

DEKPAH KING, Petitioner, v. **LYDIA RANDALL** and His Honor **J. A. GITTENS**, Commissioner of Probate, Montserrado County, Respondents.

APPEAL FROM THE CHAMBERS OF MR. JUSTICE BARCLAY.

Argued October 2, 1949. Decided December 16, 1949.

1. Mandamus will not, as a general rule, issue to review an exercise of judicial discretion, even though the court may have erred in its conclusion.
2. Mandamus is not a substitute for an appeal or a writ of error where they offer an adequate remedy to the aggrieved party.

Petitioner petitioned the Commissioner of Probate to vest an intestate estate in him. Respondent Randall filed an answer, to which petitioner filed a reply, and a motion to dismiss, to which petitioner filed a resistance. On motion by petitioner to dismiss respondent's answer and motion, the Commissioner of Probate dismissed the answer but ruled that he wished to investigate the allegation contained in respondent's motion. Petitioner applied for a writ of mandamus which was denied by Mr. Justice Barclay in Chambers. On appeal to this Court *en banc* from the denial of the writ of mandamus, *denial of writ sustained and order affirmed*.

William A. Johns for petitioner. *M. S. Cooper* for respondents.

MR. JUSTICE REEVES delivered the opinion of the Court.

Occasionally, we find on the docket of the Court a case presenting strange and peculiar issues for adjudication, and this case now under review falls within said category. It is an appeal from the Chambers of His Honor Mr. Justice Barclay to the Bench *en banc*.

Petitioner Dekpah King, dissatisfied with the ruling of Mr. Justice Barclay denying his petition for a writ of mandamus, took exceptions and has brought on appeal from said ruling for our review.

From the records sent forward, the following facts are culled :

Petitioner filed a petition in the Chambers of Mr. Justice Barclay, alleging that during the December term of the Monthly and Probate Court, 1948, Montserrado County,

he filed a petition requesting the Commissioner of Probate to vest the intestate estate of the late Reverend Robert King in him as next-of-kin.

Twelve days thereafter respondent Lydia Randall through her counsel filed her answer and two days later filed a motion entitled "Want of authority for the institution of said action." Petitioner filed within the statutory time his reply and a resistance to said motion.

Having awaited the expiration of the time for respondent to file her rejoinder, and observing that she did not, petitioner being the last pleader moved the court to dismiss respondent's answer with the motion that she had filed.

On November 11, 1948 the Commissioner of Probate, Montserrado County, having heard arguments on pleadings, dismissed said answer for having been filed without the statutory time, but ruled

"That as the motion to dismiss, embodied a subject matter altogether distinct, the court would carry out an investigation in order to ascertain the correctness of the allegation therein contained." To this part of said ruling petitioner excepted and prayed for a remedial writ of mandamus to compel said commissioner to perform and execute his duties prescribed by law during the initial stage of the case since he, the petitioner, was the last pleader, he was entitled first to have his motion considered.

The respondents in their returns raised several issues, the most important one of which, considered by the Justice in Chambers, was directed to the merits of said petition, which we here quote:

"4. AND ALSO BECAUSE Respondents say that from the averments in the Application for Writ of Mandamus contained, it is very clear that Mandamus does not lie; for if it be true, as Petitioner William A. Johns herein erroneously contends, that the Commissioner of Probate erred by dismissing Respondent Randall's Answer and ruling that he would nevertheless stage an 'investigation' in order to ascertain the 'correctness of the allegation' in the disavowing Affidavit of Dekpah King contained—to which Ruling said Counsel excepted and thereby saved the point for review of this Court on appeal—said Counsellor should have come by either a) regular appeal, b) Certiorari, or c) by Writ of Error. Respondents respectfully submit that it is a settled principle of law that :

"Mandamus will not as a general rule issue to review an exercise of judicial discretion; and this is, of course, so although the court may have erred in its conclusion. It is not like a writ of error or appeal, a remedy for erroneous decisions, and must not be permitted to usurp the functions of writ of error or appeal or take their place where they offer an adequate remedy to the aggrieved party.

"While Mandamus may be employed to compel an inferior tribunal to act or to exercise its discretion, the particular method of acting or manner in which the discretion shall be exercised will not be controlled."

Our colleague Mr. Justice Barclay in handing down his ruling was very concise and concluded it in the following manner :

"After hearing arguments Pro et Con, I have come to the conclusion that the petition should be denied as under the circumstances a Writ of Mandamus is not the proper remedy and would not lie. It is also clear to my mind that a Last Will and Testament having been regularly probated and registered and Letters testamentary issued by the Probate Court said Court altho the Answer which made exhibit of said Will had been ruled out, would have been compelled to take judicial notice of its own records and refuse to place Dekpah King or Dr. Luke B. Anthony as next of kin to the said late Rev. Robert King in possession of property willed to others and already vested in them.

"The Petition is therefore denied with costs against Petitioner. And it is hereby so ordered."

Petitioner's counsel labored very strenuously in his arguments to support his said petition, but we find we cannot support his contention, for the law does not support a party who, failing to exercise his right of appeal in any matter, applies for a remedial writ as in this case; for mandamus will not, as a general rule, issue to review an exercise of judicial discretion, although the court may have erred in its conclusion.

The ruling handed down by our distinguished colleague Mr. Justice Barclay in Chambers is therefore affirmed with costs against petitioner. And it is hereby so ordered.

Order affirmed.