THERESA LEIGH-SHERMAN, Plaintiff-in-Error, *v.* **HIS HONOR FRANCIS N. PUPO, SR.,** Debt Court Judge, Montserrado County, and **THE LIBERIAN BANK FOR DEVELOPMENT AND INVESTMENT**, by and thru its President and General Manager, Defendants-In-Error.

Heard: June 13, 1984. Decided: June 29, 1984.

1. "...Notice is not required when the claim is for a sum certain or for a sum which can, by computation, be made certain. If the plaintiff's claim is not for a sum certain or for a sum which can by computation be made certain, and if the defendant has appeared, or if more than one year has elapsed since the default, the defendant is entitled to at least five days' notice of the time and place of the application for judgment..."

2. Under our statute, a default judgment will not be granted where the plaintiff has failed to proceed within one year for the entry of judgment.

3. The use of the word 'may' makes the filing of a bond discretionary.

4. The payment of accrued costs is applicable only after the Justice has granted the application and ordered the issuance of the writ.

5. If the Chambers Justice does not order or otherwise insist that the plaintiff-in-error pays the accrued costs, the party should not suffer on account of the omission of the Chambers Justice.

6. It is the duty of the clerk of the trial court, who upon assessing and receiving the accrued costs, to notify and deliver the accrued costs to the defendant-in-error. Where the clerk fails to do so, his act as officer of court cannot prejudice any of the parties.

7. The Court will not dismiss an appeal if the negligence or tardiness complained of was a duty devolving upon the clerk of court and not the party against whom the motion was filed.

8. The only penalty provided for non-payment of accrued costs is to deny the issuance of the alternative writ.

9. If the alternative writ of error is issued, without requiring the plaintiff-in-error to pay the accrued costs, the Chambers Justice should not thereafter deny the petition. The Chambers Justice's failure to require the payment of accrued costs should not prejudice the plaintiff-in-error.

The co-defendant-in-error, Liberian Bank for Development and Investment (LBDI), instituted a debt action against the plaintiff-in-error. Plaintiff-in-error was summoned on December 12, 1979, but she did not appear. The case remained on the docket of the trial court, without any further action, until May 12, 1983, when a notice of assignment was issued for trial of the case on the 30th day of May 1983. The notice of assignment was served on a Mr. Johns who bears no relationship to the plaintiff-in-error.

When plaintiff-in-error did not appear for the trial, a default judgment was entered in favor of the co-defendant bank on May 30, 1983. Thereafter, a writ of execution was issued against the plaintiff-in-error, who then petitioned the Chambers Justice for the issuance of a writ of error, contending in substance that she did not have her day in court. The alternative writ of error was issued upon the order of the Chambers Justice who subsequently denied the petition and quashed the writ.

The Supreme Court reversed the ruling of the Justice in Chambers, ordered the trial court to set aside its judgment, and conduct a new trial.

George Henries appeared for plaintiff-in-error. *Joseph Williamson* appeared for defendants-in-error.

MR. JUSTICE SMITH delivered the opinion of the Court.

As we have gathered from the record and the argument of counsel for the parties, a debt action was instituted against the plaintiff-in-error in the Debt Court for Montserrado County by the co-defendant-in-error, the Liberian Bank for Development & Investment (LBDI). The plaintiff-in-error was summoned on December 12, 1979 but she did not appear nor file

an answer. The case remained on the docket of the court below, and there is no evidence of any further action taken by the co-defendant-in-error bank until May 12, 1983, that is to say, about three years five months after service of summons. On May 12, 1983, a notice of assignment was issued for trial of the case on the 30th day of May, 1983, and served on one Mr. Johns who bears no relationship whatsoever to the plaintiff-in-error. The defendant/ plaintiff-in-error was never served with the aforesaid notice of assignment as far as we can tell from the records.

When the case was called for trial on May 30, 1983, counsel for the plaintiff (LBDI) applied to the court to call the defendant (Theresa Leigh-Sherman) three times at the door. The defendant, not having answered at the call, a plea of not liable was entered in her favor and the plaintiff allowed establishing its side of the case. After producing evidence, a final judgment was entered in favor of the plaintiff. Thereafter, a writ of execution was issued against the defendant, who petitioned the Justice in Chambers of this Court for the issuance of a writ of error on the ground that she did not have her day in court.

Under our statute, a default judgment will not be granted where the plaintiff has failed to take proceeding within one year for the entry of judgment. Here is the statute on the point: "If a defendant has failed to appear, plead, or proceed to trial, or if the court orders a default for any other failure to proceed, the plaintiff may seek a default judgment against him". Civil Procedure Law, Rev. Code 1: 42.1.

"If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned upon its own motion or on application by the defendant or on plaintiff's application for entry of judgment, unless sufficient cause is shown why the complaint should not be dismissed. An application by defendant under this section does not constitute an appearance in the action". Civil Procedure Law, Rev. Code 1: 42.4.

". . . Notice is not required when the claim is for a sum certain or for a sum which can by computation be made certain. If the plaintiff's claim is not for a sum certain or for a sum which can by computation be made certain and if the defendant has appeared, or if more than one year has elapsed since the default, the defendant is entitled to at least five days' notice of the time and place of the application for judgment . . . " Civil Procedure Law, Rev.

We are of the opinion, therefore, that in the absence of the notice required by the statute quoted *supra*, the plaintiff-in-error in these proceedings did not have her day in court, and a writ of error will issue to correct the error.

The Justice in Chambers did not require the plaintiff-in-error to pay accrued costs before ordering the issuance of the alternative writ. The said writ having been issued was served and returned served. But before the 29th day of July, 1983, the day defendants-in-error were required to appear and file returns to the writ; plaintiff-in-error went to the clerk's office and paid the accrued costs on July 22, 1983.

Apparently, before the costs were paid by the plaintiff-in-error, the defendants-in-error had gone to the clerk's office on the said 22nd day of July, 1983, and obtained a certificate from the clerk to the effect that up to the issuance of the certificate the accrued costs had not been paid. On the 25th day of July, 1983, defendants-in-error filed their returns and prayed the Court to deny the writ which had already been issued, served and returned served, for non-payment of accrued costs. Plaintiff-in-error contended during the hearing that the accrued costs had been paid and, accordingly, presented the clerk's receipt therefor bearing the date July 22, 1983, to the Justice in Chambers.

The Justice in Chambers was not satisfied, therefore he conducted an investigation during which the clerk of the trial court, who was summoned before the Justice, acknowledged the fact that plaintiff-in-error did pay the costs, but it was paid after he had issued the certificate to the defendants-in-error on the same day.

In deciding the issue, the learned Justice in Chambers held that the accrued costs should have been paid prior to the issuance of the alternative writ because the payment of accrued costs is a precondition to the issuance of the writ. In view of this holding, the Chamber Justice denied the petition and quashed the alternative writ.

We hold that if plaintiff-in-error paid the accrued costs on the 22nd day of July, 1983, that is, before defendant-in-error made the attack on the 25th day of July, 1983 (three days before they filed their returns), there is no substantial harm done to the defendants-in-error to

justify the denial of the petition on the ground of non-payment of accrued costs.

In the case *Lotico Logging Company* v. *Stewart et. al.*, as reported in 23 LLR 393, 396-97 (1974), this Court held, in a similar situation that:

"It is our opinion that the use of the word 'may' makes the filing of a bond discretionary; that the payment of accrued costs is applicable only after the Justice has granted the application and ordered the issuance of the writ as provided in paragraph two of the section quoted. Moreover, if the plaintiff-in-error is not required to pay costs upon the issuance of the writ, the defendant-in-error loses nothing, since he will still be awarded costs, in accordance with paragraph four of this section, if the judgment is affirmed. Further-more, if the Justice does not insist upon this requirement being met, the party should not suffer for this omission".

Additionally, in our opinion, it was the duty of the clerk of the trial court, who upon assessing and receiving the accrued costs, to have notified and delivered same to the defendants-in-error; but where he failed to do so, his act as officer of the court cannot prejudice any of the parties. In the case *Perry et al.* v. *Knight et al.*, as reported in 5 LLR 276 (1936), this Court held that it "will not dismiss an appeal if the negligence or tardiness complained of was a duty devolving upon the clerk of court and not the party against whom the motion was filed."

The fact that the accrued costs were not paid prior to the filing of the petition for a writ of error in the clerk's office will not destroy the fact that the costs were paid three days before defendants-in-error filed their returns in which they attacked plaintiff-in-error for non-payment of accrued costs. The only penalty provided for non-payment of accrued costs is to deny the issuance of the alternative writ. The statute is plain on the point, that the writ should not issue unless the accrued cost is paid as a condition precedent. However, where the costs were not required by the Chambers Justice and he ordered the writ issued, it is logical to hold that the Justice had inadvertently omitted the requirement of the statute. Therefore, his act as a court officer will not prejudice the interest of any party. On the other hand, if the Chambers Justice is not given discretion by statute with respect to the requirement of accrued costs, but rather the statute makes it mandatory on him to require costs and he failed to do so before the writ was ordered issued, in our opinion, such failure

should not prejudice the plaintiff-in-error. It cannot be said of the Justice that he intended to deny the petition for which he decided not to require payment of accrued costs when he ordered the issuance of the writ.

In our opinion, the command of the statute with respect to the payment of accrued costs is directly placed on the Justice in Chambers to require the plaintiff-in-error to pay all accrued costs, or make sure that all accrued costs have been paid by the plaintiff in-error before ordering the issuance of the alternative writ. The Justice, in addition, may require the filing of a bond. All of these requirements the plaintiff-in-error must comply with, when required by the Justice, before the writ is issued.

We do agree that the payment of accrued costs by plaintiff-in-error is a condition precedent to the issuance of the alternative writ. But equally so, we hold that the alternative writ cannot be issued unless and until the plaintiff-in-error is required to pay, and he pays, the accrued costs. If the writ is ordered issued, as in the instant case, without requiring the plaintiff-in-error to comply with the law relative to payment of accrued costs, in our opinion, the Justice should not have denied the petition.

There are only four preconditions directly imposed on the plaintiff-in-error, without being required by the Justice to do so and his failure to comply therewith will subject his application to denial. Here is the statute:
"Application. A party against whom judgment has been taken, who has for good reason failed to make a 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 del

(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 counsellor of the Supreme Court, or of any attorney of the circuit court, if no counsellor resides in the jurisdiction where the trial was held, that in the opinion of such counsellor or attorney real errors are assigned". Civil Procedure Law, Rev. Code 1:16.24.

If the Legislature intended to directly place the command on the plaintiff-in-error to pay all accrued costs as a precondition to filing of the petition, subsection (e) would have been added to the statute quoted above to read that, the plaintiff-in-error shall pay all accrued costs as prerequisite to the filing of the petition.

Moreover, in this case, the Justice in Chambers investigated and found out that the costs were paid before the filing of the returns, as evidenced by the receipt issued by the clerk of the trial court on July 22, 1983. Therefore, we hold that the petition should not have been denied.

Another reason why we feel that great errors were committed by the trial court is the awarding of the amount of $17,828.28 sued for without taking into consideration the amount paid against the debt as contended in count four of the petition and not denied by the defendants-in-error.

It is our opinion that (1) the petition should have been granted and the trial judge commanded to set aside his judgment and hear the case anew, thus allowing the plaintiff-in-error, defendant in the court below, her day in court by serving her with a notice for the hearing, and; (2) had the petition been granted, the trial judge would have been directed, during the second trial, to take into consideration the amount already paid by the plaintiff-in-error, and give judgment only for the amount due. Therefore, for these and other reasons enumerated in this opinion, the ruling of the Justice in Chambers is hereby reversed with costs against the defendants-in-error. And it is hereby so ordered.

Petition granted.