

VARNEY FOBOTI, MOMO KAI, et al., Plaintiffs-In-Error, v. **HIS HONOUR E. S. KOROMA**, Resident Circuit Judge, presiding over the November Term, A. D. 1981, of the People's Fifth Judicial Circuit, Grand Cape Mount County, and **CHARLES C. DENNIS, MOVIE DENNIS**, et al. Defendants-In-Error.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE GRANTING A
PETITION FOR A WRIT OF ERROR.

Heard: April 28, 1983. Decided: July 7, 1983.

1. Accrued costs are considered paid even though payment was made to the clerk of court who has delayed transmitting same to the sheriff as required by law; although the same is an error, it is technical and harmless and has prejudiced no party in this case.
2. There is no law that accrued costs must be received by the winning party before a writ of error may be issued.
3. A writ of error will be granted when an inferior court has denied a party litigant his day in court.
4. The failure of counsel to attend a hearing in the absence of a prior notice to him to appear does not per se constitute abandonment.
5. A party will not be allowed to proceed with an action until all outstanding cost ruled against him in the prior action have been paid.

On a petition for a writ of error, defendants-in-error contended that the plaintiffs-in-error had violated the procedure governing the filing of a petition for a writ of error, in that the plaintiffs-in-error had failed to pay the required accrued costs. The Chambers Justice rejected the contention of the defendants-in-error, granted the assignment of error, and ordered the writ of error issued. On appeal to the Full Bench, ruling of the Chamber Justice was affirmed. The Court noted that the accrued costs had been paid to the clerk of the trial court who had delayed transmitting the same to the sheriff. Under such circumstances, the Court said, the rights of a party should not be prejudiced, the fault being that of an officer of the court. The Court noted that there was no rule that accrued costs had to be received by the winning party before the writ of error could be issued, and it observed that the payment of the accrued to the clerk rather than to the sheriff was a mere technicality and a harmless error which had prejudiced no party, and which should therefore not be allowed to defeat the ends of justice. The Court determined that as there was magnitude to the petition and that as the plaintiffs-in-error had been denied their day in court, a new trial should be had in the trial court. The petition was accordingly granted.

M. Fahnbulleh Jones appeared for the plaintiffs-in-error. John A. Dennis appeared for the defendants-in-error.

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

On the 21st day of December, 1981, an ejectment action was heard and decided in the People's Fifth Judicial Circuit, Grand Cape Mount County, against Varney Foboi, Momo Kai et al., then defendants and now plaintiffs-in-error, who claimed that they did not have their day in court, and filed therefore, this petition for a writ of error against the trial judge before the Justice in Chambers, Mr. Justice Yangbe. The defendants-in-error correspondingly filed their returns attacking the petitioners' petition on the ground of distortion of facts on record stating that they did not have their day in court.

The returns also charged the petitioners with the failure to conform to the mandatory requirements of the statute before a writ of error could ever be issued or granted, that is the payment of accrued costs.

Mr. Justice Yangbe, who heard the petition, granted the assignment of error and ordered the peremptory writ issued. It is from this ruling of the Justice sitting in Chambers that this appeal has come before this Court for final review.

From both an inspection and perusal of the records certified to this Court, the material and relevant issues as raised in the petition and returns and buttressed by oral arguments are:-

1. Whether or not plaintiffs-in-error were notified of the hearing date of the case but failed to appear?
2. Whether or not the \$240.00 paid to the clerk of the trial court constituted payment of the accrued costs as contemplated by the statute?

The records before us show that counsel for plaintiffs-in-error, on the 9th day of December, 1981, sent a medical certificate to the trial court indicating his inability to appear in court within five (5) days to represent his client and that it was within the five (5) days period that another notice of assignment was received by the counsel for hearing on the 11th of December, 1981. Counsel for the defendants-in-error argued that the court applied Rule 7 of the Circuit Court Rules and charged the plaintiffs-in-error with abandonment. In our opinion, the failure of a counsel to attend a hearing in the absence of prior notice to him does not per se constitute abandonment. In the instant case, the counsel for plaintiffs-in-error sent a medical certificate in which he was given five (5) days to rest, a fact that was never challenged in the returns and in the absence of such showing, it must be assumed that the certificate was honored. Besides, there is no evidence to show that after the expiration of the five (5) days mentioned in the certificate, a notice was served on plaintiffs-in-error for the hearing of this case. Therefore, the plaintiffs-in-error having not been notified of the said assignment, it must be concluded that they were denied their day in court when the case was

heard on December 11, 1981, and hence the judgment so rendered against them illegally deprived them of their property. *Anderson and Weeks v. Satia*, 17 LLR 251 (1966), and *Jallah et al., v. Sheriff* 25 LLR 226 (1976),

Counsel for defendants-in-error charged the plaintiffs-in error with the nonpayment of accrued costs, which they said was a prerequisite for the issuance of the writ of error. Notwithstanding this attack, there is ample evidence to show that the plaintiffs-in error sent to the clerk of the trial court a sum of \$240.00 with a request to prepare a bill of costs, and that they were told by the clerk that the case file was with the trial judge and that as such he could not prepare the bill of costs. In our judgment, accrued costs are expenses incurred in a prior action and which have not been paid and thus still pending when a subsequent action begins. The general rule of law is that a party will not be allowed to proceed with another action until all outstanding costs ruled against him in a prior action have been paid. 20 C. J. S., Costs, § 411 and 429.

Furthermore, accrued costs are said to be outstanding when the costs incurred in the prior action have not been paid by the party who lost the case when a new set of costs are incurred in the second action, thereby increasing the expenses of the victorious party in the lower court in a similar cause of action. Hence, the accepted rule is that the party who received judgment in the lower court should be recompensated and indemnified by the party who lost the case in the lower court and who now wants to take an appeal to the higher court or apply for a remedial process. In such circumstances, the costs are correctly described as accrued costs because of their increasing and accumulative effects. Civil Procedure Law, Rev. Code 1:16.24, and *Kennedy et al. v. Corniffs Art Printery*, 30 LLR 38 (1982).

Therefore, the payment of the US \$240.00 to the clerk of the trial court by counsel for plaintiffs-in-error, the losing party litigant in the trial court, in order to qualify him and to benefit from the writ of error, indeed represented and complied with the payment of accrued costs requirements as contemplated by both the common law and our statutes.

Counsel for defendants-in-error argued that for the amount of \$240.00 sent to qualify as accrued costs, it should have been paid to the sheriff and not the clerk of court, as in the instant case, and that he has not received the costs up to this day of argument. While we agree with the argument of counsel for defendants-in error that the Sheriff should have received all costs as required under our practice and procedure in this jurisdiction, a practice hoary with age, we disagree with the defendants-in-error on the contention that there is a law requiring that accrued costs must be received by the defendants-in-error before the writ could be issued. Moreover, the payment of the \$240.00 to the clerk of court has not been denied by counsel for defendants-in-error despite the failure of the clerk to pay this amount to the sheriff or counsel for defendants-in-error. While it is indeed an error, we hold the

same to be technical and a harmless one that has prejudiced no party in this case. Gbae et al. v. Geeby, 14 LLR147 (1960); Civil Procedure Law, Rev. Code 1:1.5.

Technicalities which do not relate to the merits of a case should not be allowed to defeat the ends of justice and a writ of error will be granted when an inferior court has denied a party litigant his day in court as in this case.

In view of the facts narrated above and the laws cited the ruling of the Justice in Chambers, from which this appeal has come, is confirmed and affirmed and the appeal dismissed.

The Clerk of this Court is instructed to send a mandate to the judge presently presiding in the Fifth Judicial Circuit, Grand Cape Mount County, to immediately resume jurisdiction over this case and proceed to hear same anew in keeping with the law. The costs of these proceedings are to abide final determination of the cause. And it is hereby so ordered.

Appeal dismissed; judgment affirmed.