NIDAL SAAB, by and thru his Attorney-In-Fact, MRS. MARTHA HAYES, Plaintiff-In-Error, v. **HIS HONOUR HALL W. BADIO, SR**., Assigned Circuit Judge, presiding over the Sixth Judicial Circuit Court, Montserrado County, and **NABIL ABOUZAKI**, Defendants-In-Error.

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

Heard: December 7, 1993. Decided: February 18, 1994.

1. When the returns to the writ of re-summons shows that the defendant has not been served and, if the plaintiff makes application not later than ten days after such returns, the court shall order service of the summons to made by publication.

2. An order for service by publication shall direct that the summons be published together with a brief statement of the object of the action in a recognized newspaper once every week for four successive weeks, and a copy thereof and a copy of the complaint mailed by registered mail to the last known address of the defendant.

3. Service by publication is complete on the day the last notice is published pursuant to the order of the court, or when the defendant appeared before the last notice is published, or if the defendant received the mailed copy of the publication containing the summons as evidenced by the returns of a receipt signed by him. Under such circumstances, the services shall be deemed to be completed on the day of such appearance or receipt.

4. An action for damages for personal injuries to the person shall be commenced within three years of the time the right to relief accrued, and action for medical malpractice not involving fraud or fraudulent concealment, shall also be commenced within three years of the time the right to relief accrues. The right to relief shall be deemed to have accrued as of the date of the termination of the treatment or of the relationship during which the malpractice occurred. With regard to medical malpractice involving fraud or fraudulent concealment, the action shall be commenced within two years from the time the right to relief accrues, provided however, that the right to relief shall be deemed to have accrued as of the time the plaintiff discovered the fraud or malpractice fraudulently concealed.

5. When an action is timely commenced and is terminated in any manner other than by a dismissal of the complaint for failure to prosecute the action or a final judgment

on the merits, the plaintiff may commence a new action upon the same right to relief after the expiration of the time limited by statute therefor and within six months after the termination, and the defendant may interpose any defense or counterclaim which might have been interposed in the original action.

6. A period of ten days is required for the holding of chamber session which shall be immediately followed by the holding of regular session beginning with the opening of the term of court. It is therefore illegal for a trial judge to hold chamber session beyond the time herein above stated.

7. Error will lie where it is shown that the defendant was not properly served with precepts and, as a consequence, did not have his day in court.

The co-defendant-in-error, Nabil Abouzaki, filed an action of damages for personal injuries against plaintiff-in-error, growing out of a motor accident which occurred on the 21' of July, A. D. 1986. The plaintiff in the trial court, now co-defendant-in-error, claimed $129,700.00 as special damages and, additionally, requested general damages for pain, suffering, mental anguish and frustration. Although the records show that this action was originally filed on July 20, 1989, there is no evidence to indicate how it was disposed of. Notwithstanding, final judgment was rendered against plaintiff-in-error for the amount of $129,700.00 as special damages and $50,000.00 as general damages on the basis of the action filed on June 1, 1992.

Plaintiff-in-error filed a petition for a writ of error, contending the following: that he did not have his day in court in that he was never served with precepts or notice of assignment for the hearing of the trial, even though he was physically present in Liberia up to March 1990, when he was compelled to leave due to the civil crisis; that while he was away in Lebanon, he was never served with any precepts nor notice of assignment for the trial; that the claim is barred by the statute of limitations because a claim for personal injury cannot be maintained six years from the date the right to relief accrued; that it was error for the trial judge to *sua sponte* order the publication of the summons without regard to the returns of the sheriff, and without an application from the defendant-in-error as required by statute; that the trial judge had no jurisdiction to determine the case because he was out of the jurisdictional term of the circuit court when he proceeded to dispose of the case; that the trial judge violated the statute by empaneling a special jury on the 17th day chamber session, which date was just three days away from the opening of the regular jury session.

In response to the petition, co-defendant-in-error filed its returns, contending that: the petition is legally untenable because there is no affidavit attached thereto to indicate that the petition was filed in good faith; that the subsequent action is not barred by the statute of limitations because the former complaint, which was filed on July 20, 1989, was neither dismissed on grounds of failure to prosecute nor was final judgment rendered on its merits; that since the plaintiff-in-error, having been legally summoned by publication, failed to appear in person or through his attorney-in-fact, error will not lie; that the holding of chamber session for seventeen days was not illegal because the trial judge was acting on the orders of the Chief Justice; that the power of attorney which was allegedly issued by the plaintiff-in-error was not signed by him and, although written in Arabic, was not officially translated in English as required by law; that the accrued cost is less than the total cost of instituting the action; and that final judgment has already been rendered and forwarded to Lebanon through the Ministry of Foreign Affairs for enforcement.

After hearing arguments *pro et con,* the Supreme Court held that the plaintiff-in-error did not have his day in court because the defendant-in-error failed to produce any evidence to establish that plaintiff-in-error received the summons and notice of assignment for the trial of the case which was filed on June 1, 1992. The Court also held that the claim was barred by the statute of limitations because the action was not filed until three years after the injury was sustained. Additionally, the Court held that co-defendant-in-error did not produce any evidence to indicate when the former action was terminated so as to determine whether the subsequent action (which was filed on June 1, 1992) was filed within six months as required by statute. Finally, the Court concluded that the trial judge acted contrary to law by empaneling a special jury three days prior to the formal opening of the said court.

Emmanuel S. Koroma appeared for plaintiff-in-error. *Eugene D. M Freeman* appeared for defendants-in-error.

MR. JUSTICE MORRIS delivered the opinion of the Court.

This error proceeding emanated from an action of damages for personal injury filed by co-defendant-in-error, Nabil Abouzaki, of the City of Monrovia, Liberia, against the plaintiff-in-error, Nabil Saab, also of the City of Monrovia, on the 1s t day of June, 1992 in the Civil Law Court of the Sixth Judicial Circuit. According to the complaint, the plaintiff-in-error injured the co-defendant-in-error, Nabil Abouzaki, through a motor accident which occurred on the 21st day of July A. D. 1986. The co-defendant-in-error and plaintiff in the lower court prayed for an amount of one

hundred twenty nine thousand seven hundred ($129,700.00) dollars as special damages, and also requested court to grant him general damages for pain, suffering, mental anguish and frustration suffered as a result of the accident. There is no showing in the records of how and when the first case, (which was filed on July 20, 1989) was disposed of or ended. However, according to the final judgment of Judge Badio which was delivered on the 25t h day of September A. D. 1992, an action of damages for personal injury was commenced on June 1, 1992 and it is this action that led to the final judgment in which the Judge awarded the plaintiff, co-defendant-in-error herein, special damages in the amount of one hundred twenty nine thousand seven hundred ($129,700.00) dollars for special damages and general damages of fifty thousand ($50,000.00) dollars.

The main contention of the plaintiff-in-error, Nabil Saab, is that he never had his day in court, in that he was never served with precepts nor notice of assignment for the trial, even though he was physically present in the city of Monrovia, Liberia, up to March 1990 when he was compelled to leave for Lebanon because of the civil crisis in Liberia. That while in Lebanon, he was never served with any precept nor with any notice of assignment for the trial. Plaintiff-in-error also argued that an action of damages for personal injury cannot be maintained after six years under our law. Plaintiff-in-error further contended that the judge *sua sponte* ordered the publication of the summons without regard to the returns of the sheriff to the writ of resummons and without an application being made by the plaintiff below as the statutes specifically prescribe. Besides, the plaintiff-in-error contended that co-defendant-in-error, His Honour Hall W. Badio, Sr. was out of the jurisdictional term of the Civil Law Court when he proceeded to determine the action of damages on the 17t h day chamber session, being September 18, 1992 for the September Term of the Sixth Judicial Circuit Court. For, as a circuit judge presiding over the September Term of the Sixth Judicial Circuit by assignment, he could not have run a chamber session for said term of court for seventeen (17) days before the commencement of the jury session in contravention of our statute. Plaintiff-in-error also contended that the co-defendant-in-error judge grossly neglected and violated the statute controlling the time special jury can be selected and empaneled. The statute prescribes that after the conclusion of the term of a circuit court when civil causes remained to be tried, a circuit court may in its discretion, at the request of another party, order a special jury empaneled to try any civil case. Contrary to this, the co-defendant-in-error, Hall W. Badio, upon the application of the co-defendant-in-error, Nabil Abouzaki, empaneled a special jury on the 17th day chamber session, being September 18, 1992, which date was just three (3) days away from the opening of regular jury session.

Traversing the petition, the defendant-in-error say that the petition was filed for the purpose of baffling and delaying justice pregnant with falsehood. There being no affidavit attached to the petition stating that the application for the writ of error has not been made for the mere purpose of harassment or delay, the entire petition should be dismissed for disregarding the statutory requirement, they argued. They also maintained that this action was filed before on the 20th day of July, A. D. 1989 in the same Sixth Judicial Circuit for Montserrado County and a writ of summons was issued and served and the plaintiff-in-error retained the Peter Amos George Law Firm who filed the answer on behalf of the plaintiff-in-error and pleadings rested with the reply. They attached photocopy of the complaint and the answer. They also admit in count 6 of their returns that:

"...since plaintiff-in-error was served with the writ of summons in July, 1989 and to which he answered and pleadings rested, no trial was held up to the advent of the civil war in Liberia commencing December 24, 1989 with its height reaching Monrovia in the month of July, 1990, thereby causing the plaintiff-in-error to depart Liberia and has not returned since the cessation of the actual hostilities of the war in December, 1990; as such, following the reconstitution of the Civil Law Court, Sixth Judicial Circuit for Montserrado County in December, 1991, Co-defendant-in-error Nabil Abouzaki had no choice but to comply and apply the law which states thus"

If an action is timely commenced and is terminated in any manner other than by a dismissal of the complaint for failure to prosecute the action or a final judgment on the merits, the plaintiff may commence a new action upon the same right to relief after the expiration of the time limited by statute therefor and within six (6) months after the termination and the defendant may interpose any defense or counterclaim which might have been interposed in the original action."

The defendants-in-error argued that by instituting a new action on June 1, 1992, they were within the pale of law as quoted above, since from the time the war actually abated plaintiff-in-error had not returned to Liberia up to the filing day of these returns. The defendants-in-error maintained that since their complaint and the summons were published four (4) times in the Inquirer Newspaper, the plaintiff-in-error cannot convincingly argue that no Lebanese national in Monrovia at the time of such publications informed him of reading said complaint and summons in the said newspaper. Plaintiff-in-error having been legally summoned by publication and failed or refused to plead, appear or announce appeal through his attorney-in-fact, Martha Hayes, error will not lie in keeping with a long line of

opinions of this Honourable Court and the Civil Procedure Law, Rev. Code 1: 16.24(1)(b).

With reference to the holding of chamber for 17 days, the defendants-in-error maintained that Judge Hall W. Badio, Sr. was acting in compliance with a mandate from the late Chief Justice, J. Henric Pearson, and attached a photocopy of a letter dated August 20, 1992 from Chief Justice J. Henric Pearson to His Honour Hall W. Badio, Sr.

Referable to the general power of attorney in favor of Martha Hayes, defendants-in-error maintain that it was not written in Arabic and translated in English nor was it signed by the plaintiff-in-error, Nadal Saab. Hence, this Court should not give any credence to the said document. Finally, defendants-in-error contended that the two hundred ($200.00) dollars paid as accrued costs is not sufficient to cover the expenses the codefendant-in-error incurred for the publication and the mailing of these publications with summons and statement to the plaintiff-in-error in Lebanon and, hence, the petition should be dismissed. They also contended that they have already forwarded the final judgment in question through the Ministry of Foreign Affairs in Liberia to Lebanon for enforcement.

Throughout the returns, the defendants-in-error have not shown to this court any evidence indicating that the plaintiff-in-error received the summons and notice of assignment for the trial of the case filed on June 1, 1992, other than the photocopy of the publication of the complaint attached to the returns and the final judgment given by the court, co-defendant-in-error judge, and the post office receipts.

Our statute provides that:

"If the return on the writ of re-summons shows that the defendant has not been served and if the plaintiff makes application not later than ten days after such returns, the court shall order service of the summons to be made by publication. An order for service by publication shall direct that the summons be published together with a brief statement of the object of the action in a recognized newspaper for a specified time, at least once in each of four successive weeks. The first publication shall be made within twenty days after the order is granted. On the day of each publication, a copy thereof together with a copy of the complaint shall be mailed by registered mail to the last known address of the defendant". Civil Procedure Law, Rev. Code 1: 3.40.

Service by publication is complete on the day when the last notice is published pursuant to the order of the court, except that:

(a) If the defendant shall have appeared before such last notice is published, the service shall be deemed complete on the day of his appearance; or

(b) If the defendant has received the mailed copy of the publication containing the summons as evidenced by the return of a receipt signed by him, the service shall be deemed complete as of the date of such receipt." Rev. Code I: 3.41.

The plaintiff-in-error has strongly maintained that his address has always been and remains that of Nadal Saab, Aramon, Lebanon and not those reflected on the posted receipts proferted at the trial in the court below. He also maintained in count 11 that he was never served with a summons or complaint commanding him to appear and defend the action of damages filed against him by co-defendant-in-error but, rather, he was only informed by friends on the last day in September 1992 that a judgment had been entered against him in Liberia in an action of damages filed by co-defendant-in-error, Nabil Abouzaki. He had no opportunity to appear and defend himself because he was not informed of the filing of the action. Hence, he could not appear and defend himself nor file an appeal. Regarding the statutory limitation placed on the commencement of an action of damages for personal injury, the statute provides:

"1. Injuries to the Person. Except as otherwise provided in paragraphs 2 and 3 below, an action for damages for injuries to the person shall be commenced within three years of the time the right to relief accrued.

The two paragraphs referred to are also quoted for the benefit of this opinion.

2. Malpractice not involving fraud. An action for damages for medical malpractice not involving fraud or fraudulent concealment shall be commenced within three years of the time the right to relief accrued; provided, however, that the right to relief shall be deemed to have accrued as of the date of the termination of treatment or of the relationship during which the malpractice occurred.

3. Malpractice involving fraud. An action for damages for medical malpractice based upon fraud or fraudulent concealment by the defendant of the information establishing a right to relief shall be commenced within two years of the time the right to relief accrued; provided, however, that the right to relief shall be deemed to

have accrued as of the time the plaintiff discovered or reasonably could have discovered the fraud or the malpractice fraudulently concealed." Civil Procedure Law, Rev. Code 1: 2.11.

The statute also provides:

"If an action is timely commenced and is terminated in any manner other than by a dismissal of the complaint for failure to prosecute the action or a final judgment on the merits, the plaintiff may commence a new action upon the same right to relief after the expiration of the time limited by statute therefor and within six months after the termination, and the defendant may interpose any defense or counterclaim which might have been interposed in the original action." Civil Procedure Law, Rev. Code 1: 2.73.

The defendant-in-error's contention is that he initially filed this action in 1989 and, therefore, the filing of the second action was within the pale of the provision of the statute quoted above. However, the defendants-in-error have not indicated when and how the first case was terminated so that the Court may be in the position to ascertain whether or not the subsequent case, filed in 1992, was filed within six months after termination of the first case.

Regarding the plaintiff-in-error's contention that the judge *sua sponte* ordered the publication without an application from the co-defendant-in-error, the Court, taking cognizance of the records before it, exhibit DIE/2, same being the 42n d days' jury session, June Term, A. D. 1992 on sheet five, notes that an application was made by co-defendant-in-error's counsel, and we quote:

"At this stage, Counsellor Roger K. Martin of the Martin Law Offices respectfully requests court for an order to the clerk of this court ordering her to issue a writ of re-summons to be served upon the defendant and if defendant did not found, (sic) to have the said writ of re-summons and a brief statement of the complaint published in a reputable newspaper in Monrovia since the returns of the Sheriff at the back of the original writ of re-summons showed that the defendant could not be served after a diligent search of said defendant and the Sheriff has reason to believe that the defendant is out of the bailiwick of the Republic of Liberia, in the case *Hafex M Jawhary, plaintiff, versus Souad Nassib Jawhary, defendant,* action of damages for wrong. And respectfully submits:

The Court: The application made by counsel for plaintiff is hereby granted since the returns of the Sheriff at the back of the original writ of summons reveals that the defendant could not be served. The clerk of this court is hereby ordered to issue a writ of re-summons to be placed in the hands of the sheriff for Montserrado County or his deputy for service, and if the said defendant still cannot be found to be served to have a brief statement of the plaintiff's complaint together with the original writ of summons published four times in a reputable newspaper in Monrovia according to law. And it is hereby so ordered. Matter suspended".

The contention that the court *sua sponte* ordered the publication of the re-summons is therefore not conceded.

Referable to the contention that is contained in count 1 regarding the failure of the plaintiff-in-error to state in the affidavit that this application has not been made for the mere purpose of harassment or delay in the affidavit as required by statute, the Court observes that in addition to the one made in count 10 of the petition, the affidavit also reads thus:

"Personally appeared before me, a duly qualified Justice of the Peace in and for the County of Montserrado, Republic of Liberia, at my office in the City of Monrovia, Counsellor Emmanuel S. Koroma, one of the counsels for defendant in the above entitled cause of action and made oath according to law that all and singular the allegations of both law and facts as are set forth and contained in the annexed and foregoing petitioner's petition are true and correct to the best of his knowledge and belief; and as to those matters of information therein contained he verily believes them to be true and correct and that this case is not filed for any dilatory purpose.

Sworn and subscribed to before this 15th
Day of December, 1992.
Justice of the Peace, Montserrado County
E. S. Koroma, Counsellor-at-Law
One of counsels for petitioner/deponent
$3.00 revenue stamps affixed on the original."

The feeling of this Court is that the statement "and that this case is not filed for any dilatory purpose" suffices the statutory requirement in the case.

Regarding the filing of the case out of statutory time, the records reveal that the accident occurred on the 21' day of July, A. D. 1986, when the defendant-in-error

sustained the wound resulting into the plaintiff-in-error reckless driving. The complaint was filed on July 20, 1989 about three years from the date of the accident and defendant's amended answer was written on the 21' day of August A. D. 1999. It is not revealed from the records how and when this action terminated. Yet, the defendants-in-error would have us agree with the law cited by them, that is, the Civil Procedure Law, Rev. Code 1: 2.73, *supra.* The Court cannot agree with this contention since the defendants-in-error have not indicated the time this case terminated so as to know whether the filing of the second complaint was within six months after the termination of the case, since the second case was filed on June 1, 1992 as per the final judgment. The accident occurred in 1989, defendant-in-error filed an action of damages for personal injuries in keeping with section 2.11 of Rev. Code 1, afore cited.

The case was heard on September 19, 1992 by a special jury prior t o the formal opening of the said court on the 3r d Monday which was on September 21, 1992. The 19th of September, 1992 was on a Saturday. The Sixth Judicial Circuit Court shall have its quarterly session on the 3' Monday in March, June, September and December of each year. New Judiciary Law, Rev. Code 17: 3.8.

Our statute provides that:

"After the conclusion of a term of a circuit court when civil cases remain to be tried, a circuit court may in its discretion, at the request of either party, order a special jury empaneled to try any civil case. The jury shall be selected in the same manner as other trial juries. Immediately after final judgment has been rendered in such a case the clerk of the court shall calculate the jury fee, including the costs of selecting and empaneling the jury, compensation of jurors, and other incidental expenses in connection with the jury. The party who requested the special jury shall pay the per diem juror's fees in advance; but when costs are assessed, the losing party must pay such fee to the sheriff within three days or execution shall issue". Rev. Code 1: 22.15.

The statute also provides that:

"The Sixth Judicial Circuit of the Circuit Court shall open its quarterly session on the third Monday in March, June, September and December in each year. The quarterly sessions of that circuit shall be entitled the March, June, September and December sessions.

Ten days before the opening of each quarterly session, there shall be a pre-trial chamber session to be held by the circuit judge assigned to sit during the quarterly session, which shall immediately be followed by a trial session beginning with the opening of each quarterly session and continuing for forty-two consecutive days not including Sundays and legal holidays, unless sooner terminated because all business before the court is disposed of before the expiration of that period.

Immediately following the close of the trial session there shall be a ten day closing chamber session to be held by the judge assigned to sit for the quarterly session and any judge concurrently assigned to the circuit." Judiciary Law, Rev. Code 17: 3.8.

From all legal authorities cited and the facts of the case, we hold that the second action of damages filed on June 1, 1992 was without the statutory time. Besides, there is no evidence indicating that the plaintiff-in-error had his day in court. Therefore, the petition for writ of error is hereby granted and the judgment in the lower court is hereby ordered vacated with costs against the defendant-in-error. The clerk of this court is hereby ordered to send a mandate to the court below ordering the judge presiding therein to resume jurisdiction and enforce this mandate. And it is hereby so ordered.

Petition granted.