

**THE MANAGEMENT OF WEST AFRICA RESOURCES CORPORATION  
(WARCO), by and thru its General Manager, JIM SOO KYUNG, Petitioner, v. HIS  
HONOUR JOHN H. MATHIES, Debt Court Judge, Montserrado County, and  
KAMEL ARNOUS AND COMPANY, Respondents.**

APPEAL FROM THE RULING OF THE JUSTICE IN CHAMBERS DENYING THE  
PETITION FOR THE ISSUANCE OF THE WRIT OF PROHIBITION.

Heard: April 10, 2000. Decided: May 12, 2000.

1. An ancillary enabling legislation which gives effect to the constitutional guarantee to a right to a trial by jury is constitutional, lawful, and valid, and must be strictly observed and complied with.
2. The statutory provisions which guarantee the right to a jury trial gives life, meaning, and expression to the constitution since the constitutional provision is not self-executing.
3. A defendant has a duty to file a motion for trial by jury at the same time that he files his pleadings or amended pleadings, or to make the demand for a jury trial within ten days after the plaintiff files a reply.
4. Issues of fraud must be referred to the jury to be decided upon.
5. Notwithstanding the failure of a party to demand a jury trial, the court, in its discretion and upon motion, may order a trial by jury of any or all issues in a case.
6. When it appears in the course of a trial by the court that the relief required, even though not originally demanded by a party, entitles the adverse party to a jury trial of certain issues of fact, the court shall give the adverse party an opportunity to demand a jury trial of such issues.
7. If a plaintiff deliberately elects not to make a request for a jury trial, or by negligence fails to request one, the defendant should be permitted to request a jury trial, even if the trial has already commenced with a single judge sitting.
8. The right to a jury trial shall be preserved inviolate.
9. While a party desiring a trial by jury must specifically request it in the pleading or by motion within ten days after pleadings have rested, yet if the party fails to request a jury trial, the court in its discretion may order it.
10. The right to a jury trial can be enjoyed or exercised after the ten-day period allowed by statute, subject to the sound judicial discretion of the judge.
11. Although the statute prescribes that a party who fails to demand a jury trial waives his right thereto, yet when the party raises the issue of fraud and forgery which have been ruled to trial and which only a jury is capable of passing upon, the court must grant the party's request for a jury trial.

Following the exchange of pleadings in an action of debt filed by Co-respondent Kamal Arnous and Company and the ruling of the case to trial for hearing of the issues characterized by the court as mixed issues of law and facts, Petitioner WARCO filed a motion for a jury trial. The motion was resisted by Co-respondent Kamal Arnous and Company and denied by

the trial court. The ground stated for the denial of the motion was that the motion was filed beyond the period allowed by statute. Thereafter petitioner sought prohibition from the Supreme Court, contending that as it had raised in its pleadings issues of fraud, it was constitutionally entitled to the right to a jury trial, a right which the trial court could not curtail. The petition having been denied by the justice in chambers, an appeal was announced to the Supreme Court.

The Supreme Court en banc affirmed the ruling of the chambers justice that the statute prescribing the conditions for a jury trial and the time within which a request for such trial should be made was constitutional, but the Court modified the ruling stating that the trial judge could not try the case without a jury since the issue of fraud had been raised and ruled to trial. The Court noted that the statute was an enabling law for the constitutional provision which, while providing guarantees for a jury trial, was not self-executing.

The Court also acknowledged that party desiring a trial by jury should make a request therefor within ten days following the resting of pleadings, but noted that there were exceptions to this general rule. Such exceptions, the Court opined, included situations in which the trial court could not conduct a trial without the aid of a jury. The Court observed that in such cases, as the instant case, where a party had failed to request a jury trial within the time specified by the statute, the trial judge, using his sound judicial discretion, and because he could not try the case without a jury, should apply the exceptions rather than the general rule, and allow a trial by jury.

The Court therefore held the trial judge to be in error in denying the petitioner's request for a jury trial. Accordingly, the Court affirmed the ruling of the chambers justice with the modification that as the trial court could not try issues involving fraud and forgery without a jury the petitioner should be allowed a trial by jury. It therefore ordered that the trial court empanels a jury for that purpose.

Francis Y. S. Garlawolu appeared for the petitioner. M. Kron Yangbe appeared for the respondents.

**MR. JUSTICE WRIGHT delivered the opinion of the Court.**

This case is on appeal before the full bench from a ruling of the Chambers Justice denying the petitioner's petition for a writ of prohibition, and affirming the ruling of the Debt Court for Montserrat County.

Briefly summarized, Petitioner West Africa Resources Corporation (WARCO) was defendant in an action of debt filed in the Debt Court for Montserrat County on February 15, 1999. In response to the complaint the defendant filed an answer on February 25, 1999, wherein it attacked the complaint. Whereupon the plaintiff withdrew his complaint and filed an amended complaint on March 3, 1999. To this amended complaint the defendant filed an amended answer on March 11, 1999, which was followed by the plaintiff filing of a reply on March 22, 1999. Thereafter pleadings rested.

The trial court heard arguments on the law issues and ruled thereon on May 12, 1999 that the pleadings, inclusive of the plaintiff's amended complaint, the defendant's amended answer, and the plaintiff's reply be submitted for trial on the merits. In its ruling, the court held that it needed to take evidence to properly pass upon the issues which it said were mixed issues of

law and fact, noting that there were no pure issues of law. The court further observed in the ruling that it was not sufficient for the defendant in the answer to merely allege fraud, but that the allegation had to be proved by the production of evidence. The defendant noted its exception to this ruling in order to preserve the issue for any appeal which may be taken if judgment was entered against it.

Thereafter, on June 17, 1999 the defendant filed a one-count motion for trial by a jury. In the motion the defendant contended that the issues of fraud and forgery, as raised in the defendant's answer, having been ruled to trial, the same had to be tried by a jury. The plaintiff resisted this motion on June 21, 1999, contending in the resistance that the demand for a jury trial had been made too late - i.e. thirty-three (33) days after the pleadings had rested. The plaintiff in the lower court, co-respondent herein, asserted further in his resistance that according to the statute, the defendant should have made his demand for a jury trial within ten (10) days after pleadings had rested.

The trial judge heard arguments on the motion and the resistance on July 20, 1999 and entered a ruling thereon on July 28, 1999, denying the motion. In denying the motion, the judge relied on the statute controlling - i.e. section 22.1 of the Civil Procedure Law. On August 25, 1999 the defendant, petitioner herein, filed before the Chambers Justice of the Supreme Court a petition for a writ of prohibition, praying the issuance of the alternative writ, contending as a basis for the prayer that it had demanded a trial by jury based on the issue of fraud raised in the pleadings which the judge had ruled to trial. In the petition, the petitioner maintained that the trial judge had denied it its constitutional right to a jury trial, which right, it said, should never be curtailed by anyone whosoever. Upon review of the petition, the alternative writ was issued by the Chambers Justice.

On September 4, 1999 the respondents filed their returns to the petition, raising several issues or contentions therein. The Chambers Justice heard arguments on September 30, 1999 and handed down his ruling on December 14, 1999, in which he denied the petition, quashed the alternative writ, denied the peremptory writ, and ordered the trial court to resume jurisdiction over the case and proceed to hear the matter on its merits. The petitioner excepted to the ruling of the Chambers Justice and announced an appeal therefrom to the full bench.

The basis for the petition and subsequently the appeal to the bench en banc is that the statute which imposes a time limitation for the filing of an application or request for a jury trial is unconstitutional and should be so declared. The petitioner contended that the constitution is unconditional in its provision granting the right to trial by jury. The Chambers Justice, like the trial judge before him, did not agree with the petitioner's contention and therefore upheld the statute, ruling that our lawmakers were mindful of the constitutional right to a jury trial at the time they enacted the statute and that they could not have intended to undermine it.

At the October 1998 Term of this Court, the identical question raised in this case was placed before this Court to be answered. The Court said then, as it does now, that "section 22.1(2), being an ancillary or enabling legislation to the constitutional guarantee of the right to trial by jury, the said statute is constitutional, lawful and valid, and it is to be strictly observed and complied with. *Vargas v. Eid*, 39 LLR 720 (1998).

During the oral arguments before this Court, counsel for petitioner was asked if he was aware of the opinion of this Court in the *Vargas* case, *supra*, to which he responded in the

affirmative. He, however, drew a distinction between the two cases, to the effect that in the instant case the debt sued for is in dispute due to allegations of fraud imputed to the plaintiff below, now co-respondent herein, which issue of fraud can only be determined by a jury.

For the sake of the record, this Court stands by and reaffirms its holding in the Vargas case that section 22.1(2)(4) is constitutional, valid, legal and enforceable as it gives life, meaning and expression to the constitution since the constitutional provision is not self-executing. This Court is a strong advocate for the protection of all the rights of individuals and will not encourage negligence and carelessness by lawyers in handling their clients' cases, especially involving fundamental rights enshrined in the constitution.

The petitioner impressed upon this Court that once the issue of fraud was raised, it was incumbent upon the trial judge to grant the motion for a trial by jury. This argument is not totally true, in that if the petitioner knew fraud was an issue in establishing the debt sued for, then it was petitioner's duty to file a motion for a trial by jury at the time he filed his amended answer, or within ten (10) days after the plaintiff had filed his reply, or to have even raised it as one of the counts in his amended answer if he did not want to file a separate motion.

With regard to the action by the trial court, we observe that the petitioner was delinquent, derelict and negligent in not timely requesting a trial by jury, which is the general rule. In this connection then, we hold that the trial judge did not err in strictly applying the rule. It is for this reason that the Chambers Justice upheld the ruling of the trial judge. We are however left with one question, and that is, how will the trial be conducted when the case resumes in the trial court in determining the factual issue of fraud and forgery? To put it another way, we hold that the trial judge and the Chambers Justice were not in error in holding that the motion requesting a jury trial was filed late and contrary to the statute, and that the statute is not violative of the constitution. But the problem we are left with is, when the case is remanded to the lower court affirming that court's denial of the motion for a jury trial, will the trial be conducted by the judge alone, thereby sitting as both trier of the law and trier of the facts, considering that the judge had earlier in his ruling on the law issues held that the pleadings contained no pure legal issues but mixed issues of law and facts, and for which he ruled all the pleadings to trial, of which the amended answer is a part? To put it still another way, can the judge, sitting alone, determine that fraud and forgery were or were not committed by plaintiff, looking at the documentary evidence attached to the pleadings?

Our law is replete with holdings by this Court that issues of fraud must be referred to the jury. *Trokon International et al, v. Reeves, Johnson, et al.*, 39 LLR 626 (1999); *Nah v. Nagbe*, 16 LLR 89 (1964). Thus, even though the petitioner was negligent in his request for a jury trial, we are of the belief that the trial judge should have granted the motion to be able to pass on the issue of fraud and still not be in violation of the statute, for our Civil Procedure Law provides that "[n]otwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion, upon motion may order a trial by jury of any or all issues." Civil Procedure Law, Rev. Code 1:22.1(5). (Emphasis supplied)

We therefore have both the general rule, section 22.1 (2) (4), as well as the exception, section 22.1 (5). But we go one step further, which is the stage where the case is at right now; that is, the motion was untimely filed (general rule) and the statute has been declared not unconstitutional. The case is to be sent back for trial (without a jury). Should the mandate be

sent and the trial commenced, the petitioner would still not have been deprived of its right to a trial by jury, in that it is within the discretion of the judge to grant such a motion even though it may be late, since such action is authorized by the exception to the general rule. In addition, the statute goes one step beyond and provides as follows:

"When it appears in the course of a trial by the court that the relief required, even though not originally demanded by a party, entitles the adverse party to a trial by jury of certain issues of fact, the court shall give the adverse party an opportunity to demand a jury trial of such issues. Failure to make such a demand within the time limited by the court shall be deemed a waiver of the right to trial by jury. Upon such demand, the court shall order a jury trial of any issues of fact which are required to be tried by jury." Civil Procedure Law, Rev. Code 1:22.116. (Emphasis supplied)

Applying this law to the facts in this case, when the complaint was filed, the plaintiff, co-respondent herein, could have requested a jury trial if he wanted one. But since he did not, the law cited above is saying that the defendant was entitled to demand a jury trial, and the court should afford him that opportunity. Generally, under our practice, since it is the plaintiff who starts the case and starts presenting evidence, usually if there are factual issues of dispute, the plaintiff, in opening, is the one who requests the court to give a jury to try the issue. The law cited above is clear in saying that if a plaintiff deliberately elects not to request a jury trial, or by negligence fails to request one, then the defendant should be permitted to request the empaneling of a jury, even if the trial has already commenced with only the judge presiding.

The statute starts out by declaring outrightly that the right to a jury trial shall be preserved inviolate. See Civil Procedure Law, Rev. Code 1:22.1(1). We join the Chambers Justice in his holding that "our lawmakers were mindful of the constitution-al right at the time the statute was being enacted and therefore their intent could not have been to undermine that constitution-al provision." "It is because of this that the lawmakers went out of their way to leave some escape route whereby a litigant would not be unduly denied his constitutional right. So, the general rule is that if you desire a trial by jury, you must specifically request it in the pleadings or by motion within ten days after pleadings rest. Civil Procedure Law, Rev. Code 1:22.1. Or else the right is waived. Section 22.1 "4. But the exception is that even if the party fails to request a jury trial, the court in its discretion may order it (section 22.1(5)), and can do so even if the trial has already started. (section 22.1)."

Note that this right can still be enjoyed or exercised after the ten (10) days allowed by the statute. However, this is subject to the discretion of the judge, which must be sound and judiciously exercised as to whatever time limit is set to allow for the request to be made after the ten days.

In the instant case, although the plaintiff, co-respondent herein, did not request a jury trial, and the defendant, petitioner herein made its application later than the ten days allowed by law, this Court takes the view that the judge should have granted the motion on the strength of the exception to section 22.1, and he would have been justified since the issue of fraud and forgery had been squarely raised by the defendant in the answer which had been ruled to trial, and which required a trial by jury.

Consistent with the above holding, we are constrained to order that the trial court's ruling denying the defendant's motion for trial by jury be and is hereby reversed and the court is ordered to empanel a jury to try the issue of fraud and forgery. Accordingly, we are equally constrained to disagree with the Chambers Justice that the court, sitting alone, should go ahead with the trial of the case on the merits.

Wherefore, and in view of the foregoing, it is the considered opinion of this Court that the ruling of the Chambers Justice be and is hereby affirmed but modified to provide for a trial by jury as requested by the petitioner. The trial court will therefore resume jurisdiction and proceed with the case on its merits but with the aid of a jury duly empaneled to determine the issue of fraud and forgery.

The Clerk of this Court is hereby ordered to send a mandate to the Debt Court for Montserrado County, commanding the judge therein presiding to resume jurisdiction and proceed with the trial of the case on the merits with the aid of a jury to dispose of the issue of fraud and forgery. Costs are to abide the final determination of the case. And it is hereby so ordered.

**Ruling affirmed with modification**