

**THE ORIGINAL AFRICAN HEBREW ISRAELITE FOUNDATION OF LIBERIA**, represented by its Director, **LEONARD OWENS**, Petitioner/Appellant, v. **HIS HONOUR NAPOLEON B. THORPE**, Assigned Circuit Judge, Sixth Judicial Circuit, Montserrado County, and **FRANCIS H. LEWIS and EVA LEWIS**, Respondents/Appellees.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE DENYING  
ISSUANCE OF THE WRIT OF CERTIORARI

Heard: June 14, 1983. Decided: July 8, 1983.

1. A writ of certiorari is a remedial process of an extraordinary nature in the sense that it is intended to correct errors allegedly committed during an interlocutory ruling as and when they are committed. Thus, the authority of the writ is in the present tense and not in the past or in the future, being neither retrospective nor retroactive, but current.
2. A party defendant whose answer has been dismissed and who has been ruled to a bare denial must not only interpose timely objections to the ruling and register exceptions thereto, but the party must proceed to a review by certiorari immediately following the ruling, and not allow the proceedings to go to trial on the merits, or to participate therein, before seeking the remedial remedy. The failure by the aggrieved party to take such action is tantamount to an admission, and the party will be estopped from denying the truthfulness of his conduct.
3. Certiorari will normally not be allowed to review interlocutory rulings on a question of law, since questions of law are the sole prerogative of the trial judge and should therefore be left to the judge's discretion, unless bad faith can be imputed to him or there is a showing of an abuse of that discretion.
4. A writ of certiorari can neither be used as a substitute for a regular appeal, nor can it assume the functions of other remedial processes, especially where the party has other adequate remedies available to it.
5. In equity proceedings, the trial judge sits alone without a jury, and cancellation proceedings, being equitable proceedings, are conducted like any other equity proceedings, before the court without a jury.
6. Fraud is not an issue of fact, but rather an issue of law to be determined by the court.
7. The dismissal of a defendant's answer and ruling of the defendant to bare denial do not per se deprive the defendant of his right to be heard and to produce evidence in his defense, except that he cannot produce affirmative defenses.

Petitioner filed a petition for certiorari, praying the Justice in Chambers to review the dismissal of petitioner's answer by the trial court and its ruling of petitioner to a bare denial,

when disposing of the issues of law. Although the petitioner had excepted to the trial judge's ruling, it had not taken any further steps; instead, it had allowed the trial court to commence trial of the case on the merits and had participated therein. It was as the trial was nearing its conclusion that the petitioner petitioned the Justice in Chambers for the writ of certiorari.

The Chambers Justice denied the petition and quashed the peremptory writ. An appeal was taken from this ruling to the Full Bench of the Court. The Court sustained the ruling of the Chambers Justice, holding that the petitioner should have proceeded to have the ruling of the trial judge reviewed immediately upon it being handed down, and not wait until the commencement of the trial of the case on its merits, especially after it had participated therein and waited until the case was nearing an end. The Court noted that certiorari, as a remedial process, was intended to review an immediate act of the trial court, not an act of the distant past or in the future. The Court opined that the failure of the petitioner to proceed in a timely manner was tantamount to an admission of the allegation of fraud, and that the petitioner was therefore estopped from seeking a review after such admission. In reaching its conclusion on the issue, the Court emphasized that certiorari would not lie to review an interlocutory ruling of a trial judge in disposing of issues of law, as that function was the sole prerogative of the trial judge and within his discretion, unless bad faith could be imputed to him or he is shown to have abused that discretion.

On the issue raised by the petitioner that the trial judge had erred in ruling on the question of fraud without the assistance of a jury, the Court held that in equity proceedings, the trial judge hears and determines a case without a jury. The Court noted that fraud was an equity matter, and that as such the trial judge could hear and determine the matter without a jury. Moreover, the Court said, the question of fraud was a question of law for the judge and not for the jury. The trial judge did not act improperly in deciding the matter without a jury, the Court said.

Lastly, the Court, addressing the petitioner's contention that it had been denied its right to due process by the judge's dismissal of its answer and by the trial court's ruling of it to a bare denial, said that as the dismissal of the petitioner's answer was nothing more than ruling the defendant to a bare denial, the appellee was not deprived of producing evidence, oral and written, in support of his denial, except as to defenses of an affirmative nature. The Court observed that in the instant case, not only had the petitioner participated in the hearing of the case, but that it had produced witnesses and rebuttal evidence to substantiate its denial of the co-respondents' claim.

Using the above as the basis for its agreement with the ruling of the Chambers Justice, the Court affirmed the said ruling and denied the petition.

Roland Barnes appeared for the Petitioner and S. Edward Carlor and Nelson William Broderick appeared for the Respondents.

MR. CHIEF JUSTICE GBALAZEH delivered the opinion of the Court

This is an appeal by the defendant, now petitioner, the Original African Hebrew Israelite Foundation of Liberia, from the ruling of His Honour, Justice Frank W. Smith, dismissing the petition for the writ of certiorari. The petition grew out of cancellation proceedings instituted by the plaintiffs, Francis H. Lewis and his wife, Eva Lewis, co-respondents herein, in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, against the petitioner. The trial court, in ruling on the law issues raised in the pleadings, dismissed the petitioner's answer on the ground of fraud, and ruled the complaint and count 3 of the reply to trial. Counsel for petitioner noted exceptions to the ruling and submitted.

The records before us show that the trial judge, co-respondent herein, ruled on the law issues on the 29<sup>th</sup> day of October, 1982, and that on the same day proceeded to hear the case on its merits without a jury. Nowhere in the records did we find any indication that the petitioner gave notice that it would seek remedial process. In fact, the records showed that several witnesses testified on behalf of the petitioner, and that they were examined and cross-examined by both the petitioner's and co-respondents' counsels. We further observe from the records that while the trial of the case was in progress, the petitioner decided to halt the trial of the case by applying to the Justice in Chambers for a writ of certiorari, contending, *inter alia*, that by dismissing its answer, the trial judge had not only deprived it of a proper defense, but had also prejudiced its interests. It also contended that fraud, the issue on which the answer was dismissed, being a factual issue, same should have been ruled to trial by the jury.

As revealed by the records certified to us, there were many issues raised in the case. However, we believe that the pertinent issue determinative of this case is whether or not a writ of certiorari will lie to nullify trial proceedings which are almost at the stage of completion, to correct errors said to have been committed during the disposition of the law issues? A writ of certiorari is a remedial process of an extraordinary nature. It is remedial in the sense that it is intended to correct errors allegedly committed during an interlocutory ruling as and when they are committed. The authority of a writ of certiorari is in the present tense and not in the past, nor the future. It is thus neither retrospective nor prospective in nature, but current. It is intended to correct procedural errors immediately upon their commission during the trial of a case. 14 C. J. S., Certiorari, § 41; Civil Procedure Law, Rev. Code 1: 16.21.

A look at the records show that during the disposition of the issues of law, the co-respondent trial judge dismissed the answer on the ground of fraud and ruled the case to trial on other legal grounds raised in the complaint and reply. The petitioner interposed timely objections and registered its exceptions to the ruling but did nothing more. Instead, it allowed the co-respondent judge to proceed with the trial of the case on its merits. This was

an admission by implication by the petitioner. Admission is a positive defense against the party making it and will estop the party from denying the truth of his conduct. Civil Procedure Law, Rev. Code 1: 25.8; *Dennis v. Republic*, 3 LLR 45 (1928).

If the petitioner was dissatisfied with the co-respondent trial judge's ruling, it should not have only noted exceptions to the said ruling, but it should also have petitioned the Justice in Chambers for a writ of certiorari immediately following the ruling, rather than submitting itself to the trial and participating therein until the trial was nearing completion. By resorting to the writ of certiorari at that eleventh hour, the petitioner was not only employing delaying tactics but was also trying to ask this Court to give an advisory opinion or to review issues that would normally be the subject of a regular appeal. A writ of certiorari cannot be a substitute for a regular appeal, or assume the functions of other remedial processes, especially where the party has other adequate remedies available to it. *Morris v. Flomo*, 26 LLR 314 (1977). We hold therefore that a writ of certiorari will not lie to nullify trial proceedings which are almost complete, to correct errors alleged to have been committed during the disposition of the law issues, or to correct errors allegedly committed at any stage of the trial, which took place in the past but was not immediately acted upon, as to do so would create a dangerous precedent. Accordingly, it is our considered opinion that our distinguished colleague, sitting in Chambers, did not err in dismissing the petition on the grounds given in his ruling and commented upon in this opinion.

We wish to observe at this juncture that although we have singled out one issue as being the controlling issue, there were other points raised in the petition and brief which have also claimed our attention. This Court has held on several occasions that certiorari will normally not be allowed to review interlocutory rulings on a question of law. *Raymond Concrete Pile Company v. Perry et. al.*, 13 LLR 522 (1960). The rationale behind this holding is that questions of law are the sole prerogative of the trial judge and the judge is thus left with a wide degree of discretion in the disposition of law issues, unless bad faith can be imputed to him, or there is a showing of an abuse of that discretion.

We note also from the petition and the brief that the petitioner questioned the judges' authority to sit without a jury, claiming, among other things, that fraud, being a factual issue, it should have been ruled to trial by a jury. Time and again this Court has held that in equity proceedings the trial judge sits alone without a jury and that cancellation proceedings are equitable proceedings and, as such, are conducted like any other equity proceeding. *Pratt et al. v. Smith et al.*, 26 LLR 160 (1977). This being the case, the trial judge was correct in sitting on and disposing of the case without a jury. We hold further that our distinguished colleague was also correct in dismissing the petition on this ground. We wish to observe, in this connection, that fraud is not an issue of fact as alleged by the petitioner but rather an issue of law to be determined by the court. *Wilson et al. v. Wilson et al.*, 27 LLR 182 (1978).

Lastly, we want to also remark here that the dismissal of the petitioner's answer on the ground of fraud, amounted to nothing more than a bare denial, which in essence meant that the petitioner would not be allowed to produce evidence of an affirmative nature in its defense to substantiate its denial. This did not, however, bar the petitioner from defending itself at the trial as per the bare denial, or from producing other forms of evidence to support its defense. Hence, the petitioner could have produce evidence, documentary or oral, to refute the correspondents' allegation of fraud or any other imputation. As a matter of fact, the petitioner did indeed participate in the hearing of the case, and above all, did produce evidence in rebuttal. We are therefore surprised at the claim of the petitioner that its rights to be heard and to confront the other party were denied. Once again, we wish to make it crystal clear that the dismissal of the answer and the ruling of the petitioner to a bare denial did not destroy the petitioner's right to be heard, to produce evidence and to confront the adversary party.

From the above analysis of the case, we conclude (a) that a writ of certiorari will not lie to nullify trial proceedings that were almost complete, in order to correct errors alleged to have been committed during the disposition of the law issues; (b) that cancellation proceedings are equitable proceedings and, as in all cases of equity, the judge sits alone without a jury; (c) that the dismissal of an answer and the ruling of a defendant to a bare denial do not per se deprive a defendant of his right to be heard and to produce evidence, except that he cannot produce affirmative defenses; and (d) that our distinguished colleague sitting in Chambers was right in dismissing the petitioner's application for the writ of certiorari, as that was within his sole discretion. *Dennis v. Hamidi et al.*, 13 LLR 34 (1957).

This Court has always frowned upon lawyers who take pleasure in resorting to dubious ways of defending the interests of their clients. We are still at a loss to understand why and how a lawyer of the petitioner's counsel standing could have participated in a judicial investigation to the extent done in the instant case and suddenly decide to abandon the trial and to come to this Court for a remedial remedy. Such attitude does not only frustrate justice and fair play, but also causes the Court to lose much needed time and moments to execute more deserving matters.

In view of all we have said, and the laws relied upon and cited herein, it is our opinion, and we hold, that the ruling of the Justice in Chambers dismissing the petitioner's application for the alternative writ of certiorari be and same is hereby affirmed. Costs are ruled against petitioner. The Clerk of this Court is hereby ordered to send a mandate to the trial court commanding the judge presiding therein to resume jurisdiction over the case and recommence the trial of the said case. And it is hereby so ordered.

*Petition denied.*