MOKOH BOYE, Petitioner, v. T. EDWARD NELSON, Sheriff, Montserrado County, et al., Respondents.

APPEAL FROM RULING OF JUSTICE IN CHAMBERS GRANTING ISSUANCE OF WRIT OF PROHIBITION.

Argued May 29, 1978. Decided June 30, 1978.

1 No one can be concluded by a judgment rendered in a suit to which he was not a party, and a party cannot be bound by a judgment without being allowed a day in court.

2 A writ of prohibition may be directed to the court or to the parties to a cause pending therein, or to both conjointly, although the majority opinion is that the only necessary respondent is the tribunal whose proceedings are sought to be restrained, and a sheriff seeking to enforce a judgment of such a tribunal may be named as respondent in lieu of the tribunal itself.

3 Prohibition is a proper remedy not only to prohibit the doing of an unlawful act by a lower court but also for undoing what has already been unlawfully done under authority of the court.

4 A person having knowledge of an action which may affect his rights but to which he is not a party is not required to intervene in order to protect his rights.

5 A person claiming a right to possession of premises involved in an action of ejectment to which he is not a party is not concluded by a judgment against the defendant in that action on the theory that as grantee he was in privity with the defendant.

6 Although prohibition will not be granted as a matter of right when another complete and adequate remedy is available, the grant or refusal rests within the sound discretion of the court according to the facts and circumstances of the particular case.

In enforcing a judgment against the defendant in an action of ejectment, the sheriff attempted to evict from the land which had been the subject of dispute a person who claimed to be the grantee of the defendant by reason of a purchase some years previously. She had not been made a party to the ejectment suit, and filed an application for a writ of prohibition before the Justice in chambers against the sheriff enforcing the judgment to restrain further action against her until a hearing could be held to determine her rights.

The Justice in chambers granted the writ and petitioner appealed to the Supreme Court. It was held that the writ was properly issued to protect the rights of one who had never had an opportunity for a hearing in court. Ruling against the contention of respondents that the judge of the lower court was the proper respondent in a prohibition proceeding, the Supreme Court held the suit properly brought against the sheriff. The *ruling* of the Justice in chambers was *affirmed.*

J. Dossen Richards for petitioner. *James G. Bull* for respondents.

MR. JUSTICE BARNES delivered the opinion of the Court.

In *Tubman v. Murdoch,* 4 LLR 179 (1934), this Court held that it is a rule of universal application that the rights of no one shall be concluded by a judgment rendered in a suit to which he is not a party, and that a party cannot be bound by a judgment without being allowed a day in court. He must be cited or have made himself a party in order to authorize a personal judgment against him.

In *Johns v. Witherspoon,* 9 LLR 152, 154 (1946), this Court in denying relator's petition for leave to intervene to show rightful title to property in dispute said:

> "We do not see that the legal title to said property and the right of petitioner to bring an action to recover possession of his alleged property which is presently the subject of litigation between William A. Johns and William N. Witherspoon, will be in any way affected by any judgment we may render in favor of either of the present contending parties since petitioner was not made a party to the action, was not summoned and placed within the jurisdiction of the court below, and did not have his day in court, and is not represented in said case."

As recently as in its October 1977 Term in *Eitner v. Sawyer,* 26 LLR 247, where respondent sought to enforce a judgment against petitioner who was never made a party to the suit, this Court consistently maintained its holding in *Tubman v. Murdoch, supra,* that a judgment concludes only parties to the suit.

According to the record certified to this Court, James W. Sims instituted an action of ejectment against R. Henri Gibson. The case was ruled to trial but before judgment was rendered, the defendant withdrew his defense. Thereafter on February 7, 1977, His Honor J. N. Lewis rendered judgment against defendant Gibson.

The application for a writ of prohibition was filed before the Justice in chambers by Mokoh Boye, the purchaser of the land from R. Henri Gibson which was the subject of the suit in ejectment. In the petition for the writ, she alleges that she had made the purchase in 1967 and that she built a house upon it and lived in it for several years and therefore has a vested right and title to the land. It is further alleged that she was not made a party to the action against Gibson, her grantor, and thereby given notice and an opportunity to protect her property rights and interest in the property; that even though she is not a party and had no knowledge of the case, yet the sheriff is attempting to evict her from the premises; that although the judgment is against Gibson, the sheriff is attempting to execute and enforce such judgment against her when she has not had her day in court, thereby seeking to deprive her of her property without due process, of law. Petitioner finally alleges that she has no adequate remedy at law and could not have proceeded by a regular appeal because she was not a party to the action and had no knowledge of the proceeding. She therefore prays that the alternative writ of prohibition against the respondents herein be issued prohibiting and restraining them and any persons acting under them from proceeding further in this case until a

hearing has been held and to show cause why the writ should not be made absolute.

The Justice in chambers granted the petition, and from that ruling, respondents have appealed to the bench *en banc* for final determination.

The respondents in their return complain as follows:

1. Because respondents say that petitioner seeks a writ of prohibition to be directed to respondents T. Edward Nelson, sheriff of Montserrado County, and James W. Sims who was plaintiff in the parent suit instead of against the judge of the trial court whose orders the sheriff has executed. The law requires that writs of prohibition be directed to the judge of the inferior court whose proceedings are sought to be restrained. For such error the writ should be denied.

2. And also because respondents say that the writ prayed for should be denied because prohibition will not lie to prohibit acts already committed. Respondents submit that in the instant case, respondent James W. Sims had already been placed in possession of the subject property by the sheriff and had made his return to said writ of possession long before the filing by petitioner of her petition before Your Honor. Respondents request Your Honor to take judicial cognizance of the records in the instant case before Your Honor.

"3. Respondents submit further that the writ prayed for should be denied because petitioner had knowledge of the ejectment suit filed against her grantor, R. Henri Gibson, but failed to intervene in said ejectment suit. Not only had petitioner been informed by Plaintiff Sims that the property she was developing was plaintiff's but she was also aware that ejectment had been filed against her grantor. A writ of prohibition will not lie as in this instant case, where respondent failed to intervene in the parent or main suit knowing that said suit had been instituted.

"4. Respondents say further that petitioner has an adequate remedy at law for damages for fraud against her grantor, R. Henri Gibson, who sold her property to which he had no valid title. Prohibition will not lie since respondent may obtain proper redress at law against her grantor."

The pertinent portion of the ruling of the Justice in chambers on count 1 of respondents' return said: "A procedural issue is raised by the respondents to the effect that the writ of prohibition was directed against the sheriff and co-respondent James W. Sims who was plaintiff in the parent case instead of the trial judge. In *Dweh v. Findley,* 15 LLR 638 (1964), this Court held that a writ of prohibition is principally directed against the court or tribunal rather than the parties to the parent case, but cited *Republic v. Harmon, s* LLR 300 (1936), as authority for the view that a writ of prohibition may be directed to the court or to the parties to a cause pending therein, or both conjointly, although the majority opinion is that the only necessary respondent is the tribunal whose proceedings are sought to be restrained. From this, it is our view that this Court has not directed that a prohibition shall not issue against a party to the parent case or to the judge and the party conjointly but that it should be principally directed against the tribunal as the necessary respondent. In the instant case, the prohibition was directed against the party to the parent suit and the sheriff who was enforcing the judgment of this tribunal out of whose proceedings the petition for prohibition arose." "It is commonly said that the writ is not one of right, but one of sound judicial discretion, to be granted or refused according to the facts and circumstances of the particular case." 63 AM. JUR. 2d, *Prohibition, § 7 (1972).* This Court would not be faithful to the cause of

justice to ignore the facts and circumstances surrounding this particular case, and therefore agrees with the ruling of the Justice in chambers on this count of respondents' return.

In passing upon the second count of respondents' return, the Justice in chambers relied on *Mensah v. Tecquah,* 12 LLR 147 (1954), which held that prohibition will lie where the lower court exceeded or abused its jurisdiction or attempted to proceed by a rule different from those which ought to be observed at all times. In such case, the writ not only prohibits the doing of an unlawful act but goes to the extent of undoing what has already been done. In the instant case, the petitioner was never brought under the jurisdiction of the court and never had her day in court, yet the sheriff is attempting to enforce a judgment against her. Nothing could be more anomalous. We liken this anomaly to a person who is indebted to another and is informed on the streets by the ministerial officer that a case has been adjudged against him making him liable for the payment of a debt and that the execution of the judgment is being enforced. A judicial infamy that would be. Count 2 of respondents' return is hereby overruled.

In his ruling on count 3 of the return the Justice in chambers cited sections 5.61 and 5.62 of the Civil Procedure Law, Rev. Code, Title I. These provisions of law deal with the two divisions of intervention, intervention as of right and permissive intervention. Respondents contend in count 3 of the return that since petitioner had knowledge of the ejectment suit against Defendant Gibson, her grantor, she should have intervened. The petitioner in her application alleges to the contrary that she had no knowledge of the case. Be that as it may, because petitioner did not intervene, could a judgment be enforced against her when she was never brought under the jurisdiction of the court? We think

not. Why was she not joined as a party in the ejectment

case? The records show that she purchased land from defendant Gibson in 1967, as was mentioned elsewhere in this opinion, on which land she built a house and lived in it for several years. It is our opinion that no judgment could be enforced against her without due process of law. In his argument before this Court, counsel for respondents relied strongly on the common law rule on ejectment that "after recovery of a judgment in favor of the plaintiff in an action of ejectment the defendant and all those in privity with him may be dispossessed under the writ of possession issued thereon, and that all persons acquiring possession from and under the defendant during the pendency of the action, whether as vendees, lessees, or otherwise, are privies within the meaning of the rule." 25 Am. JUR. 2d, *Ejectment, § 135* (1966). Respondents further contended that petitioner being privy with her grantor from whom she purchased the land makes her a party to the action. We cannot uphold such an argument. "No person in possession of the premises claiming title thereto prior to, or at the time of, the commencement of the action can be dispossessed unless he was made a party to the suit so as to be bound by the judgment." 25 AM. JUR. 2d, *Ejectment, § 135*
(1966). Count 3 of the return is hereby overruled.

Counsel for respondents contended in count 4 of their return that since petitioner had adequate remedy for damages for fraud against her grantor, R. Henri Gibson, who sold her property to which he had no valid title, prohibition will not lie.

Although generally, prohibition is not demandable as a matter of right when another complete and adequate remedy is available, under certain circumstances the grant or refusal rests within the sound discretion of the court to which application is made. *Kilpatrick v. Oostafrikaansche, 10* LLR 84 (1949). It is our considered opinion that petitioner not being a party to the ejectment suit could not be bound by the judgment thereof, and the

only proper course to have pursued under the circumstances was to prevent the tribunal under whose jurisdiction she had never been brought from enforcing a judgment against her. Count 4 of the return is hereby overruled.

In view of the foregoing citation of law and the facts and circumstances herein before stated, this Court *en banc is* in full agreement with the ruling made by the Justice in chambers, and therefore affirms said ruling granting the peremptory writ of prohibition against respondents. Costs of these proceedings are adjudged against respondents. And it is hereby so ordered.

Ruling affirmed.