

**Ming Fung Import & Export Corporation APPELLANT VERSUS The Estate
of the late Charles D. Sherman APPELLEE.**

APPEAL

HEARD: NOVEMBER 12, 2008 DECIDED: JANUARY 29, 2009

MR. JUSTICE KORKPOR DELIVERED THE OPINION OF THE COURT

This prohibition matter is on appeal before us from the ruling of the Chambers Justice, Her Honour Felicia V. Coleman; she granted the writ of prohibition and ordered the judge presiding in the Monthly & Probate Court of Montserrado County to resume jurisdiction and set aside his final judgment growing out of the bill of information filed by the Ming Fung Import & Export Corporation, appellant, against the estate of the late Charles D. Sherman, appellee.

The records reveal that the late Charles D. Sherman died on December 17, A.D. 1986, leaving many real and personal properties, including the 1, 260 acres of rubber farm located on the Bong Mines — Kakata highway, Margibi County, which is the subject of this case. Under his will and testament, Charles D. Sherman appointed his wife, Vivian Sherman, the sole executrix of his estate. The will provided further that in the event the wife predeceased the husband, their son, Rudolph Sherman, the testator's friend, William L. Cotton and the International Trust Company of Liberia would act as executors of the estate.

The records further reveal that Mrs. Vivian Sherman predeceased her husband; that William Cotton, died before the will was proved, probated and registered, and the International Trust Company of Liberia declined appointment as one of the executors, thus leaving Rudolph Sherman as the sole executor of the estate of the late Charles D. Sherman.

On December 4, 1988, the appellee, represented by Rudolph Sherman and Angeline Sherman Quiglass, entered into a lease agreement with the appellant, represented by its then General Manager, Jin Li Rong for the lease of the 1, 260 acres of rubber farm located on the Bong Mines-Kakata Highway for a period of twelve years, commencing from the 1st day of January A.D. 1999, up to and including the 31st day of December 2010. The lease agreement was attested to by the Monthly & Probate Court of Montserrado County.

We quote clauses three and twelve of the lease agreement.

"3. It is hereby mutually agreed that lessee shall pay to the lessor for use of said piece of realty rental as follows:

a. At the signing of this Indenture of Lease, Twenty Five Thousand United States Dollars (US\$25,000.00) representing rental for the first two (2) years, 1999 and 2000 at the rates of seven hundred and fifty United States dollars (US\$750.00) per month for the first year or Nine Thousand United States dollars (US\$9,000.00) per annum and One Thousand and One Hundred United States dollars (US\$1,100.00) per month for the second year or Thirteen Thousand and Two Hundred United States dollars (US\$13,200.00) per annum, making the total of Twenty Two Thousands Two Hundreds United States Dollars (US\$22,200.00) and the balance Two Thousand Eight Hundred United States dollars (US\$2,800.00) will be applied against the rent for the third year such that One Thousand Four Hundred United States dollars (US\$1,400.00) will be deducted from each payment for the third year, granted under this lease.

b. For the five (5) years starting from January 1st 2001 to December 31st, 2005, One Thousand Five Hundred United States Dollars (USD 1,500.00) per month or Eighteen Thousand United States Dollars (USD 18,000.00) per annum payable semi-annually on January and July of each year.

c. For the last five years starting from January 1st, 2006 to December 31st, 2010, One Thousand Eight Hundred United States Dollars (US\$1,800.00) per month or Twenty One Thousand Six Hundred United States Dollars (US\$21,600.00) per annum, payable semi-annually at the rate of Ten Thousands Eight Hundred United States Dollars (US\$10,800.00) on January and July of each year.

"12. It is further agreed and understood by the parties that in the face of "Force Majure", this Agreement will automatically cease and will be resumed without any changes, such that there will be no decrease relative to the duration of the Lease."

All rental payments provided for under the lease agreement were made and the appellant took over and operated the farm up to and including July A.D. 2002, when due to the outbreak in fighting in the country, especially around the Kakata area, it became impossible for the appellant to continue to operate the farm. The appellant then wrote a letter to the appellee indicating that it was ceasing operation:

"July 1, 2002

Rudolph E. Sherman and Angeline Sherman

Monrovia, Liberia

Dear Sherman

As the current political situation is becoming more tense and unstable in Liberia, the rubber farm operation at Kakata, Bong Mines Highway, Margibi County, Republic of Liberia as mentioned in the lease contract, is impossible to go on as usual. Our Corporation, Ming Fung Import & Export Corporation, stopped operation on the farm two months ago, as no tapper was willing to stay to work. Hence, we will have no choice but to cease our operation, despite our financial loss.

According to the "Force Majure" clause number 12 in the contract, it says "the agreement will automatically cease". Based upon our understanding so far, our Corporation does not owe any amount on the lease, since we started operating the rubber farm until now. Therefore, we shall have no liability whatsoever based on the terms of the contract.

We, Ming Fung Import & Export Corporation, hereby announce that we shall not continue the operation on the rubber farm beginning from the date of this letter. Moreover, due to the unclear situation in Liberia, we will terminate the agreement of the said rubber farm, and this letter serves as a notification.

Thank you for your attention.

Best regards,

Management."

It appears that immediately after writing the above quoted letter, Mr. Jin Li Rong, General Manager of the appellant left Liberia due to heightened hostilities in the country.

On July 10, 2002, Rudolph Sherman, the sole executor of the Charles D. Sherman estate, wrote a letter to the Monthly & Probate Court for Montserrado County bringing to the Court's attention that unknown people were intruding on the rubber farm and that he feared that these unknown people could cut down the rubber trees for coal production. He therefore requested the Monthly & Probate Court of Montserrado County to allow him take measures to protect the farm. The judge of the Monthly & Probate Court at the time, His Honor John L. Greaves, granted permission to Rudolph Sherman to do whatever he could to protect the farm. It was

based on this permission that the heirs of the late Charles D. Sherman re-entered the farm that was leased to the appellant.

About two years later, when hostilities ceased in the country, the appellant, under a new management headed by Kam Kam Lam, informed the appellee that appellant was ready to resume operation of the farm. On June 16, 2004, a memorandum of understanding was signed between the appellant and Rudolph Sherman, the sole executor of the appellee which we quote below:

"REPUBLIC OF LIBERIA, MONTSEERRADO COUNTY
MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING, made and entered into this 16th day of June, A.D. 2004 by and between the estate of the late Charles D. Sherman, presented by his heir, Rudolph E. Sherman of the City of Monrovia, County and Republic aforesaid, (hereinafter collectively known and referred to as "OWNER") and Ming Fung Import & Export Corporation, a Liberian Corporation doing business within the Republic of Liberia, represented by its present General Manager, Kam Kam Lam (Hereinafter known and referred to as "MANAGER"), hereby:

WITNESSETH:

WHEREAS, an Indenture of Lease was entered into on the 4th day of December, A.D. 1998 between the estate of the late Charles D. Sherman, represented by his heirs, Rudolph E. Sherman and Angeline Sherman-Quiglass as Lessors and Ming Fung Import & Export Corporation, represented by its former General Manager, Jin Li Rong as Lessee for Lessors' Rubber Farm consisting of one thousand two hundred and sixty (1,260) acres of land located at Kakata, Bong Mines Highway, Margibi County.

WHEREAS, said Indenture of Lease was executed for a period of twelve (12) calendar years certain, commencing from the 1st day of January, A.D. 1999 up to and including the 31st DAY OF December, A.D. 2010; and

WHEREAS, the Lessee on July 1, 2002 wrote Lessors that because of the hostilities that were existing in Liberia it was ceasing operation and will return when the conditions are removed in accordance with clause 12 (twelve) of the Indenture of Lease;

NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:

1. That the Manager shall have and hold the described farm for and during the full period of twelve (12) calendar years certain, commencing from the 1st day of January, A.D. 1999 up to and including the 31st day of May 2013 which certifies the lost of two years six months as compared to the previous lease agreement of 1st day of January A.D. 1999 up to and including the 31st day of December, A.D. 2010..

2. It is hereby mutually agreed that the Manager shall pay to the Owner for the use of said piece of realty, rental as follows:

(a) At the signing of this Memorandum of Understanding starting from September 30, 2004 to May 31, 2008, US\$1,500.00 (One Thousand Five Hundred United States Dollars) per month;

(b) For the last five years starting from June 1, 2008 to May 31, 2010, US\$1,800.00 (One Thousand Eight Hundred United States Dollars) per month; and

(c) From 2010 June 1, to 2013 May 31st US\$2,000.00 (Two Thousand United States Dollars) per month.

3. It is mutually agreed and understood by the parties that the Manager shall have the right to begin preparatory work on July 30, 2004 in the morning hours on said farm and shall have the whole of August for such purposes and shall exercise complete control over the management of the farms, that is, farms 1, 2, 3, and 4 without hindrance, molestation or interference from the Owner or any person/persons whomsoever.

4. It is mutually agreed and understood by the parties that the Manager shall not be responsible to pay any money for material on the farm which is left on the farm after taking over said farm.

5. It is mutually agreed by the parties that because farms 3 and 4 have been interfered with, any problem rising out of said farm, it shall be binding on the Owner to resolve the matter and liquidate any damages the Manager shall sustain.

6. This Memorandum of Understanding becomes effective and does not change the original agreement and therefore all other terms of the original agreement between

the parties remain unchanged and remain binding on all parties.

In witness whereof, the parties have executed this memorandum of understanding on the date first above written.

FOR THE OWNER:

Rudolph E. Sherman One of Heirs of the Late Charles D. Sherman's Intestate Estate.

FOR THE MANAGER:

Kam Kam Lam

\$5.00 Revenue Stamps Affixed on the Original."

The memorandum of understanding was probated at the Monthly & Probate Court of Montserrado County and registered at the national archives. Notwithstanding the execution of the memorandum of understanding by the parties and the payment of agreed fees to Rudolph Sherman by the appellant, the appellant was not permitted to take over the farm.

On February 17, 2005, appellant filed a bill of information before the Monthly & Probate Court of Montserrado County against the appellee. The bill of information was withdrawn and amended. In the amended bill of information, the appellant contended that a lease agreement was consummated between the appellant and the appellee on December 4, 1998 under which lease agreement the one thousand, two hundred and sixty (1,260) acres of rubber farm belonging to the appellee was leased to the appellant; that the said lease agreement was approved and attested to by the Monthly & Probate Court of Montserrado County; that for all intents and purposes the Monthly & Probate Court of Montserrado County has maintained and still maintains control over the Charles D. Sherman estate; that the appellant had paid all agreed rentals/fees both under the lease agreement as well as the memorandum of understanding signed by the parties. The appellant further averred that it took advantage of the force majeure clause under the lease agreement and informed the appellee through a letter dated July 1, 2002, that due to fighting in the country, especially in and around the city of Kakata, Margibi County, where the rubber farm is situated, it was no longer possible to continue the operation of said farm; that about two years later, the appellant returned to Liberia and found out that the farm had been turned over to one Emery Dennis by Rudolph Sherman; that when the

memorandum of understanding was signed with Rudolph Sherman, Emery Dennis was removed from the farm, but immediately thereafter, co-respondent Eric Sherman, a brother of Rudolph Sherman, took possession of the farm and refused to turn same over to the appellant. The appellant therefore prayed the Monthly & Probate Court of Montserrado County to order the farm returned to appellant.

On March 11, 2005, the appellee filed amended returns in which it basically contended that the appellant had terminated the lease agreement signed with the appellee, abandoned the rubber farm, subject of the lease agreement and left the country, therefore, the appellant no longer had a contractual relationship with the appellee. The appellee filed a motion to dismiss the bill of information which was heard and denied. The judge of the Monthly & Probate Court of Montserrado also denied a motion for summary judgment filed by the appellee and ordered that the bill of information be proceeded with.

On August 19, 2005, His Honor J. Vinton Holder, Judge of the Monthly & Probate Court of Montserrado County finally ruled in the matter of the bill of information. He held that "the Probate Court has general charge and supervision of estate of deceased persons and has the right to watch the interest of all parties concerned, especially the wishes of the deceased, when it comes to the attention of the Probate Court that those wishes have been expressed in the form of a last will and testament."

On September 5, 2005, the appellee filed a petition for a writ of prohibition contending essentially that the bill of information did not have a parent suit pending; hence, the Monthly & Probate Court of Montserrado County unlawfully entertained and granted the said bill of information.

An amended returns was filed by the appellant on November 14, 2005 contending that under the law when a party excepts to an adverse ruling and announces appeal therefrom, the appealing party cannot abandon the appeal and seek prohibition as a remedy and substitute for the appeal. The respondent also contended that the matter of the Charles D. Sherman estate has, at all material times, remained under the control of the Monthly & Probate Court of Montserrado County, therefore, the filing of the bill of information before the Monthly & Probate Court of Montserrado County was proper.

On January 12, 2006, the Chambers Justice, Her Honor Felicia V. Coleman, made ruling. The lone issue considered by the Chambers Justice is whether or not a probate

judge can legally acquire jurisdiction over a party in a bill of information where there is no parent suit? The Chambers Justice determined that there was no parent suit from which the appellant's bill of information grew; she held that a bill of information not being a complaint cannot be legally entertained and decided without the existence of a parent suit. This appeal is before us from the ruling made by the Chambers Justice.

In deciding this case, we shall pass on three issues:

1. Whether or not under the facts of this case the appellant terminated the lease agreement with the appellee such that there was no longer a lease contract between the parties?
2. Whether or not the appellant's bill of information was properly filed before the Monthly and Probate Court of Montserrado County?
3. Whether or not prohibition will lie in this case?

Concerning the first issue - whether or not the appellant terminated the lease agreement, we must take recourse to the letter written to the appellee on July 1, 2002. It is clear from that letter first of all, that the appellant would not have ceased operation of the farm had it not been due to renewed fighting, especially in that part of the country where the farm is located. The first paragraph of the letter states: "As the current political situation is becoming more tense and unstable, the rubber farm operation at Kakata, Bong Mines Highway, Margibi County, Republic of Liberia, as mentioned in the lease contract, it is impossible to go on as usual."

Secondly, the appellant specifically made reference to the "force majeure" clause in the lease contract as the basis for ceasing operation. Even where in the third paragraph of the letter the appellant used the word "termination", the reason was stated as "due to the unclear situation in Liberia". Given the facts and circumstances in this case, we hold that the appellant did not intend to permanently "terminate" the lease agreement so that there was no longer a lease contract between the appellant and the appellee. What the appellant 'actually did was to cease operation as a result of a condition that amounted to "force majeure", a situation beyond the control of neither party to the lease agreement. Clause # 12 of the lease agreement between the appellant and appellee provides that "...in the face of Force Majeure, this agreement will automatically cease and will be resumed without any changes, such that there will be no decrease relative to the duration of the lease." Clearly, the intent of the

appellant was not to terminate the lease contract, having paid rentals and other fees in advance to the appellee. That the appellant only ceased operation due to hostilities in the country was recognized and acknowledged by Rudolph Sherman, the sole executor of the Charles D. Sherman estate. In the third preambular paragraph to the memorandum of understanding signed between Rudolph Sherman and the appellant, it is stated that "...the lessee [appellant] on July 1, 2002, wrote lessors [appellee] that because of the hostilities that were existing in Liberia it was ceasing operation and will return when the conditions are removed in accordance with clause 12 of the indenture of lease". (Emphasis added).

So, clearly there was no intent on the part of the appellant to terminate the lease contract, the appellant's intent was to suspend the lease contract until the situation of force majeure is abated and when that happened, the appellant returned to the country to continue operation of the farm. It has been held that the abandonment of a contract is a matter of intention to be ascertained from the facts and circumstances surrounding the transaction from which the abandonment is claimed to have resulted. 17A Am Jur 2d, Section 528, Abandonment. We hold that the facts and circumstances in this case do not show that the appellant's intention was to abandon the lease contract. But even if the appellant terminated or abandoned the lease contract, the subsequent signing of the memorandum of understanding between appellant and Rudolph Sherman, the sole executor of the Charles D. Sherman estate, revived and validated the said lease contract.

We next address the issue — whether or not the appellant's bill of information was properly filed before the Monthly & Probate Court of Montserrado County.

In the case: *Mitchell v. Nelson et al.*, 31 LLR 270 (1983) the Supreme Court held that a bill of information can be filed before a court, provided it is brought by a party to a main suit pending before the court. The question is, was there a main suit pending before the Monthly & Probate Court of Montserrado County out of which the appellant's bill of information grew and if so, was the appellant, Ming Fung Import & Export Corporation a party to said suit?

We observed that the lease agreement executed between the appellant and the appellee on December 4, 1988 for the lease of one thousand, two hundred and sixty (1,260) acres of rubber farm belonging to the appellee was attested to by the Monthly & Probate Court of Montserrado County. Even prior to the time of executing the lease agreement, matters relating to the Charles D. Sherman estate were being handled by the Monthly & Probate Court of Montserrado County. For example, all

dividends paid to the late Charles D. Sherman by companies in which he has shares were sent directly to the Monthly & Probate Court of Montserrado County for the benefit of the distributees. In a letter No. PC/TJ/179/94 dated October 6, 1994, Her Honor Gloria M. Scott, then Probate Judge of the Monthly & Probate Court of Montserrado County confirmed receiving from the Sherman & Sherman Law Firm, two checks for the Charles D. Sherman estate, one bearing No. 00485 dated October 4, 1994, in the amount of sixteen thousand, eight hundred dollars (\$16,800.00) drawn on TRADEVCO Bank, Monrovia, and the other check bearing No. 1174071 also dated October 4, 1994, in amount of six thousand, three hundred dollars (\$6,300.00) and also drawn on TRADEVCO Bank of Monrovia. These share dividends were paid through the Monthly & Probate Court of Montserrado County to the Charles D. Sherman estate.

It appears that the heirs of the late Charles D. Sherman estate have internal problems, thus, the Monthly & Probate Court of Montserrado County has and continues to safe-guard the interest of the many heirs of the estate by ensuring that the amounts due them are paid and received through the Probate Court.

In particular respect to the transactions between the appellant and the appellee over the lease agreement entered into on December 4, 1988, for the farm in Kakata, Margibi County, we observe that all payments made to the appellee have been made through the Monthly & Probate Court of Montserrado County. In fact, it is the court that often reminds the appellant that payment to the estate is due and should be made through the court. For example in a letter dated January 9, 2002, to the general manager of the appellant, Ming Fung Import & Export Corporation written by the Clerk of the Monthly & Probate Court of Montserrado County, and approved by the then Probate Judge, His Honor John L. Greaves, the Court reminded the appellant that payment was due (January 1, 2002) in the amount of nine thousand United States dollars (US\$9,000.00) for the lease of the farm and ordered the appellant to immediately pay said amount upon the receipt of the letter. The records before us are replete with payment receipts not only from the Ming Fung Import & Export Corporation, appellant in this case, but also from many other entities and individuals who were or are obligated to the Charles D. Sherman estate. What this tells us is that the matter of the Charles D. Sherman estate has been and is still under the control of the Monthly & Probate Court of Montserrado County. From what we see, the estate has not been closed and is therefore still under the jurisdiction of the Monthly & Probate Court of Montserrado County.

We therefore hold that the matter of the Charles D. Sherman estate is still pending

before the Monthly & Probate Court of Montserrado County, and the appellant, being a lessee of one of the properties belonging to the estate, has all rights, as a necessary party, to inform the Monthly and Probate Court concerning the property it leased from the estate which is being administered by the Monthly & Probate Court of Montserrado County.

Concerning whether prohibition will lie in this case, we hold that prohibition will not lie. This Court has held repeatedly that the extraordinary writ of prohibition will not lie where the party has another adequate and available remedy by appeal. *Fazzah v. National Economic Committee* 8 LLR 85 (1943); *Doe et al. v. Randolph* 35 LLR 724 (1988).

The records show that at the time the judge of the Monthly & Probate Court of Montserrado County handed down decision in the bill of information, the lawyer representing the appellee was not in court, even though he had received notice of assignment to appear for the ruling. A counsel was appointed to take the ruling for the absent counsel for the appellee. The court appointed counsel excepted to the ruling and announced an appeal to the Supreme Court; a copy of the ruling was delivered to the counsel for appellee who subsequently filed a motion seeking relief from judgment. The motion was heard and denied. Instead of perfecting the appeal as announced, the appellee's counsel filed a writ of prohibition with the Chambers Justice. We hold that having abandoned its appeal, the appellee cannot seek prohibition as a substitute.

WHEREFORE, the ruling of the Chambers Justice is hereby reversed.

The Clerk of this Court is ordered to inform the Monthly & Probate Court of Montserrado County to resume jurisdiction over this case and give effect to this ruling. And it is so ordered.

COUNSELLORS WILLIAM A. N. GBAIN'TOR OF GBAIN'TOR & ASSOCIATES LAW FIRM APPEARED FOR APPELLANT. COUNSELLORS DAVID B. GIBSON, JR. AND M. WILKINS WRIGHT APPEARED FOR APPELLEES.