IBM, by and thru its General Manager, Plaintiff-In-Error**,** *v.* **HIS HONOUR FREDERICK K. TULAY,** Resident Circuit Judge, presiding over the People's Civil Law Court for the Sixth Judicia1 Circuit, Montserrado County, and SEKU SIRLEAF, Defendants-In-Error.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE DENYING A PETITION FOR A WRIT OF ERROR.

Heard: May 13, 1985. Decided: June 20, 1985.

1. Although the sheriff's returns showing service of precepts is presumed to be correct, the presumption is rebuttable and not conclusive.
2. A sheriff's returns, when not rebutted, becomes conclusive as to the service of the precepts specified therein.
3. The Supreme Court will take cognizance of matters only upon certified copies of the proceedings in the lower court.
4. The Supreme Court will give due credit to the returns of a ministerial officer of a court in the execution of a writ of possession or a notice of assignment where shown by the certified records and not shown by such records to have been refuted.
5. Where the certified records of the trial court show an act to have been done, the Supreme Court will always, and in such cases, be governed by the records, regardless of any allegations or statements to the contrary on appeal, no matter how positive or by whom made.

6. The Supreme Court has no authority to order an investigation into an alleged act done by a ministerial officer in a lower court which was not made a part of the certified records to the appellate court, since the Supreme Court can only take cognizance of matters appearing in the records made in the lower court and certified to the Supreme Court.
7. The failure of a counsel for a party to properly file and argue alleged unbecoming acts of a ministerial officer in the lower court deprives the Supreme Court from taking into consideration for the first time the acts complained of.
8. Issues not raised in the trial court, and not presented in a proper and timely manner on appeal, will not be determined by the Supreme Court.
9. By "day in court" is meant that no person shall be personally bound until he has been duly cited to appear, and has been afforded an opportunity to be heard.
10. Judgment without citation and an opportunity to be heard is wanting in all the attributes of a judicial determination; it is a judicial usurpation and oppression, and can therefore never be upheld in a forum which requires that justice be administered justly.
11. Where an appeal is duly announced by a court appointed counsel, a failure by the losing party to prosecute the appeal without any reason whatsoever, deprives the party of the benefit of assignment of error.
12. Error is a mistaken judgment or incorrect belief as to the existence or effect of matters of fact, and such a mistaken or false conception or application of the law to the facts of a cause will furnish ground for review of the proceedings upon a writ of error.
13. The appointment of a lawyer by the trial court to take the judgment of an absent party and the announcement of an appeal from such judgment cannot warrant an assignment of error, especially where the acts of the judge and the appointed attorney are not

repugnant to law or prejudicial to the party assigning the error.

14. The failure of a party to perfect an appeal announced on his behalf by a court-appointed lawyer cannot be treated as a denial of the party's day in court.

Plaintiff-in-error filed a petition before the Justice in Chambers, complaining that based upon false returns made by the sheriff of the lower court, to the effect that counsel for plaintiff-in-error had refused to sign the notice of assignment for trial of an action brought against it in the lower court, the court had, on application of counsel for the defendants-in-error, conducted the trial of the case in the absence of the plaintiffs-in-error and its counsel. A verdict was returned in favor of co-defendant-in-error, Seku Sirleaf, which was confirmed by the trial court judge in his final judgment. However, prior to entering final judgment, the judge appointed counsel to take the judgment on behalf of the plaintiff-in-error. The appointed counsel noted exceptions to the judgment and announced an appeal to the Supreme Court for and on behalf of the plaintiff-in-error. He thereafter delivered the court document to counsel for plaintiff-in-error.

In his petition, the plaintiff-in-error denied that its counsel ever refused to sign the notice of assignment, and it accused the bailiff of falsehood in the returns. It therefore requested an investigation by the Justice in Chambers.

The Justice in Chambers, after hearing the arguments on the petition and returns, denied the petition. It is from this denial that the plaintiff-in-error has appealed to the Bench *en banc*.

The Supreme Court, agreeing with the reasons given by the Chambers Justice for denial of the petition, affirmed the said ruling. The Court agreed with the plaintiff-in-error's contention that while the returns of the sheriff is generally considered as correct, it is subject to rebuttal. It observed, however, that there was no showing in the records certified to it

from the trial court of any challenge by the plaintiff-in-error to the sheriff's returns. The Court noted that because it was confined to the records certified to it, and the records were devoid of any challenge to the sheriff's returns, it had to accept as true and correct the said returns of the sheriff. It held that by not challenging in the trial court the returns of the sheriff, the plaintiff-in-error had waived any benefits available to it through a writ of error.

In addition, the Court opined that the action by the trial judge in appointing an attorney to take the judgment of the court for the plaintiff-in-error, and the noting of exceptions and announcement of appeal by the appointed counsel were not injurious or prejudicial to the plaintiff-in-error. As such, it said, there was no basis for an assignment of error. The failure by the plaintiff-in-error, it said, to perfect its appeal could not therefore be deemed as a denial of the plaintiff-in-error's day in court. The Court therefore *affirmed* the ruling of the Justice in Chambers.

Julia Gibson of the Gibson & Gibson Law Firm appeared for the plaintiff/appellant. *S. Edward Carlor* appeared for the respondents/appellees.

MR. JUSTICE JANGABA delivered the opinion of the Court.

These error proceedings grew out of an action of damages instituted by Seku Sirleaf against IBM, by and through its general manager, and are now before us on an appeal from the Chambers of our distinguished colleague, Mr Justice Boima K. Morris.

The history of the case reveals that the defendant-in-error filed an action of damages against plaintiff-in-error in the Civil Law Court for the Sixth Judicial Circuit during its December Term, 1983. Trial of the case was had and the jury returned a verdict in favor of

the co-defendant-in-error, awarding him the sum of $9,000.00, the same being the total of $6,000.00 for one year's rent and $3,900.00 as general damages. It is against the enforcement of this judgment that the plaintiff-in-error herein, IBM, by and through its general manager, filed a petition for a writ of error in the Chambers of Mr. Justice Morris. The Chambers Justice, after entertaining arguments on the petition and the returns, denied the petition. It is from this ruling of the Justice in Chambers that the plaintiff-in-error appealed to the full bench.

In seeking redress from the verdict of the jury in the trial court, the plaintiff-in-error filed a nine-count application for a writ of error. However, only the most important counts, being 2, 3 and 6, are deem important to warrant our consideration. We herewith quote the said counts for the benefit of this opinion:

> "2. Your plaintiff-in-error says that during the December Term, A. D. 1983 of the People's Civil Law Court, a notice of assignment was issued on the 13th day of January 1984, assigning the case for jury trial on the 16th day of January, 1984 at the hour of 2:00 p.m. Said notice of assignment was handed to Bailiff Henry Nelson to be served on counsels for both parties. The said bailiff, Hen-ry Nelson, served the notice if assignment on plaintiff/ defendant-in-error's counsel and made false returns and misrepresented information to the sheriff to the effect that he had served the notice of assignment on the counsel for the defendant/plaintiff-in-error but the said counsel had refused to accent and receive same. This returns of the sheriff is false and misleading because Counsellor Julia F. Gibson of the Gibson & Gibson Law Firm never saw Bailiff Henry Nelson, nor did the secretary of the office, Mr. Jackson Moore, ever see Bailiff Henry Nelson in the office with the said assignment. It is notoriously known that Bailiff Philip Nelson and Henry Nelson usually makes false returns to precepts and

processes issued out of court of records and delivered to them to be served. In fact, in the Gibson & Gibson Law Firm, there were at the time two counsellors-at-law, Counsellor Julia F. Gibson and Counselor Sarah J. Gibson, but recourse to the returns show that Bailiff Henry Nelson did not particularly state on which one of these lawyers he served the notice of assignment and who refused to accept and sign for same. Plaintiff-in-error requests court to take judicial notice of the assignment and returns of the sheriff, based upon the information given him by Bailiff Henry Nelson. This conclusively proves that the returns is false and mis-leading to all intents and purposes. Copy of the returns of the sheriff is hereto attached and marked exhibit "P-2". That all other assignments in said case were signed for and never refused by said Law Firm. Recourse to the records will prove this.

3. Your plaintiff-in-error says that in view of the false and misleading returns made by the sheriff on the 16th day of January 1984, when the case was called, counsel for defendant-in-error relying on this false and misleading returns of the sheriff, applied to the court to invoke Rule Seven (7) of the rules of court, which was granted to the effect that defendant/plaintiff-in-error had abandoned its defense, which caused the court to proceed with the hear-ing of the case. Your plaintiff-in-error challenges, to all intents and purposes, the returns of the sheriff, which necessitated the request and the granting of the application of defendants-in-error's counsel. Copy of the said proceedings are hereto attached and marked exhibit "P-2", dated January 16th, 1981, 23rd day's session, sheet six (6) .

6. Your plaintiff-in-error says that it was not given an opportunity to except to the final judgment and announce an appeal to this Court because it was not represented in person, by counsel or both and was also deprived of excepting to the said final

judgment and announcing an appeal, as evidenced by the introductory paragraph of the final judgment. Your plaintiff-in-error requests this Court to take special judicial notice of the introductory paragraph of the final judgment."

In brief, the counts allege that (1) the assignment was never served on the plaintiff-in-error's counsel by bailiff Henry Nelson; (2) that the plaintiff-in-error was never given an opportunity to except to the judgment; and (3) that the defendant, now plaintiff-in-error, never had its day in court. Therefore, according to plaintiff-in-error, this Honourable Court should order an investigation. These are the principal reasons, based upon which plaintiff-in-error's counsel submitted the application for a writ of error and prayed to have the final judgment of the lower court set aside and the case redocketed for a new trial.

The defendants-in-error have opposed the granting of the peremptory writ on the following grounds:

1. That the Gibson and Gibson Law Firm is a corporation with several lawyers and the alleged absence of a single member is no ground to invalidate or postpone a hearing.

2. That the alleged falsity of the returns to the notice of assignment was original in nature, whereas the Supreme Court has only appellate jurisdiction over such matters which should have been raised and investigated in the court below.

3. That our law does provide for the appointment of a lawyer by the court to take judgments for absent parties. Therefore, to appoint Counsellor Lewis K. Free to take the judgment was legal and orderly; hence no error was committed.

We are in complete agreement with Mr. Justice Morris' ruling and have therefore incorporated relevant portions thereof to form a part of this opinion:

"In the case at bar, the plaintiff-in-error has not taken any step that would warrant this Court ordering the institution of an investigation into the alleged falsity of the sheriff's

returns. Although the sheriff's return showing service is presumed to be correct, the presumption is rebuttable and not conclusive; however, when not rebutted, as in this case, the service becomes conclusive. In view of the record certified to us, this Court must regard the notice of assignment as having been issued and served, for this Court has consistently held that it will take cognizance of matters only upon certified copies of the proceedings in the lower court. The Supreme Court will give due credit to the returns of a ministerial officer of court in the execution of a writ of possession, and in this case, a notice of assignment." *Dwalubor v. Good-Wesley,* 21 LLR 43, 45 (1972). In *Donzoe v. Thorpe,* 27 LLR 166, 172 (1978), the Supreme Court held:

> "The Supreme Court takes cognizance of matters apparent in the record made in the lower court and certified by the clerk. *Hulsmann v. Johnson,* 2 LLR 20, 21 (1909). There is a long line of cases in which this Court has restated this position; unless the record in the trial court shows by the certificate of the clerk that a certain act has been done, the Supreme Court cannot, in its review of the case, recognize the said act to have been done. On the other hand where the trial court's certified record shows the act to have been done, the court will always and in every such case be governed by the record, regardless of any allegations or statements to the contrary, no matter how positive or by whom made."

This Court has no authority to order an investigation into an alleged act of a ministerial officer which was not made a part of the certified records before us, as this Court can only take cognizance of matters appearing in the record made in the lower court and certified to it.

The failure on the part of the counsel for plaintiff-in-error to properly file and argue the alleged unbecoming act of a ministerial officer to the lower court, deprives the Court from

taking into consideration for the first time the act complained of.

This Court has persistently held that issues not raised in the court below and not presented in a proper and timely manner on appeal, will not be determined by the Supreme Court. *Flood v. Alpha,* 15 LLR 331 (1963).

The records before us reveal that two days after the return of the jury's verdict and two days before the rendition of final judgment, Counsellor Julia F. Gibson wrote a letter, dated January 18, 1984, to the judge asking the court to continue all cases represented by the Gibson & Gibson Law Firm until her return from the United States of America where she was going due to the sudden death of her uncle.

The absence of the plaintiff-in-error and its counsel on the day the judgment was rendered and the fact that the court appointed a lawyer to take the judgment for the plaintiff-in-error to register exceptions and to announce an appeal on their behalf, are aspects of the proceedings in which counsel for the plaintiff-in-error strongly feels showed that the court extended special aid to the defendants-in-error. Were these acts by the court and the appointed lawyer injurious to or a denial of the plaintiff-in-error's day in court, and therefore a basis for the assignment of error? A day in court is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be up held where justice is administered justly." BALLENTINE'S LAW DICTIONARY 329; *Mulba v. Dennis,* 22 LLR 46, 49-50 (1973).

In keeping with the foregoing, we hold that plaintiff-in-error's argument that she was denied her day in court cannot be maintained. According to the records in this case, an appeal was duly announced by the court appointed counsel, in keeping with Rev. Code 1 :51.6, and who took the judgment for the defendant below. The failure on the part of the plaintiff-in-error to prosecute that appeal without any reason whatsoever, cannot gain the assignment of error. Further, as to whether the court committed any error in its treatment of this act on the part of the plaintiff-in error, our answer is in the negative. Error is defined as "A mistaken judgment or incorrect belief as to the existence or effect of matters of fact, or a false or mistaken conception or application of the law; such a mistaken or false conception or application of the law to the facts of a cause as will furnish ground for a review of the proceedings upon a writ of error. A mistake of law, or false or irregular application of it, such as vitiates the proceedings and warrants the reversal of the judgment." BLACK'S LAW DICTIONARY 487 (5th ed.). The application of a rule that is provided by law, when such a rule is activated by a situation, cannot be construed as error in view of the legal definition supra. The appointment of a lawyer by the court to take the judgment of an absent party and the announcement of appeal from such judgment could not warrant the assignment of error, especially so when all of such acts on part of both the judge and lawyer are not repugnant to the law or prejudicial to the party assigning the error.

It is our considered opinion, therefore, that the plaintiff-in-errors counsel, having failed to perfect the appeal announced by the court appointed lawyer such failure cannot be treated as a denial of its day in court.

The ruling of our distinguished colleague, Mr. Justice Boi-ma K. Morris, made in Chambers, is therefore affirmed with costs against plaintiff-in-error. And it is hereby so ordered.

Petition denied; Chambers' Justice Ruling affirmed.