WYNSTON O. HENRIES, Resident Circuit Judge, Sixth Judicial Circuit, Montserrado County, and BOIMA SANDO DAGBEH, Respondents/ Appellants, *v.* **JARTU FAHNBULLEH**, **ELVIS WOLO**, **MAMIE LAWRENCE**, **KONAH MAIMAH**, **JAMES YATA**, **MARTHA DIVINE**, **DOMS TAR VARNEY FAHNBULLEH**, et al., Petitioners/ Appellees.

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

Heard: December 16, 2004. Decided: February 28, 2005.

1. Prohibition cannot correct errors or irregularities committed in a trial where adequate and complete remedy lies in appeal, error or certiorari.
2. The erroneous decision of a jurisdictional question is not a ground for the issuance of the writ of prohibition if the court has jurisdiction of the general class to which the particular case belongs, and there is available an adequate remedy by appeal.
3. If the inferior court or tribunal has jurisdiction of both the subject matter and of the person of the defendant, prohibition will not lie to correct errors of laws or facts for which there is adequate remedy by appeal or otherwise, whether such errors are merely apprehended or have been actually committed.
4. Acts which amount to an erroneous exercise of jurisdiction, rather than an excess of jurisdiction, do not provide grounds for the issuance of prohibition.
5. Under Liberian law he who alleges a fact has the burden to prove the allegations.
6. Where a case is assigned for hearing and the assignment is acknowledged by both parties, but one party fails to be present without excuse, the trial judge is in the confines of his authority in granting a default judgment against the absent party.
7. When a defendant to a suit before a court of competent jurisdiction fails to appear, either in person or by counsel, on a day assigned for the hearing of the case, such failure is sufficient cause for the opponent to ask for a default judgment.
8. The writ of prohibition cannot be used to control or prevent the exercise of' discretion by a court which has jurisdiction and where there is no usurpation of power but mere claim of error.
9. All courts in the Republic of Liberia shall be opened from 8:00 a.m. to 4:00 p.m. on Mondays through Fridays and 9:00 a.m. to 12:00 noon on Saturdays, recess and adjournment being in the discretion of the judge.
10. A party who received proper notice of assignment to be present but failed to do

so cannot claim that he never had his day in court.

11. A party against whom judgment has been taken, and who for good reason failed to make a timely announcement of the taking of an appeal from such judgment, may within six months after its rendition file with the Clerk of the Supreme Court an application for leave for review by the Supreme Court by writ of error.
12. A writ of error is the plain, proper, adequate and available means to a party the moment the party becomes aware that final judgment has been rendered against said party when the party was not in court, for good cause, to announce an appeal.
13. A writ of error, and not prohibition, would afford the Supreme Court the opportunity to review an entire case file in respect of alleged irregularities complained of by a party who claims that for good cause the party was not in court to appeal a final judgment rendered against them.
15. The extraordinary writ of prohibition can only be granted in cases of manifest necessity where other remedies are not available.

The co-appellant/co-respondent, Boima Sando Dagbeh, instituted an action of summary proceedings against the appellees/petitioners to recover possession of real property. The petitioners/appellees filed returns alleging that as title was involved summary proceedings to recover real property would not lie. Hence, along with their returns, the appellees filed a motion to dismiss the action. The motion was heard and denied and the case assigned for hearing on a Saturday, at 10:30 a. m. The notice of assignment was served and returned served on the parties. However, when the case was called for hearing on Saturday, at 12:30 p. m. neither the petitioners/ appellees nor their counsel was present. Whereupon, the co-respondent made application to the court for default judgment. The application was granted and the co-respondent was permitted to present his side of the case. Thereafter, final judgment was entered by the judge and the appellees/ petitioners ordered evicted from the disputed property.

The appellees, not being satisfied, filed a petition for a writ of prohibition before the Supreme Court Justice in Chambers. The Justice in Chambers heard the petition, granted the writ and ordered the ruling of the trial judge vacated. The Justice held that the trial judge had proceeded by wrong rule when he rendered final judgment in the absence of the appellees/ petitioners and their counsel without appointing a deputy attorney to take the ruling, which act he said denied the appellees of the right of appeal to the Supreme Court.

On appeal to the full bench the ruling of the Chambers Justice was reversed and the petition for the writ of prohibition denied. The Supreme Court held that most of the actions of the trial court complained of by the petitioners were in the nature of irregularities, and that prohibition could not be used to correct errors and

irregularities committed in a trial where other adequate remedy such as appeal, writ of error or certiorari was available. The Court opined that an erroneous decision by the trial judge on a jurisdictional question was not a ground for prohibition where the court had jurisdiction of the general class to which the particular case belonged and the remedy of appeal was available.

Moreover, the Court said, the erroneous exercise of jurisdiction rather than an excess of jurisdiction cannot be the basis for prohibition. The Court further held that if the inferior court or tribunal has jurisdiction of both the subject matter and the person of the defendant, prohibition will not lie to correct errors of law or fact made by the judge where adequate remedy exist by appeal.

Moreover, the Supreme Court said, where judgment is entered against a party who for good cause could not be in court and no counsel is appointed to take the decision for the absent party and announce an appeal, the proper reedy is a writ of error and not prohibition. Prohibition, the Court observed, can only be granted in case of manifest necessity where other remedies were not available, a situation not present in the instant case.

On the question of whether the appellees/petitioners had their day in court, the Supreme Court opined that when a defendant, having been duly notified on the hearing of a case, fails to appear, either in person or by counsel, for the hearing of the case, but the party against whom the judgment is entered cannot complain of not having had his day in court. But even had the appellees not had their day in court, the Supreme Court, said, that would still not put the case in the province of prohibition, the appropriate remedy being a writ of error.

George S. B. Tulay of Tulay & Associates Law Firm appeared for the appellants/respondents. *Sylvester S.* Kpaka of the J. D. Gordon Law Office appeared for the appellees/ petitioners.

MR. JUSTICE KORKPOR delivered the opinion of the Court.

This case is before us for review from the ruling of the Chambers Justice granting the writ of prohibition. The facts are as follows:

On November 19, 1997, co-appellant Boima Sando Dagbeh instituted an action of summary proceedings to recover possession of real property in the Civil Law Court, Sixth Judicial Circuit, Montserrado County. The co-appellant stated in his petition that he owned land with two houses thereon in Dagbeh Town, Sinkor, Monrovia, which the appellees, Jartu Fahnbulleh et al., were occupying illegally, wrongfully and unlawfu1ly. The co-appellant attached to his complaint, as exhibits 'A' and 'B' respectively, a certified copy of the deed issued to Boima S. Dagbeh by President G.

W. Gibson in 1901 for the land in question, and letters of administration issued in his favor, dated April 26, 1989. The appellees, Jartu Fahnbulleh et al. (petitioners below), filed their returns denying the petition and simultaneously filed a motion to dismiss the petition. Pleadings rested with co-appe1lant Boima Sando Dagbeh's reply.

The motion to dismiss was heard and denied. Thereafter, the case was assigned for hearing on July 4, 1998, at the hour of 10:30 a.m. on a Saturday. The notice of assignment was duly served, returned served and acknowledged by counsels for both parties. When the case was called at 12:30 p.m. instead of 10:30 a.m., in keeping with the notice of assignment, the appellees as well as their counsel were not present. Upon application made, the trial judge, Wynston O. Henries, granted default judgment against the appellees and permitted co-appellant Boima Sando Dagbeh's lawyer to present his side of the case in order to perfect the imperfect judgment of default. Thereafter, the trial judge rendered final judgment, ordering the appellees to be evicted from the disputed property.

On July 13, 1998, the appellees applied to the Chambers Justice for a writ of prohibition. In their eight-count petition, they alleged that they had title to the property in question which they inherited from their ancestor, Chief Bai-Bah, who had been declared rightful owner of the said disputed property by this Supreme Court. Since, according to the petitioners, title was in issue, summary proceedings to recover possession of real property would not lie. The appellees further alleged that they were in court on the day on which the case was assigned and departed court two hours later when the trial judge had not appeared; that the trial judge subsequently appeared and proceeded with the trial after 12:30 p.m. on a Saturday, in contravention of the statute; and that the trial judge rendered judgment without appointing a deputy attorney to take the ruling for the appellees and announce an appeal, in violation of Section 51.6 of the Civil Procedure Law. The appellees therefore prayed the Chambers Justice to stay all further proceedings and remand the case to the lower court for retrial on ground that they did not have their day in court.

The appellees further alleged in their petition that when the law issues in the case were argued on April 18, 1998, the court reserved ruling; and that the notice of assignment for the ruling on a subsequent date was served on a lawyer other than the counsel of record in the case, thus causing counsel for the appellees to be absent from court when the ruling was made. The appellees also alleged that the trial judge's ruling on the law issues was dated April 14, 1998, four days before arguments on the law issues were actually held. The appellees further alleged that the writ of possession was irregularly issued.

Co-appellant Boima Sando Dagbeh filed returns submit-ting that no title was involved in the case. Co-appellant Boima Sando Dagbeh further stated that although the appellees averred that they had ownership and possession of the property in

dispute, what they relied on and proferted were a deed and the Supreme Court's ruling in favor of third parties who are not involved in the action of summary proceedings to recover possession of real property. He maintained that the title deed annexed to the appellees' pleading in the lower court was a deed in favor of the late Chief Bai-Bah and that the Supreme Court opinion proferted was also in favor of the late Chief Bai-Bah. Co-appellant Boirna Sando Dagbeh argued that title was not in issue because the appellees had neither proferted any title documents in their own names nor established any lineage between them and the late Chief Bai-Bah, and that the late Chief Bai-Bah Estate was being administered by people different from the appellees. Co-appellant Boima Sando Dagbeh further maintained that the administrators of the Bai-Bah Estate were aware that the property, subject of this suit, was not a part of the Bai-Bah Estate, as the Bai-Bah Estate was in Gboveh Town while the property in question was in Dagbeh Town.

Concerning the alleged irregular service of the notice of assignment for the court's ruling on the law issues, the co-appellant raised the question of waiver and laches since, according to him, the appellees did not object to the alleged irregularity. The co-appellant denied that the appellees or their counsel had ever appeared in court on the day of the trial, but maintained that the trial judge waited for the appellees and/or their counsel for sometime before proceeding with the trial at about 12:30 p.m.

After hearing arguments from the parties *pro et con*, Mr. Justice Karmo G. Soko Sackor, Sr., then presiding in Chambers, ruled on January 19, 1999. He granted the peremptory writ of prohibition and ordered the ruling of the trial court vacated.

In his ruling, Justice Sackor held that the trial judge proceeded by wrong rule when he rendered a final judgment in the absence of the appellees and their counsel without appointing a deputy attorney in keeping with statutory requirement, thereby denying appellees their right of appeal to this Court.

During arguments before this Court, the parties essentially maintained their respective contentions as contained in their briefs filed. The briefs were based on the positions set forth in the petition for the writ of prohibition and the returns thereto. In summary, the appellees argued that because of the alleged errors committed by the trial judge, this Court should confirm the ruling of the Chambers Justice, grant the peremptory writ of prohibition, reverse the ruling of the trial court and order the trial court to commence a new trial. Co-appellant Boima Sando Dagbeh, on the other hand, argued that the ruling of the Chambers Justice should be set aside and that this Court should confirm the ruling of the trial court. He further argued that prohibition would not lie in this case.

As we see it, there is one central and decisive issue in this case, i.e., whether or not prohibition is the proper remedy to correct the alleged wrongdoing of the trial court that the appellees have complained of? In other words, assuming *arguendo* that the

irregularities enumerated by the appellees were indeed committed by the trial judge, can prohibition provide a remedy by addressing those irregularities? Our answer to this question is no.

In a litany of cases, the Supreme Court has held that prohibition cannot correct errors or irregularities committed in a trial where adequate and complete remedy lies in appeal, error or certiorari. *Chariff Pharmacy v. the Pharmacy Board of Liberian and Haddad*, 37 LLR 135 (1993); *Doe et al. v. Randolph*, 35 LLR 724 (1988); *Fazzah v. National Economy Committee,* 8 LLR 85 (1943).

Moreover, in the case *The Management of Catholic Relief Services v. Natt et al.*, 39 LLR 415 (1999), this Court held that the erroneous decision of a jurisdictional question is not a ground for the issuance of the writ of prohibition if the court has jurisdiction of the general class to which the particular case belongs and where there is adequate remedy by appeal. The Supreme Court also held in that case that if the inferior court or tribunal has jurisdiction of both the subject matter and of the person of the defendant, prohibition will not lie to correct errors of laws or facts for which there is adequate remedy by appeal or otherwise, whether such errors are merely apprehended or have been actually committed.

Based on the authorities cited above, we hold that the contention of the appellees that the trial court lacked jurisdiction over the action of summary proceedings because title was in issue is not ground for the issuance of prohibition. The appellees do not deny that the trial court had jurisdiction over the parties as well as over an action of summary proceedings to recover possession of real property. The appellees contended, however, that the trial court should have refused jurisdiction over the summary proceedings to recover possession of real property because title was in issue, and as such, an action of ejectment should have instead been filed. But this Court has held that acts which amount to an erroneous exercise of jurisdiction, rather than an excess of jurisdiction, do not provide grounds for the issuance of prohibition. *The Saleeby Brothers v. Zoe, Khalifa et al.,* 37 LLR 165 (1993).

The appellees further contended, during argument before us, that by granting default judgment against them they were denied their day in court, and that by not appointing a deputy attorney to take the ruling the trial judge proceeded by wrong rule. Let us look at these contentions of the appellees.

It is established by the records before us that hearing into the case was set for Saturday, July 4, 1998, at the hour of 10:30 a.m. Also, the appellees averred and co-appellant Boima Sando Dagbeh's counsel agreed in count 7 of his returns to the petition for writ of prohibition, that hearing into the case was delayed up to 12:30 p.m. on the scheduled date. What is not established is whether the appellees ever appeared for the hearing. The appellees claim that they and their lawyer arrived in court before 10:30 a.m. on Saturday, July 4, 1998, and departed after waiting for two

hours when the judge had not appeared in court. Co-appellant Boima Sando Dagbeh denied that the appellees and their lawyer ever appeared in court on the day of the trial. The co-appellant said that the trial judge was in court and that the reason the trial started at 12:30 p.m. is that the judge was waiting, hoping that the appellees and their lawyer would show up for the case, which they did not do.

The minutes of the 6th Judicial Circuit, Civil Law Court, Temple of Justice, on the day in question read in part as follows:

"17th day's jury session, In the Sixth Judicial Circuit Court,

June Term, A. D. 1998,

Saturday, July 4, 1998.

BEFORE HIS HONOUR: WYNSTON O. HENRIES, RESIDENT CIRCUIT JUDGE.

SHEET ONE

This court met this morning at the hour of l0:00 o'clock with His Honour the judge presiding. The sheriff announced the day's session for transaction of business pursuant to adjournment.

Devotion was conducted by the sheriff and thereafter the roll of venire jurors were called and thereafter court recessed pending the arrival of the judge.

The Court: Mr. Sheriff, recess hour having expired, court now resume normal business and it is hereby so ordered.

IN RE: THE CASE BOIMAH SANDO DAGBEH, PLAINTIFF, VERSUS JARTU FAHINBULLEH et al. of Degbeh Town, Montserrado County, Republic of Liberia, RESPONDENTS, ACTION OF SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF REAL PROPERTY, NOW CALLED FOR HEARING.

The court: Mr. Sheriff, call the case. And so ordered.

The Sheriff: Your Honour, case called and submits.

The Court: Representations: Plaintiff is represented by the Tulay & Associates Law Firm in person of George S. B. Tulay, counsellor-at-law, who is in court with plaintiff and his witnesses and ready to proceed but observes the absence of the respondents and their counsels even though the notice of assignment was served and returned served on the parties in this case through their counsel. Plaintiff, through his counsel, therefore request this court for a default judgment to be granted onto him and a plea of not liable entered for the respondents, and the sheriff of this court be ordered to call the defendants three times at the door of this court and if they fail to answer to their names, plaintiff be permitted to make the imperfect judgment perfect by the production of witnesses and evidence to prove his case against the defendants. For reliance, plaintiff cites sections 42.1, 42.2, 42.5, 1 LCLR, in support of his application. And submits.

> The Court: The request of the plaintiff is granted and a plea of not liable is entered in favour of the defendant. The sheriff of this court is ordered to call the names of the defendants three times at the door of this court. And so ordered.
>
> The Sheriff's Report: Your Honour, I have called the names of the defendants in this case three times at the door of this court but they failed to answer to their names. And submits.
>
> The Court: The report of the sheriff is noted. And so ordered.
>
> At this stage, counsel for plaintiff prays that in view of the sheriff's report that he has called the defendants three times at the door of this court but they failed to answer to their names, he requests court for the qualification of the plaintiff and his witnesses to make the imperfect judgment perfect by giving both oral and documentary evidence in support of the plaintiff's complaint. And submits.
>
> The Court: The application of the plaintiff's counsel is granted. The clerk of this court is ordered to qualify the plaintiff and witnesses to testify in this case. So ordered."

As seen from the foregoing minutes of the trial court, although it is stated that court met at 10:00 a.m. on Saturday, July 4, 1998, and recessed pending the arrival of the judge, and although the court commenced business after recess with the presence of the judge, the records do not say when the trial judge actually arrived in court. It is possible that the judge arrived in court at 10:30 a.m. on schedule but decided to wait for appellees and their counsel as maintained by co-appellant Dagbeh. It is also possible that the judge arrived late, but before 12:30 p.m. But there is no evidence whatsoever that appellees and their lawyer ever appeared in court at the scheduled date for the hearing of the case. Even though the appellees stated in their petition that when they and their lawyer arrived in court they met other lawyers in persons of Counsellors Roland Dahn and Isaac Nyeplu, strangely, no affidavits were obtained from those lawyers to substantiate this important allegation. Our law recognizes that he who alleges a fact has the burden to prove the allegations. In the absence of proof to the contrary, we find no reason not to believe the position in the trial judge's ruling that the appellees failed to proceed to trial for which default, in the discretion of the judge, was granted.

Where a case is assigned for hearing and the assignment is acknowledged by both parties, as in the instant case, but one party fails to be present without excuse, the trial judge is in the confines of his authority if he grants default judgment against the absent party. This Court has held that when a defendant to a suit before a court of competent jurisdiction fails to appear, either in person or by counsel, on a day assigned for the hearing of said case, such failure is sufficient cause for the opponent to ask for a default judgment. *Kona and Tiawan v. Carver,* 36 LLR 319 (1989). This

Court has also held that the writ of prohibition cannot be used to control or prevent the exercise of' discretion by a court, which has jurisdiction and where there is no usurpation of power but mere claim of error. *Saleeby Brothers v. Zoe, Khalifa et al.,* 37 LLR 165 (1995).

The appellees argued that the trial judge commenced the case after 12:00 noon on a Saturday in violation of Rule 1 of the General Rules applicable in all courts of Liberia. This Rule in effect says that all courts shall be opened from 8:00 a.m. to 4:00 p.m. on Mondays through Fridays and 9:00 a.m. to 12:00 noon on Saturdays, recess and adjournment being in the discretion of the judge. But specifically, Rule 3, Circuit Court Rules, as Revised, states:

> "On the first day of the opening of the court in regular session and on Saturdays the court shall meet at 10:00 a.m. and on all other days at 8:00 a.m. The recess and day to day adjournment of the court shall always be in the discretion of presiding judge, he having due regard for expediting as much work as possible within a working day."

As we see it, it makes no difference that the case was scheduled for hearing on a Saturday. What matters is that the two parties agreed to have their case heard on a Saturday and they should have adhered to said schedule. Circuit courts in our jurisdiction do meet on Saturdays when required, especially where both parties to a case agree to do so with leave of court in the interest of justice.

The matter before us was scheduled for hearing in the circuit court on Saturday, July 4, 1998, at 10:30 a.m. and the court records show that the court met at 10:00 a.m., in conformity with the above quoted rule of the circuit court. The court recessed pending the arrival of the judge. Under the circumstance, we hold that the trial court did not violate the rule of court as claimed by the petitioners since the quoted rule clearly sets opening time on Saturday at 10:00 a.m., with recess and adjournment always in the discretion of the presiding judge.

Concerning the appellees' contention that they never had their day in court, we hold the view that a party who received proper notice of assignment to be present but failed to do so cannot claim that he never had his day in court.

Moreover, even if there exists a genuine reason for the appellees to have been out of court when final ruling in the case was being rendered against them, that is to say, if the appellees are entitled to excusable neglect because they and their lawyer were indeed present in court for about two hours as alleged by them, and left when the judge had not appeared which would suggest that the appellees, for good reason, were not in court to have announced an appeal when final judgment was rendered in the case, this would still not put this case in the province of prohibition. Our Civil Procedure Law, at Section 16.24, provides:

> "A party against whom judgment has been taken, who for good reason failed

> to make a timely announcement of the taking of an appeal from such judgment, may within six months after its rendition file with the Clerk of the Supreme Court an application for leave for review by the Supreme Court by writ of error."

Clearly, a writ of error would have been the plain, proper, adequate and available means to the appellees the moment they became aware that final judgment had been rendered against them when they were not in court "for good cause" to announce an appeal. A writ of error, and not prohibition, would have afforded this Court the opportunity to review the entire case file in respect of the alleged irregularities complained of by the appellees. We reiterate that there is no evidence that the appellees appeared in court for the case. Hence, the trial judge did not proceed by wrong rule against them by granting a default judgment.

The other principal contention of the appellees is that the trial judge failed to appoint a deputy attorney to take the ruling for them. Regarding this contention, the Court says again that if indeed the contention of the appellees is that they were in court and stayed until the required time, then this would give the appellees "good reason" for not being able to make a timely announcement of an appeal within the meaning of section 16.24 of the Civil Procedure Law, quoted above. In such case, the proper remedy would lie in error and not prohibition.

In summary, the appellees have applied for the writ of prohibition contending that (a) the trial court should have refused jurisdiction in the action of summary proceedings to recover possession of real property because title was in issue; (b) that even though they appeared in court on the scheduled date and stayed two hours before leaving, the trial judge arrived two hours late and proceeded to hear the case, thereby denying them their day in court; (c) that the trial court judge failed to appoint a deputy attorney to take the ruling in the case, thereby denying them their right to appeal; (d) that when law issues in the case were argued on April 18, 1998, the court's ruling was reserved, but an assignment for the ruling was served on a lawyer other than the counsel of records in the case; (e) that the judge's ruling on the law issues was dated on April 14, 1998, four days before argument on the law issues were actually held; and (f) that the writ of possession evicting the appellees from the premises was irregularly obtained.

For the reasons we have stated hereinabove, we hold that these contentions of the appellees are all but alleged irregularities said to have been committed by the trial judge which cannot be corrected by a writ of prohibition. In our view, the appellees had other adequate and available remedies by way of certiorari, error or regular appeal. We are therefore unable to grant the extraordinary writ of prohibition prayed for by the appellees because the said writ can only be granted in cases of manifest necessity where other remedies are not available.

In view of the above, the ruling of the Chambers Justice granting prohibition is hereby reversed, the alternative writ quashed, and the peremptory writ refused. Costs are ruled against the appellees. The Clerk of this Court is hereby ordered to send a mandate to the trial court to resume jurisdiction over the case and give effect to this judgment. And it is hereby so ordered.

Petition denied; judgment affirmed.