**Milad R. Hage** of the City of Paynesville, Montserrado County APPELLANT Versus His Honour **James E. Jones, Judge**, Debt Court of Montserrado County and **Della R. Williams** of Wheaton, Maryland, U.S.A. by and thru her Attorney-In-Fact, **Salieu B. Abraham** Of Monrovia, Liberia APPELLEES

APPEAL

HEARD: NOVEMBER 12, 2007 DECIDED: DECEMBER 21, 2007.

MR. JUSTICE KORKPOR, SR. DELIVERED THE OPINION OF THE COURT

This matter is on appeal before us from a ruling made by our distinguished colleague, Her Honour Gladys K. Johnson, presiding in Chambers on June 18, 2007, quashing the Alternative Writ and denying the Peremptory Writ of Prohibition.

The certified records reveal that the respondent/appellee and petitioner/appellant entered into a lease agreement for the lease of one fourth ( 1/4) acre of land belonging to the respondent/appellee located in Kakata, Margibi County, for a period of twenty (20) years beginning January 10, 1990 up to and including January 9, 2010 at a lease payment of two thousand five hundred dollars ($2,500.00) per annum.

Clause 2(a & b) of the lease agreement, which gave rise to this litigation, provides:

"2 -That for and in consideration of the use and occupancy of the herein demised premises, the parties agree that the Lessee shall pay or cause to be paid to the Lessor an annual rental of two thousand five hundred Dollars ($2,500.00) making an aggregate of fifty thousand Dollars (50,000.00) for the twenty (20) years certain, which amount shall be paid in the following manner:

a. That the Lessor has requested and the Lessee has agreed and promised that after the signing of this agreement, Lessee shall expend sixteen (16) years rental, or an aggregate of forty thousand Dollars ($40,000.00) to erect a four-bed room bungalow (one storey dwelling) with two (2) bath-rooms, a living-dining room and a kitchen on behalf of the Lessor, in keeping with the structural plan which shall be initiated or signed by both parties hereto indicating Lessor's approval of the said plan, and Lessee's promise to construct said building in accordance with said plan, it being understood and agreed that the construction of said building shall be completed in two (2) years, that is to say, on or before December 31, 1991.

b. That the remaining four (4) years' rental in the amount of ten thousand Dollars ($10,000.00) to cover the balance rental of the first 20 years of this lease shall be paid by the Lessee at the rate of five hundred Dollars ($500.00) per annum, commencing on the 10th day of January, A.D. 1990, and shall continue to be paid by the Lessee up to the 10 th day of January of each and every year during the certain year term of this agreement."

The certified records further reveal that on November 6, 2000, the petitioner/appellant wrote the respondent/appellee the following letter:

"Red-Light, Paynesville
Monrovia, Liberia
November 6, 2000

Della R. Williams
3312 Clay Street
Wheaton, MID 20902

Dear Madam Williams:
I received your letter accepting my offer to pay the money to you instead of building the four bed-room bungalow as per our agreement.

Sorry that you had been very ill but I thank the Almighty God for your successful surgery and pray that God gives us all longer life.

Although things are difficult in Liberia for now, I'll try my hardest to remit payments to you in monthly installments until the full amount is liquidated, beginning November 2000. I don't want to say how much, but depending on business performance, I will remit whatever I can generate monthly.

I am trying to arrange a loan, if this goes through, then I'll do a lump sum settlement.

I am not too comfortable with your Administrator, because he puts up some funny tricks to crook me.

I will give you a fax # in due course, but for now call me at AT&T 231-391162 and state the time you would like to call me so that I will wait for your call at the stated time.

Kind and best regards and wish you good health.

Sincerely yours,
Milad R. Hoge."

As seen from the letter quoted above, when the petitioner/appellant did not fulfill his obligation in constructing the four bed-room bungalow for respondent/appellee, as provided for in clause 2(a) of the lease agreement, he offered to make payment in lieu of construction, and the offer was accepted by respondent/appellee. But the petitioner/appellant failed to keep his commitment to pay rent instead of building the bungalow.

The matter was referred to the Ministry of Justice where it was investigated and an agreement reached for the petitioner/appellant to pay the accrued rentals. At the Ministry of Justice, the petitioner/appellant made payment in the amount of One Thousand United States Dollars (US$1,000.00) and arranged installment payments for the balance. The records show that the petitioner/appellant made other subsequent payments and then stopped. As a result, respondent/appellee instituted an action of debt against petitioner/appellant on February 18, 2005 in the Debt Court of Montserrado County for the balance accrued rent in the amount of Thirty One Thousand Five Hundred United States Dollars (US$31,500.00), plus interest of 6% per annum

In her complaint, the respondent/appellee alleged that petitioner/appellant failed and neglected to honor the terms of the agreement as provided for in the above quoted clause 2 (a & b) of the lease agreement; that the bungalow mentioned in the agreement was neither built nor was any rent payment made by the petitioner/appellant for a period of ten (10) years, despite repeated demands by respondent/appellee on petitioner/appellant to honor the terms of the agreement.

The petitioner/appellant filed answer to the complaint denying respondent/appellee's right to recover the amount of Thirty One Thousand Five Hundred United States Dollars (US$31,500.00) against him. He noted that although he entered a twenty-year lease agreement with the respondent/appellee, sixteen (16) years of the rental was to be used to construct a four bed-room bungalow; that he could not construct the four bed-room bungalow due to the civil war in Liberia which lasted until 1997 and made it impossible for him to perform his side of the lease contract.

The petitioner/appellant maintained that an action of debt cannot lie in this case, that the respondent/appellee should have instead brought an action for specific performance. The petitioner/appellant further contended that he had paid the amount of Seven Thousand United States Dollars (US$7,000.00) to respondent/appellee for 2 ½ years of the last four years of the lease agreement in keeping with clause 2(b) of the lease agreement; that when he was taken to the Ministry of Justice, he paid the amount of Two Thousand United States Dollars (US$2,000.00) to the Assistant Minister of Justice who received same for the respondent/appellee, therefore, the amount of Thirty One Thousand, Five Hundred United States Dollars (US $31,500.00) which the respondent/appellee sued for is not supported by the receipts issued by the respondent/appellee.

Pleadings rested, and the case was heard and judgment rendered on July 5 2005 in favor of the respondent/appellee. The petitioner/appellant noted exceptions and announced an appeal. Since appeal in the Debt Court under our law does not serve as a stay to the enforcement of judgment, the court set out to enforce its judgment by presenting the bill of cost, but the petitioner/appellant and his counsel refused to sign same. The respondent/appellee then applied for a writ of execution which was ordered issued. As a result, the petitioner/appellant appeared in court, at which time he made part payment on the judgment amount and agreed to make installment payments on the remaining amount. But again, the petitioner/appellant failed, like on other previous occasions, to honor his commitment. He was cited in contempt, but he resisted service of the writ of contempt on him. Consequently, the Debt Court issued a writ of arrest for contempt against petitioner/appellant and sought the assistance of the Ministry of Justice to carry out the service of the writ.

The records show that the petitioner/appellant was arrested and imprisoned on July 20, 2005, and released on the following day.

On September 15, 2005, petitioner/appellant filed a petition for a writ of prohibition, contending that respondent/appellee had earlier filed an action of debt on June 5, 2001 in the Debt Court of Montserrado County concerning the same subject matter and involving the same parties which had not been disposed of; that despite the fact that the earlier action of debt was still pending, respondent/appellee had filed yet another action of debt dated February 18, 2005 in the same Debt Court of Montserrado County involving the same parties and subject matter, therefore, the second action of debt should not lie. Petitioner/appellant further contended that the cause of action should not have been debt, but rather specific performance of clause 2(a) of the lease agreement entered into between him and respondent/Appellee; and

that arresting and incarcerating him to enforce payment of a money judgment was a violation of our statute for which prohibition should lie.

The respondent/appellee filed returns denying any knowledge of the existence of another complaint in an action of debt involving the same parties and the same subject matter. The respondent/appellee contended that the petitioner/appellant did not raise the issue of the alleged two debt actions involving the same parties over the same subject matter in the court below; that the issue could not be raised in a petition for prohibition for the first time before the Chambers Justice, and that the petitioner/appellant should have attached the pleadings in the alleged earlier action of debt to his petition for prohibition to substantiate the allegation that that action was still pending involving the same parties and the same subject matter. Respondent/appellee maintained that the counsel for petitioner/appellant announced an appeal which he should have pursued, instead of resorting to the writ of prohibition; that the petitioner/ appellant having made several part payments and promised to comply fully with the final judgment, cannot now resort to the use of the remedial writ of prohibition to derail the payment process.

The Chambers Justice heard argument pro et con in the matter and, on the June 18, 2007, ruled ordering the alternative writ of prohibition quashed, and the peremptory writ denied.

We are in agreement with the ruling of our colleague that prohibition will not lie in this matter. We are also in agreement with the four pertinent issues she identified, and on which she decided the case. We will therefore raise the same issues, however, with some modifications. They are:

1. Assuming that there were two actions of debt filed by the respondent/ appellee against the petitioner/appellant in the Debt Court of Montserrado County; did the trial judge make a reversible error by entertaining one of the actions?

2. Whether or not the respondent/appellee should have filed an action of specific performance and not an action of debt?

3. Whether or not the arrest and detention of petitioner/appellant under the circumstance of this case was in violation of the law?

4. Whether or not prohibition will lie in this case?

Being in full accord with the Chambers Justice on the disposition of the first issue, we have incorporated by reference, that portion of her ruling on the matter. This is what she said:

"Starting with the first issue, the answer is in the negative. The Debt Court Judge did not commit reversible error when he entertained the latter of two cases allegedly brought by the same Plaintiff against the same Defendant and on the same subject matter. First of all there was no profert made of the pleadings in the alleged first case. But even if such showing had been made, it would not have been an abuse of discretion for the Judge to entertain one of two cases brought involving the same parties and the same subject matter and in the same court. Selecting one of two cases filed at different time touching the same subject matter; the same parties and before the same court would be in violation of no parties' right to a fair and impartial trial, except if the Defendant were to show proof of such a violation. Counsel for Petitioner failed to provide or even state the prejudice or injustice his client suffered due to the Judge's action in selecting one of two alleged cases pending before him, involving the same parties and the identical set of facts. The only prejudice or injustice that could have been meted out if the Judge had thrown the Plaintiff's case(s) out of court on the ground of multiplicity of suits or actions would have been momentary, which of course would have affected both parties if the suits were dismissed without prejudice and the parties had to refile. The Principle of Multiplicity of Actions which the Defendant/Petitioner argued before the Chambers Justice was not raised in the Answer to the Complaint in the Court below. It was however raised in a motion to dismiss which the Judge denied. Moreover, the Principle of Multiplicity of actions under our Statutes is not applicable to the circumstances of this case. Under our statute, in order to constitute a ground for dismissal on the principle of lis pendens, there must be pending in another court a case involving the same parties and the same subject matter. Kru vs. Tarpeh, 19 LLR 472 (1970). In the case at bar, it is alleged that an action involving the same parties and the same subject matter had been filed earlier and then there was a subsequent action filed years later by the same Plaintiff against the same Defendant, involving the same subject matter and the same parties in the same court. In my opinion, this second action is a mere surplusage which does not vitiate. The judge using his discretion decided to hear the latter action filed. All things being equal, there was no prejudice to the rights of the Defendant. The Principle of Multiplicity of Suits would not apply in this case, because the Judge heard only one of the two cases involving the same and identical set of facts and parties. There was no other case pending in another court within the Republic similar to the one the Judge heard in the Debt Court. Bitar vs. Sidhu, 29 LLR84 (1981)."

The second issue is, whether or not the respondent/ appellee should have filed an action of specific performance instead of an action of debt? On this issue the petitioner/appellant argued that the respondent/appellee brought the wrong form of action, as his remedy does not lie in debt. By this argument, the petitioner/appellant is implying that the respondent/appellee should have brought a suit to compel the construction of the bungalow and the payment of $500.00 per annum commencing January 10, 1990 to January 9, 2010, as specifically provided for under the lease agreement between the parties.

Specific performance of a contract connotes 'performance specifically as agreed'. The purpose of the remedy is to give to the one who seeks it the benefit of his contract in specie by compelling the other party to do exactly that which he has agreed to do. 71 AMJUR 2d, Section 1, generally; nature and purpose of contract.

But in the case before us, specific performance of a contract will not hold because the parties to the lease contract had, by mutual consent, changed that part of the lease contract which required the petitioner/appellant to do a specific thing and that is, construct a bungalow. In lieu thereof, the parties' position, as clearly stated in the letter written by the petitioner/appellant on November 6, 2000 quoted above, is that the petitioner/appellant would pay rent. As we see it, the contention that the respondent/appellee should have sued in specific performance could have been valid if the petitioner/appellant had not offered to change the terms of the lease agreement contained in clause 2(a) thereof, from constructing a bungalow to the payment of rent, and the respondent/appellee had not accepted the offer. This letter, from all indications, is an unconditional promise made by the petitioner/appellant to pay a sum certain for a consideration received, which was accepted by the respondent/appellee. We hold that the remedy for his failure to pay rent is in an y. action of debt and not specific performance of a contract.

Moreover, the records show that several part payments were made by the petitioner/appellant against his rental obligation. Where a part payment has been made against an obligation of a party, an action of debt is the proper remedy to enforce the payment of the balance outstanding.

The third issue is whether or not the arrest and detention of the petitioner/appellant under the circumstance of this case was in violation of the law?

The records show that the petitioner/appellant and his counsel refused to sign the bill of cost and pay the judgment amount, whereupon the respondent/appellee applied for a writ of execution. The petitioner/appellant then proceeded to the Debt Court where he made a part payment and promised to make installment payments to liquidate the balance remaining. Upon his failure to make the installment payments as agreed, the Debt Court cited him in contempt, but he resisted the service of the writ of contempt on him. The Debt Court then issued a writ of arrest for contempt against him and sought the assistance of the Ministry of Justice to have him arrested. The records further show that the petitioner/appellant was arrested and imprisoned on July 20, 2005 and released on the following day.

Under our laws, courts have the inherent power to punish for contempt, and the punishment may include a fine/and or imprisonment. Refusal to obey order of court constitutes contempt, regardless of the unsoundness or voidness of the order. *Glassco et al. v. Thompson,* 30 LLR 670 (1983). Given the facts of this case where the petitioner/appellant refused to appear when cited in contempt, the Debt Court acted properly when a warrant was issued for his arrest. However, we are taken aback when the commitment upon which the petitioner/appellant was incarcerated states as reason for his imprisonment, "failure and refusal to satisfy the money judgment rendered against him...." In our opinion, the trial court would have been justified, had it imprisoned the petitioner/appellant for contempt of court for his refusal to obey court's order.

Section 44.1, *1LCL Revised, Civil Procedure Law* provides: "A person shall not be arrested or imprisoned for disobedience of any money judgment or order requiring the payment of money except for those money judgments enforceable by punishment for contempt under section 44.71(3) or by imprisonment under section 44.71(2) if execution is not satisfied." We note that the exceptions under sections 44.71(3) and 44.71(2) are not applicable in this case. We therefore hold that for arresting and imprisoning the petitioner/appellant "for [his] failure and refusal to satisfy the money judgment rendered against him...," the trial judge was in error. The proper thing was to have enforced execution against the property of the petitioner/appellant to satisfy the judgment against him, and not to put him in prison.

But as stated above, the imprisonment was short lived; the petitioner/appellant was arrested on July 20, 2005 and released the very next day. Under normal condition prohibition would lie, since the Debt Court Judge proceeded by wrong rule. But it was not until about two months after the release of the petitioner/appellant from prison that he filed this extraordinary writ of prohibition. The petitioner had, by then,

been released so the Chambers Justice could order nothing to be done. This Court has held in many cases that where the act is already completed and there is nothing left to be done, prohibition will not lie. *Coleman v. Cooper,* 12 LLR 226(1955). *Sinoe v. Nimley,* 16 LLR 152(1965).

Finally, prohibition cannot lie in this case because the judgment is valid; the writ cannot be used to disturb a valid judgment. Also, prohibition cannot lie where there is another adequate and available remedy. The petitioner/appellant in this case announced an appeal from the judgment of the Debt Court, which appeal was granted. Instead of pursing the appeal so announced, he has resorted to the use of prohibition. This Court has consistently held that prohibition is no substitute for an appeal. *Fazzah v. Nat'l. Economy Committee,* 8 LLR, 85(1943).

IN VIEW of what we have said, the ruling of the Chambers Justice quashing the alternative writ of prohibition and denying the peremptory writ is hereby confirmed. The appeal taken by the petitioner/appellant from the ruling of the Chambers Justice is denied. The Clerk of this Court is ordered to send a mandate to the Debt Court of Montserrado County to resume jurisdiction over this case and enforce its judgment. Cost against the petitioner/appellant. AND IT IS SO ORDERED.
*RULING CONFIRMED.*