petitioner/appellee had sought the writ of prohibition on the grounds that there was no publication of a notice for the sale in the newspapers; that the auctioned property was a mortgaged property which the law forbids from sale by execution; that contrary to the provisions of the law there was no filing of the notice of execution with the clerk of the probate court; the writ of execution was itself outside the requirements of the statutes in that it failed to specify the date of the judgment, the amount involved in the judgment, a description of the mortgaged property and it contained no caution against its sale; that only half the auction price of \$20,100.00 was paid contrary to law; and finally, that the co-appellant judge being without legal authority to issue a writ of execution for the sale of mortgaged real property, the sheriff consequently had no title and/or possession to sell the property involved herein to anyone.

On the other hand, respondents/appellants contended that the writ of prohibition was applied for about six (6) days after the issuance of the sheriffs deed for the property in question; that as such, the petition was belated and ineffectual, and should therefore be denied; that it was without the office of the writ of prohibition to seek to correct alleged irregularities since the writ is only intended to prevent acts and therefore not appropriate in this case, the act of execution having already been completed *in toto*. They charged that the petitioner was guilty of waiver, since the issue of "mortgaged property" was never raised in the trial court, either in the answer to the action of debt or in the motion to vacate the execution, and that as the judge never passed on the issue in the lower court, the Justice in Chambers also could not pass on same without himself raising an issue that was not a part of the records certified to this Court. They maintained that the trial judge had observed all the known rules and that petitioner had failed to say which rules or statutory requirements the judge had ignored in acting as he did. For these additional reasons, they said, the writ of prohibition is ineffectual in this case, especially since prohibition cannot lie where the lower court had neither exceeded its jurisdiction nor proceeded by wrong rules.

Finally, respondents/appellants contended that the failure of the sheriff to have filed a copy of the notice of execution or sale with the clerk of the probate court or any other person for that matter is no justification for invalidating the sale and thereby divesting an innocent *bona fide* purchaser for value, who did not have prior notice of the defects in the sale. Respondents/appellants therefore prayed this Court to reverse the ruling of the Justice in Chambers and instruct that the sale and other acts of the lower court not be disturbed as same were in harmony with the law.

From all the foregoing facts and circumstances of this appeal it is our conviction that the following issues need our determination:

1. Whether or not the mortgage of real property for the payment of debt is an alternative to foreclosure or can the mortgagee sue in an action of debt and have the mortgaged property sold at a public auction in satisfaction of the judgment?
2. Whether or not a sheriff at the sale of real property from an execution is mandatorily required to file a notice of execution with the clerk of the probate court?
3. Whether or not the writ of execution issued by the trial court conformed to the requirements of statute in this jurisdiction?
4. Whether or not the trial judge proceeded contrary to the statute and known rules?
5. Whether or not the trial judge had jurisdiction to issue the writ of execution against the mortgaged property, and therefore, the sheriff had title or possession thereby and hence, the sale of the real property to Edith Dennis, Corespondent, was in fact valid and legal in law?
6. Whether or not prohibition can undo a wrong?

Starting with the issue of whether or not the auction sale of the real property in this case, based on a writ of execution, violated the statute on the sale of mortgaged property in Liberia, we quote the relevant statute on the sale of mortgaged property in an execution:

"2. Real property which is mortgaged shall not be sold pursuant to an execution issued upon a judgment recovered for all or part of the mortgage debt." Civil Procedure Law, Rev. Code 1: 44.43.

The foregoing statute clarifies that as long as a real property has been mortgaged, it shall not be sold to satisfy an execution upon a judgment for all or a part of the mortgage debt. The statute is so explicit that it provides us the answer without further explanations. The contention of appellants is that they had the option to proceed against the mortgagor (appellee) either in an action of debt or in foreclosure proceedings. But the statute cited above is unambiguous and gives no such option to a mortgagee. The appellants have cited *Tucker v. Brownell*, 24 LLR 333 (1975), in support of their contention that the mortgagee for debt has an alternative cause of action apart from foreclosure in order to recover the debt obtained under a mortgage agreement. Indeed, this Court held in that case that mortgages executed to cover payment of a debt do not of themselves preclude the creditors from disregarding the mortgage contract and suing to recover the debt only. Notwithstanding, that case is distinguished from the case under review for several reasons. In the case of *Tucker v. Brownell*, this Court noted that foreclosure proceedings were first pursued and later discontinued, and that thereafter an action of debt was pursued.

It was also observed in that case that there was a promissory note to pay the debt, but while the note referred to the mortgage there was nothing else in the record of the case on the said mortgage agreement. This Court therefore held that in such cases where a note subsists

between the mortgagor and the mortgagee, the latter can ignore the mortgage agreement and sue on the bare note instead of pursuing foreclosure proceeding. In its rationale this Court emphasized that the note evidenced the indebtedness, while the mortgage agreement served as security for payment. The mortgagee, it said, could therefore sue on the note or foreclose the mortgage since the two formed two separate agreements in law.

We are entirely in agreement with the holding in *Tucker v. Bronnell*, but we wish to clarify herein that where the mortgagee decides to sue on the note in an action of debt and obtains judgment and a writ of execution is issued against the mortgagor, he cannot reach the mortgaged realty in order to fulfill the requirements of the writ of execution. The mortgaged realty can only be reached by foreclosure proceeding. In the case under review, while mortgagee had right to an option to sue in an action of debt, the writ of execution could not thereafter reach the mortgaged realty in order to satisfy any portion of the judgment in the action of debt to recover the mortgaged debt. Civil Procedure Law, Rev. Code 1: 44.43(2).

The next issue is whether or not the sheriff at an execution sale is mandatorily required to file a notice of that sale in the office of the clerk of the probate court of that circuit and placard same in prominent places for the benefit of the public, including service upon the judgment debtor. The statute provides that the sheriff shall post a notice of the execution on the property and also on the door of the courthouse of the circuit where the property is located and in two other conspicuous places in the circuit. He shall also file a notice of the execution with reference to such real property in the office of the clerk of the probate court of the county where the property is located. The filing of such notice shall have the same effect as the filing of a notice of pendency." Civil Procedure Law, Rev. Code 1:44.42.

We hold that the foregoing regulations of the statute on the levying upon real property was followed by the sheriff in this case and we consider same a serious error since it is a mandatory requirement of the statute which cannot be handled otherwise. The appellants referred to those provisions as mere technicalities which should be wholly ignored. We do not, however, support this argument of appellants because this Court has held in the past that while "legal technicalities should be avoided in judicial proceedings, if possible, ... the courts cannot ignore in a case applicable requirements made mandatory by statute and precedent." (Our emphasis). See *Holmen et al. v. Montgomery*, 23 LLR 19 (1974). We are still in agreement with the holding in the Holmes case, and we hold that the sheriff seriously violated the statute.

We next consider whether or not the writ of execution in this case conformed to the statutory requirements for the form of a writ of execution in this jurisdiction. The statute is plain on this matter and provide that "[a]n execution shall specify the date of the judgment, the court in which it was entered, the amount of the judgment, and the amount due thereon. Where one or more persons against whom the judgment was recovered are not judgment

debtors, or are deceased, the execution shall also specify each judgment debtor not deceased and direct that only property, in which such judgment debtor has an interest, or debts owed to him, be levied upon or sold thereunder. Where the judgment was recovered for all or part of a mortgage debt, the execution shall also describe the mortgaged property, specify the book and page where the mortgage is recorded, and direct that no part of the mortgaged property be levied upon or sold thereunder." (Emphasis ours). Civil Procedure Law, Rev. Code 1: 44.39(1).

The writ of execution affecting this matter has been fully quoted *supra*, and it clearly shows that the requirements of the statute was not met. Moreover, the sale was not going to be carried out even if the writ had conformed to the requirements of the statute for execution or levy upon mortgaged property, since the writ of execution had failed to describe the property as the statute requires or to state the amount of the judgment and the amount due thereon. More seriously, it failed to describe the mortgaged property and to give the book and page in which the mortgage deed was recorded. Above all, however, it failed to direct, as the statute requires, that no part of the mortgaged property be levied upon or sold under the execution. Hence, the writ of execution was a nullity and therefore void.

We will also see whether or not the trial judge had proceeded contrary to the statute and the known rules. This is a simple issue since the irregularities outlined above were all perpetrated under the eyes of the trial judge, and they obviously show that the judge completely ignored the provisions of the law on the disposition and sale of mortgaged property. The trial judge was entirely in error and had proceeded contrary to the statute on the sale of mortgaged property. Indeed, we are of the opinion that the acts of the judge caused the errors of the sheriff.

In resolving the fifth issue, we are of the further opinion that the trial judge was without jurisdiction when he ordered the sheriff to levy upon the mortgaged property and to sell it by public auction under execution, instead of conducting foreclosure proceedings as the law requires. Hence, the sheriff was without the necessary legal authority of possession and/or title to the mortgaged property in order to offer the mortgaged property for a public sale as in other ordinary cases. The sheriff's sale therefore failed to convey legal title to the real property and likewise the purchaser acquired none at all.

Finally, we conclude this opinion by considering whether or not the writ of prohibition was the proper remedy available to the petitioner/appellee in this matter. The respondents/appellants contended that even though irregularities may have been committed by the trial court, the proceedings there had been completed and nothing remained to be done. Since, according to them, the writ of prohibition merely prevents acts intended to be done, it is ineffective as a remedy where nothing remains to be done in the matter. Contrary to this contention, this Court has ample authorities on the writ can be issued. For instance,

in *Fazḡab Brothers v. Collins and Central Industries, Ltd.*, 10 LLR 261 (1950), we held that "a writ of prohibition not only prevents whatever remains to be done by the court against which the writ is directed, but gives complete relief by undoing what has been done."

This Court also held as recently as 1974 that the writ of prohibition is designed to prevent what remains to be done as well as to undo what has illegally been done. *Ayad v. Dennis et al.*, 23 LLR 165 (1974). Prohibition will lie to prevent execution of a judicial order after a final determination in the absence or excess of jurisdiction. *Holt et al. v. Nimely*, 17 LLR 128 (1965).

In view of the above, the ruling of the Chambers Justice is hereby affirmed and the Clerk of this Court is ordered to send a mandate to the court below to that effect. Costs ruled against the respondents/appellants. And it is hereby so ordered.

Petition granted.