

PROVIDENT TRANSPORT COMPANY, Plaintiff-In-Error, *v.* **HIS HONOUR
HALL W. BADIO**, Assigned Circuit Judge, Sixth Judicial Circuit, Montserrado County, and
JOSEPH P. KELLER, Defendants-In-Error.

PETITION FOR A WRIT OF ERROR TO THE CIRCUIT COURT FOR THE SIXTH
JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: November 30, 1995. Decided: January 26, 1996.

1. A party against whom a judgment has been taken, who for good cause failed to make a timely announcement of the taking of an appeal from such judgment, has the right to apply to the Supreme Court for leave for a review by a writ of error.
2. No service of a notice of assignment needs to be made on a party in default for failure to appear, except where new or additional claims are interposed.
3. Where a defendant fails to appear or file an answer, such defendant is not entitled to notice in the form of a notice of assignment for hearing of the case.
4. A day in court is the time appointed for one whose rights are called judicially in question, or who is likely to be affected by judicial action, to appear in court and be heard in his own behalf.
5. A litigant has "his day in court" when he has been duly cited to appear and has been afforded an opportunity to appear and be heard.
6. Where a defendant has appeared upon receipt of a summons and complaint, he is entitled to be served with every written notice which is required to be served upon parties in an action before the court.

Defendant- in- error instituted an action of damages for wrong in the Civil Law Court of the Sixth Judicial Circuit, Montserrado County. Plaintiff in error neither made a formal appearance nor filed an answer upon being served with the process together with the complaint. Without a prior notice of assignment being served on plaintiff in error, trial was conducted, at the end of which judgment by default was rendered in favor of defendant-in-error. It is from this judgment that plaintiff-in-error applied to the Supreme Court for a writ of error, alleging that he was denied his day in court.

The Supreme Court denied the petition and ordered the judgement enforced, holding among

other things, that where a defendant fails to appear or to file an answer to a process and complaint, such defendant is not entitled to notice in the form of a notice of assignment. The Court also overruled plaintiff-in-error's contention that he did not have his day in court, holding that where a defendant has been duly cited to appear and has been afforded the opportunity to be heard, but fails to appear, he has been accorded his day in court, and that a writ of error cannot lie.

J. D. Baryogar Junius, in association with *C. Aimesa Reeves*, appeared for plaintiff-in-error. *Parlee Kwekeh*, in association with *Moses K. Yangbe*, appeared for defendants-in-error.

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

Plaintiff-in-error, Provident Transport Company, is the defendant in the court below. Co-defendant-in-error Joseph P. Keller, the plaintiff below, obtained a judgment against defendant in an action of damages for wrong in the sums of US\$5,862.63 and L\$59,321.00 as special damages and US\$2,931.31 and L\$29,665.00 as general damages.

Defendant has filed this application for a writ of error alleging that said judgment was obtained without affording it its day in court; that even though it did not appear in the action of damages for wrong by filing a formal appearance or answer, it was entitled to be notified of the trial; that the trial of the case was called for hearing without notifying it of said trial by a notice of assignment. These are the errors complained of which the defendant seeks to be corrected by the writ of error prayed for.

On the other hand, the defendant-in-error contends that the judgment which he obtained against the defendant was by default; that defendant was duly served with process together with the complaint for damages for wrong which requested him to appear or to answer; that defendant neither made a formal appearance nor filed an answer to the complaint filed against it by the plaintiff; that the court was therefore under no obligation to notify it of the trial of this matter or for any other proceeding which occurred during and up to the time of the rendition of the final judgment in this case; that after final judgment was rendered, the bill of costs issued by the Clerk was taxed by the Togba and Cooper Law Offices, lawyers for plaintiff, and by the Garnett and Associates, lawyers for the defendant; that when the plaintiff failed to satisfy the bill of costs, an execution was applied for and same was resisted by Counsellor Baryogar Junius who was not counsel of record for defendant; that no notice of additional counsel had been filed nor was a change of counsel made; that a notice of assignment was issued and served on both Counsellors Junius and Togba and Cooper to appear to hear the resistance made by Counsellor Junius to the execution and the objection filed by the Law offices of Togba and Cooper objecting to Counsellor Junius representing

the defendant; that the court ruled on the objection made by plaintiff's counsel granting the issuance of the writ of execution, and ordered the sheriff to proceed to execute same. It was then that all further proceedings were stopped when Counsellor Junius who was not counsel of record, applied for this writ of error.

The parties to this error proceeding have raised several issues. However, we shall discuss in detail only those issues which govern the issuance of a writ of error. This is the issue that is before us. Our statute provides that a party against whom a judgment has been taken, who for good cause failed to make a timely announcement of the taking of an appeal from such judgment, has the right to apply to this Supreme Court for leave for a review by a writ of error, of the judgment so that whatever errors the court rendering said judgment may have committed against the adjudged party, can be corrected.

The plaintiff-in-error in this case has admitted not filing an appearance or an answer to the action in the court below, but says that the trial of the damage suit was had without it being notified of said hearing. The statute with respect to service of papers, states that "no service needs be made on party in default for failure to appear except as provided in Section 9.2(2)" Civil Procedure Law, Rev. Code 1:9.2(2). Section 9.2(2), provides "that only new or additional claims for filing shall be served upon a party who has not appeared..."

The defendant in the court below did not appear or file an answer and the statute is very clear that in such instant, such defendant is not entitled to notice in the form of a notice of assignment for hearing of the case. In other words, defendant abandoned the entire action by his failure to appear and therefore a default judgment was correctly rendered against the defendant. *Id.*, 1: 8.3, 9.2(2) and 4.2.

Defendant also contends that he did not have his day in court. Defendant admits being served with process but did not appear by filing a formal appearance or an answer to the complaint filed by the plaintiff in the court below. According to the opinion of this court, "day in court" 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. A litigant has his "day in court" when he has been duly cited to appear and has been afforded an opportunity to appear and be heard. *Liberian American Insurance Corporation v. Wright and A. Hejazi Corporation*, 37 LLR 415 (1993), October Term, A. D. 1993.

Defendant, the plaintiff-in-error, also contends that the judgment which plaintiff obtained in the court below is erroneous because defendant was not cited for the hearing of said matter; and also that the judgment may result in oppression to defendant. Defendant relies upon *Walker v. Kezula*, 25 LLR 325 (1976) and *Watson v. Ware*, 10 LLR 158 (1949). In these two

cases, the defendants appeared and filed answers. These two cases are distinguishable from the case now under review. In this case, defendant did not appear after having been summoned and served a copy of the complaint. This act of defendant is tantamount to an abandonment. In both cases, the defendants appeared after they were summoned, and in keeping with our Civil Procedure Law, they were entitled to be served with every written notice which is required to be served upon parties who have appeared in an action before our courts. Civil Procedure Law, Rev. Code 1: 8.3(1).

In view of the foregoing, the application for the writ of error is hereby denied. The Clerk of this Court is hereby ordered to send a mandate down to the court below ordering it to resume jurisdiction over this matter and proceed to enforce its judgment. Costs are assessed against plaintiff-in-error. And it is hereby so ordered.

Petition denied.