

MICHAEL K. KUNAKEY, Plaintiff-In-Error, v. **HIS HONOUR FRANK SMITH**,
Assigned Circuit Judge presiding over the December A. D. 1979 Term of the Civil Law
Court for the Sixth Judicial Circuit, Montserrado County, **CFOA (LIBERIA) LTD.**, and
THE BOARD OF GENERAL APPEALS, Ministry of Labour, Youth and Sports,
Defendants-In-Error.

APPEAL FROM THE RULING OF THE CHAMBERS JUSTICE DENYING THE
ISSUANCE OF A WRIT OF ERROR.

Heard: May 24, 1983. Decided: July 8, 1983.

1. It is morally and legally binding upon the court's appointed counsel to timely transmit the records of the court to the party against whom judgment had been rendered, exceptions taken and appeal announced in order to afford the absent party or his counsel due and timely opportunity to prosecute his appeal.
2. The trial jurisdiction of a subordinate court automatically ceases when the trial case is removed by due process of law to the Supreme Court.
3. A trial court and the Supreme Court cannot exercise concurrent jurisdiction.
4. Error will lie where an appeal is not perfected due to the failure of the court's appointed counsel to transmit the information of the court's final judgment, the exception taken thereto, and the appeal announced therefrom to the absent party or his counsel.

On rendering a judgment against plaintiff without notice, either to him or his counsel, the judgment against plaintiff-inerror was taken by court appointed counsel who failed to timely transmit the judgment or the exceptions taken to the plaintiff-in-error to enable him perfect a proper appeal. Plaintiff-in-error therefore sought redress from the Supreme Court, by filing of a petition for a writ of error. The Justice in Chambers denied the petition and quashed the alternative writ. From this ruling an appeal was taken to the Court en banc.

The Supreme Court granted the petition for the writ of error and ordered the case remanded for a new trial with due notice to all parties. The Court noted that under the Rules Governing the Procedure in the Courts and Regulating the behavior of Lawyers, it was morally and legally binding upon the court's appointed counsel to timely transmit the records of the court to the absent counsel or his client against whom the judgment had been rendered in order to provide the losing party the opportunity to perfect his appeal. The failure of the court appointed counsel to carry out this duty, the Court opined, was not only a disobedience to the trial court's order and a breach of a professional duty, but also amounted to a denial of the right of due process to the plaintiff-in-error. The Court

therefore reversed the decision of the Chambers Justice and granted the petition and the peremptory writ.

Nelson W. Broderick appeared for the plaintiff-in-error. Christian D. Maxwell appeared for the defendants-in-error.

MR. JUSTICE KOROMA delivered the opinion of the Court.

In a seven-count petition, the plaintiff-in-error moved the Chambers of Mr. Justice Yangbe for the issuance of a writ of error on the respondents herein alleging substantially that he was denied his day in court when the respondent judge heard and dismissed his petition for illegal dismissal in his absence. In that, although an assignment for the hearing of the petition was regularly made and served upon the petitioner in the lower court and upon which assignment he attended, the trial judge did not call the petition for hearing in keeping with the assignment because of his engagement in the trial of other cases. That following this, the trial judge is said to have verbally postponed the hearing from 9:00 a.m. to 2:00 p.m. of the same date provided, however, both parties appeared then. The plaintiff-in-error did not appear in consonance with this verbal assignment where upon the defendants-in-error and respondents in the lower court moved for the invocation of Rule Seven of the Circuit Court Rules, so he could be permitted to argue his side of the petition. The court entertained argument on the side of the respondents following the granting of the motion. Ruling was reversed and matter suspended. Without any other assignment, the case was called up five-days later for ruling wherein the parties were absent. The court appointed counsel to take the ruling for each side. The petition was dismissed and the court appointed counsel for plaintiff-in-error excepted thereto and appealed to the People's Supreme Court sitting in its October Term, A. D. 1980. Seemingly, the plaintiff-in-error had no knowledge of the ruling made against him and the announcement of appeal in his favour because the court's appointed counsel failed and neglected to transmit this information to him. The period to exercise the primary jurisdictional step to effect an appeal had seemingly elapsed before the plaintiff-in-error was appraised of the ruling against him in the lower court.

On February 5, 1980, the plaintiff-in-error filed his petition for a writ of error and on July 18, 1980, he withdrew and re-filed the said petition. On August 4, 1980, the defendant-in-error and respondents in the court below moved the trial court for dismissal of plaintiff-in-error's appeal for failure to proceed. While the motion for failure to proceed was yet pending in the court below, the petition for writ of error was heard and denied. Hence, this appeal to the bench en banc.

The issues that deserve our consideration in the final determination of these proceedings are: (1) Did the lower court commit an error when it invoked Rule Seven of the Circuit Court Rules and entertained argument by of the defendants-in-error in the absence of the plaintiff-in-error? (2) Did the trial court commit an error when it dismissed the case in the absence of

the plaintiff-in-error? (3) Is the final judgment or ruling in the main case still pending in the trial court and therefore error cannot lie?

To attend upon an assignment of court is a solemn and mandatory obligation of a lawyer imposed upon him by his oath of office. To dispose of such assignment in cadence with the notice of assignment which has been served and returned served by either hearing the case or making such records as to show that such assignment has not wantonly been neglected is equally a solemn judicial obligation of the court. In the instant case, and especially in the court of record where no disposition, as contemplated hereinabove, was made of a case in keeping with the assignment or immediately following the hour when the case should have been heard, another notice of assignment was the only alternative to afford the parties their day in court. Doing otherwise was tantamount to a reversible error. Where a notice of assignment has already lapsed without any action or disposition on the part of the court, its command, instruction or function cannot be resurrected to affect the substantial interest of any party. It was therefore error on the part of the court below to have invoked Rule Seven and entertained argument on the side of the respondents in the court below. The invocation of Rule Seven of the Circuit Court Rules is strictly predicated and contingent upon due notice to all parties.

It was no error on the part of the court below to have ruled in the absence of the parties once they were represented by the court's appointed counsel who excepted to the ruling made against the defendants in the lower court and announced appeal to this Court. However, the failure on the part of the court's appointed counsel to transmit this information to the defendants in the trial court now invites our comments in passing.

While we hold that the court committed no error in ruling in the absence of the petitioner in the lower court, yet, since the main purpose of appointing a counsel to take the ruling for the absent party had not been achieved, we have no cause to believe that the plaintiff-in-error did not suffer further denial of his day in court through the conduct of the court appointed counsel. Under Rule One of the Code of Moral and Professional Ethics with reference to the lawyer's duty to the court, Rule thirty-two with reference to a lawyer's duty to his brother lawyer, and the Oath of Admission of a lawyer to the legal profession, "Rules for Governing Procedure in the Courts and for Regulating the Moral and Ethical Conduct of Lawyers, Pages 1, 9, and 10," it was morally and legally binding upon the court's appointed counsel to timely transmit the records of the court to plaintiff-in-error, petitioner in the trial court against whom judgment had been rendered, exceptions taken and appeal announced in order to afford him due and timely opportunity to prosecute his appeal. The failure of the court's appointed counsel to completely perform the duty for which he was appointed was a disobedience to the court's order and a breach of the fraternal cord that binds all members of the legal profession. We strongly warn lawyers in the Liberian jurisdiction against the repetition of acts of this nature which do not bespeak of the fraternal spirit of the legal

profession and which should at all times characterize the treatment and consideration of one lawyer to the other.

In order to judiciously pass upon the third point hereinabove, listed in the settlement of the issues raised by the parties, and the point upon which the Chambers Justice predicated his ruling, it becomes necessary to reiterate the time and by whom an application for a writ of error can be made. According to the Civil Procedure Law, Rev. Code 1: 16.24 (1), "A party against whom judgment has been taken, who has 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 a review by the Supreme Court by writ of error." According to Black's Law Dictionary, judgment is "[t]he official and authentic decision of a court of justice upon the respective rights and claims of the parties in an action or suit therein litigated and submitted to its determination." BLACK' S LAW DICTIONARY 977 (4th ed.).

The assignment of error was denied on the ground raised by the defendants-in-error and sustained by our colleague in Chambers that a motion for failure to proceed was still pending in the trial court, indisposed of, and that therefore the trial court was still exercising trial jurisdiction over said case. Consequently, defendants-in-error asserted and the Chambers Justice agreed that the Supreme Court, which exercises appellate jurisdiction, could not do so concurrently with the trial court. Hence, the alternative writ of error was quashed and the petition denied.

In consonance with the statutory provision and the definition of a judgment hereinabove quoted, a decision had been rendered by the court litigating the rights and claims of the plaintiff-in-error, petitioner in the trial court wherein the right to apply for the writ of error had then accrued upon him. More than this, the records before us show that the petition for a writ of error was filed on February 5, 1980, withdrawn and refiled on July 18, 1980, whereas the motion to dismiss for failure to proceed was filed on the 4th of August 1980. In our opinion instead of denying the petition for a writ of error on the notion that the lower court still had trial jurisdiction and therefore the Supreme Court could not concurrently exercise appellate jurisdiction, it would have been the exercise of judicial prudence and discretion to have held the movant in contempt of the Supreme Court for filing that motion six months after the filing of the application for writ of error. For, once the right to apply for the writ of error had accrued upon the plaintiff-in-error and he exercised the same, the stay order to the defendants-in-error including the trial judge, immediately stripped the court below of its trial jurisdiction until restored upon it by mandate of the Supreme Court. The trial jurisdiction of a subordinate court automatically ceases when the trial case is removed by due process of law to the Supreme Court until restored by due process of the law. Hence, at no time a trial court and the Supreme Court can exercise concurrent jurisdiction. The substance and contention of the petition for a writ of error being the denial of the plaintiff--

in-error's day in court whereby in the finality judgment was rendered against him, a motion to enforce such a judgment is null and void ab initio, especially when the petition was filed several months earlier and was still pending disposition before the motion was filed. The motion therefore never coexisted with the petition for writ of error. There is a legal maxim that says "That which is void from the beginning is not cured by the passage of time" QUOD AB INITIO NON VALET IN TRACT^o TEMPORIS NON CONVALESCE.

Wherefore and in view of the facts, circumstances and legal citations hereinabove stated, it is our holding that the ruling of the Chambers Justice be and the same is hereby reversed. The petition for a writ of error is hereby granted and the peremptory writ ordered issued. The Clerk of this Court is directed to send a mandate to the trial court commanding the presiding judge therein to resume jurisdiction and dispose of the petition for illegal dismissal anew after due notice to all parties. And it is hereby so ordered.

Ruling reversed.