

MONROVIA PROPERTIES, INC., by and thru its Authorized Officer, Petitioner, *v.*
HIS HONOUR J. BOIMA KONTAE, Assigned Circuit Judge, Sixth Judicial Circuit
Court, Montserrado County, and **MARTHA COOPER SHERMAN**, by and thru her
Attorney-In-Fact, **ARTHUR SHERMAN**, Respondents.

PETITION FOR A WRIT OF CERTIORARI AGAINST THE CIVIL LAW COURT,
SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: March 24, 2004. Decided: August 13, 2004.

1. The Supreme Court will not pass upon a constitutional question although properly presented by the records, if there is also present some other ground upon which the case may be disposed of.
2. Certiorari is a special proceeding to review and correct decisions of officials, boards, or agencies acting in a judicial capacity, or to review and intermediate order or interlocutory judgment of a court.
3. The power to grant default judgment is not based upon one notice of assignment but lies within the sound discretion of the trial judge.
4. In real property cases a default judgment should not be granted upon only one assignment issued for the hearing; if upon an assignment neither the defendant nor his counsel appears, the court should at least make another assignment.
5. While the Civil Procedure Law provides that if a defendant has failed to appear, plead or proceed to trial, or if the court orders a default for any other failure to proceed, plaintiff may seek a default judgment against him, the court in granting a default judgment should not rely on only one notice of assignment, especially in cases involving real property.
6. There must be at least two notices of assignment issued, served and returned served, and if the defendant fails to appear, then the granting of a default judgment can be considered proper or justified.
7. In the dispensation of justice, the judge who hears the case must be the one to decide it, not another judge.

Co-respondent Martha Cooper Sherman, by and thru her attorney-in-fact, Arthur Sherman, filed a petition in the Circuit Court for the Sixth Judicial Circuit, Montserrado County, praying the court to cancel the lease agreement concluded and executed between her and the petitioner, Monrovia Properties Inc. The co-respondent asserted as the basis for the petition for cancellation that the petitioner had violated the lease agreement by sub-letting the demised property without the consent or approval of the co-respondent, as required by the agreement. Notice of assignment having been duly issued and served for hearing of the

case, and the defendant and its counsel having failed to appear for the hearing, counsel for co-respondent prayed for the entry of a default judgment. The default judgment was granted and the co-respondent allowed to commence the production of evidence to make the imperfect judgment perfect.

However, as co-respondent/plaintiff first witness was concluding his testimony, counsel for the petitioner appeared in court and made representation and informed the court that he was not served with an assignment and prayed for an investigation by the court. The request was granted by the court but with the proviso that if the office of counsel for the petitioner did receive the notice of assignment, the case would be proceeded with without the participation of the petitioner or its counsel. When, on the following day counsel for the petitioner conceded that someone in his office had received the assignment, the court proceeded, as per its ruling, with the case, barring counsel for the petitioner from participating in the same.

It was from this action of the trial court that the petitioner filed a petition with the Chambers Justice of the Supreme Court for the issuance of a writ of certiorari. Given that constitutional issues were raised, the case was ordered forwarded to the Full Bench for disposition.

The Supreme Court, determining not to deal with the constitutional issues presented since there were other issues upon which the matter could be decided, granted the petition. The Court held that although the Civil Procedure Law provided for the granting of default judgment where there was a failure of a defendant to appear following the issuance and service of a notice of assignment, such default judgment should not be granted upon the failure of the defendant to appear on the first assignment of the case, especially, as in the instant case, where the case involved real property. The Court opined that for the trial court to enter a default judgment that could be considered proper and justified, it must have issued not less than two notices of assignment which had been served and returned served on the defendant, and the defendant must have failed to appear on each of such assignments. The Court therefore *granted* the petition, reversed the ruling of the trial judge, and ordered a new trial.

Snonsio E. Nigba of Legal Services, Inc. appeared for the petitioner. *Richard McFarland* of The Flaawgaa R. McFarland Legal Services appeared for the respondent.

MR. JUSTICE CAMPBELL delivered the opinion of the Court.

The records in this case reveal that co-respondent Martha Cooper Sherman, by and thru her attorney-in-fact, Arthur Sherman, Jr. of the City of Monrovia, Liberia, entered into a lease agreement with Monrovia Properties, Inc., a corporation organized and existing under the laws of Liberia, represented by its President, Stephen B. Dunbar, Jr., as lessee. The lease

agreement was for a parcel of land situated on Bushrod Island around the Free Port of Monrovia, known as CFAO (Liberia) Ltd. Garage, containing two and one-half (2.5) acres of land, and was for a term of seventeen (17) calendar years, commencing from the 6th day of March, A. D. 1992 up to and including the 5th day of March, A. D. 2009.

The lease agreement required petitioner, Monrovia Properties, Inc., to pay Thirty Four Thousand Liberian Dollars (LD\$34,000.00) annually in advance for the period covering March 6, 1992 to March 5, 1999, and Sixty Thousand Liberian Dollars (LD\$60,000.00) annually in advance for March 6, 1999 to March 5, 2009 respectively.

Clause five (5) of said agreement provides, among other things, that the lessee has the right to sub-let or to assign a portion or the whole of the demised premises, or to assign the lease, in whole or in part during the period or life of the agreement, subject to the prior consent of the lessor, now respondent.

As a result of the Liberian civil conflict, the premises were partly damaged and at some point in time occupied by ECOMOG, as a result of which the respondent/petitioner could not continue with business on said premises. However, due to financial problems, petitioner, Monrovia Properties, Inc., leased a portion of the demised premises to Phoenix International, Inc., a corporation organized and existing under the laws of Liberia, represented by its President, Dr. Nathaniel Richardson, on July 9, 1999, for a period of one (1) year, commencing from the 1st day of July, A. D. 2000, for rental of Ten Thousand United States Dollars (US\$10,000.00).

At the expiration of this lease agreement, petitioner again entered into a new lease agreement with Phoenix International, Inc. on February 9, 2001 for the same premises previously leased, for a period of five (5) years, commencing on the 1st day of August, A. D. 2000, up to and including the 31st day of July, A. D. 2005. Under the new lease agreement, Phoenix International, Inc. was required to pay Ten Thousand United States Dollars (US\$10,000.00) at the signing of the lease agreement, Twelve Thousand Five Hundred United States Dollars (US\$12,500.00) per annum from August 1, 2001 to July 31, 2003, and Fifteen Thousand United States Dollars (US\$15,000.00) per annum from August 1, 2003, to July 31, 2005, as rental fees.

Having learned about these lease agreements, co-respondent Martha Cooper Sherman, by and thru her attorney-in-fact, filed a petition for the cancellation of the lease agreement of March 6, 1992 with the Sixth Judicial Circuit Court for Montserrado County, sitting in its June, A. D. 2001 term. The co-respondent alleged that the petitioner had violated clause five (5) of the lease agreement by leasing the subject premises to Phoenix International, Inc., without the prior consent of the co-respondent, and that petitioner had also accumulated rental arrears in the sum total of Thirty-Four Thousand Seven Hundred Thirty-Three United States Dollars and Thirty-Three Cents (US\$34,733.33).

The petition for the cancellation of lease agreement also alleged that respondent/petitioner fraudulently pretended to be the true owner of the property when she

executed the said lease agreement as lessor instead of serving as sub-lessor. It further titled the agreement "Lease Agreement", instead of the appropriate caption "Sub-Lease Agreement" as is legally done. Co-respondent therefore prayed the court to cancel the lease agreement of March 6, 1992 between petitioner/co-respondent, as lessor, and respondent/petitioner, as lessee, for breach of contract and fraud.

To the petition for cancellation, petitioner, Monrovia Properties, Inc., filed a seven-count returns, wherein it denied the allegations contained in the petition.

The records also show that several motions, such as motion to enjoin payment of rent by Phoenix Inter-national, Inc. to Monrovia Properties, Inc., motion to vacate temporary restraining order, motion for sequestration of rent, and motion to introduce newly discovered evidence were filed, to which returns thereto were also filed.

In the motion to vacate the temporary restraining order, along with an indemnity bond, petitioner alleged that the temporary restraining order was not accompanied by an indemnity bond to indemnify the petitioner, contrary to law. It therefore prayed that the temporary restraining order be vacated.

The court below, allegedly without notice to the petitioner/ co-respondent, vacated the temporary restraining order. The petitioner/co-respondent therefore filed a petition for a writ of prohibition before the Justice in Chambers. The alternative writ was ordered issued, thereby staying all proceedings in the court below. The petition for a writ of prohibition was assigned, heard, and denied, and a mandate sent down to the court below to resume jurisdiction.

The trial court, having resumed jurisdiction, assigned, heard and denied the motion to vacate the temporary restraining order, as well as the motion for sequestration of rent and the motion to introduce newly discovered evidence. Thereafter, an assignment was issued, served on both parties and returned served for the hearing of the cancellation proceedings on November 18, 2003, at 11:00 a.m.

When the case was called for hearing on the said 18th day of November, A. D. 2003, petitioner Monrovia Properties, Inc. and counsel were absent without an excuse. Petitioner/co-respondent's counsel therefore prayed for default judgment. Said application was granted by the court which ordered the petitioner/co-respondent to make the imperfect judgment perfect. While co-respondent's first witness was on the witness stand on direct examination, respondent/petitioner's counsel appeared in court and was allowed to make representation.

While making his representation, Counsellor Snonsio Nigba informed the court that he was not aware of the assignment of November 18, 2003, at 11 a.m. as shown on the court's file, and as per the sheriff's returns which alleged that said assignment was received and signed for on behalf of Legal Services, Inc. by one of its secretaries. He therefore prayed the court that some investigation be conducted as to the genuineness of the signature on said notice of assignment.

The court, in this regard, noted the representation of Counsellor Nigba and announced that the investigation would proceed on condition that if it were established that the notice of assignment was served on Legal Services, Inc. then the respondent/petitioner's counsel will not be allowed to participate in the proceedings. The court then granted the submission and adjourned the hearing of the case to resume on November 19, 2003 at 10 a.m. so as to conduct an investigation.

At the resumption of the trial on November 19, 2003, counsel for petitioner informed the court that upon investigation conducted at his office, none of the secretaries signed for the notice of assignment, but that he had discovered that the said notice of assignment was signed for by another staff in the office. He therefore withdrew the application for an investigation and prayed that the case be proceeded with in keeping with practice in this jurisdiction. To this submission, the trial judge ordered the trial proceeded with, but without the participation of the petitioner's counsel, in affirmation of the court's ruling of November 18, 2003. Petitioner's counsel excepted to this ruling and filed a seven count petition for a writ of certiorari before the Chambers Justice.

In its petition for the issuance of the writ of certiorari, petitioner contended that the refusal of the co-respondent judge to allow its counsel to cross examine co-respondent's first witness after the notation of petitioner's counsel representation was a total violation of respondent/petitioner's constitutional right and the right to the due process of law. It was also claimed that under the law and in keeping with the practice in this jurisdiction, the granting of a default judgment is an imperfect judgment to be made perfect upon the presentation of all the evidence by the moving party, and that said imperfect judgment does not exclude the defendant from cross examining a witness or to be heard upon his appearance, for to do so would be in violation of the "due process" clause that is guaranteed under the Constitution of the Republic of Liberia.

The petitioner further contended that its counsel, having appeared in court, and made representation and same having been noted by the court, he could not thereafter be excluded from the trial proceedings simply because the court was conducting a default judgment proceeding.

The petitioner also alleged that co-respondent Judge J. Boima Kontoe committed a reversible error in his ruling by barring petitioner's counsel from participating in the trial, that is, to cross examine co-respondent's witnesses and to present evidence after petitioner had appeared thru its counsel and his representation noted by the court. The petitioner prayed that an alternative writ be issued and the co-respondent judge be ordered to appear to show cause why the petition for certiorari should not be granted.

The alternative writ was ordered issued, served and returned served. The co-respondent, Martha Sherman, filed a five-count returns contending, among other things, "that Volume I of the Civil Procedure Laws Revised, section 42.1 up to and including section 42.9 were not legally engineered for entry in section 42.2 and section 42.7 and that said section 42.2 only

deals with the occasion after a default trial where the judge thinks fit to want to examine the evidence presented, thru a jury, and only where damages are involved and this is not an action of damages that requires the help of juries”. It was argued “that volume one of the Civil Procedure Law Revised, section 42.7(2), deals with a situation where the instrument sought to be cancelled contains or calls for an arbitration clause, but this is not the case as it is a lease agreement and does not contain such arbitration clause.”

The co-respondent further alleged “that petitioner’s count two of the petition constitutes an admission that petitioner’s counsel was not present when the default trial commenced and that co-respondent’s first witness had rested on direct examination.”

The returns also alleged that petitioner was never denied any constitutional right; instead petitioner waived its right when the notice of assignment to appear on November 18, 2003 was signed for, but it failed to appear. Furthermore, the petitioner waived its right when it failed to object to the trial court’s position of November 18, 2003, wherein the judge ruled that petitioner’s counsel would not participate in the proceedings if it were established that the notice of assignment was properly signed for. Because constitutional issues were raised in the petition and returns, the Ad-Hoc Chief Justice forwarded the case to the Full Bench for determination; hence, this matter is before us.

Based on the facts and circumstances as stated above, there is only one cardinal issue to be determined by this Court, which is: Whether or not a default judgment should be granted upon the issuance of one notice of assignment in the trial of a case involving real property?

Before we address the issue stated above, this Court says in passing that the petition for certiorari and the returns thereto raised constitutional issues. The Court has decided not to pass on said constitutional issue because it is “the view that Supreme Court will not pass upon a constitutional question although properly presented by the records, if there is also present some other ground upon which the case may be disposed of, is not strictly adhered to in our jurisdiction. It is of supreme necessity that recourse be had to constitutional provisions without which the controversy may not be finally determined”. See *The Liberian Bank for Development And Investment (LBDI) v. Holder*, 29 LLR 310, Syl. 1(1981).

Firstly “Certiorari is a special proceeding to review and correct decisions of officials, boards, or agencies acting in a judicial capacity, or to review an intermediate order or interlocutory judgment of a court”. See Civil Procedure Law, Rev. Code 1:16.21 (1), I LCLR 228.

A recourse to the facts in this case tells us that at the call of the case on November 18, 2003 at 11 a.m., petitioner’s counsel appeared late in court when the trial of the case was in progress, after the granting of a motion for default judgment and while respondent’s first witness was at the close of direct examination. Petitioner’s counsel was allowed to make representation and he informed the court that he had no knowledge of the hearing of the case being scheduled for November 18, 2003, at 11 a.m. He therefore prayed the court to

conduct an investigation as to the sheriff's returns that the notice of assignment was received and signed for by a secretary in the office of Legal Services, Inc.

As a result of this submission, the trial was suspended to resume on November 19, 2003 at 10 a.m. On November 19, 2003, as per the schedule for the resumption of the trial, petitioner's counsel admitted that the said notice of assignment was received and signed for by a staff of his law firm and therefore requested the court to proceed with the trial in keeping with law.

Co-respondent Judge, J. Boima Kontoe, owing to the submission of Counsellor Snonsio E. Naigba, counsel for petitioner, ordered the case proceeded with without his participation on grounds that where a personnel of a law office represented to the ministerial officer that he or she is a secretary in said office and based on the representation returns are made to the effect that service was made on the personnel, it does not invalidate in any manner or form the returns of the sheriff. The sheriff is not in the business of investigating the official job descriptions of staff members that are working in the various law offices.

A careful review of the records certified to this Court reveals that only one notice of assignment was issued out for the hearing of the cancellation proceedings on November 18, 2003, at the hour of 11 a.m., after the disposition of the several motions that grew out of the cancellation proceedings. This Court says the power to grant default judgment or not based upon one notice of assignment lie within the sound discretion of the trial judge.

This matter involves petition for the cancellation of a lease agreement and the lease sought to be cancelled involves real property. The trial judge should have refused to grant the default judgment prayed for by counsel for co-respondent since this was the first assignment for the hearing of the cancellation proceedings. The judge should have ordered issuance of another assignment for the hearing of the proceeding for another day and time. See the case *Mensah et al. v. Wilson*, 37 LLR 656, Syl. 2 (1994), where it is expressly provided that "in real property cases a default judgment should not be granted upon only one assignment issued for the hearing. If on the assignment neither the defendant nor his counsel appears, the court should at least make another assignment."

While it is true that Section 42.1 of the Civil Procedure Law, 1 LCLR, page 214, provides that "if a defendant has failed to appear, plead, or proceed to trial, or if the court orders a default for any other failure to proceed, plaintiff may seek a default judgment against him", we believe, however, that the courts, in granting default judgment should not rely on only one notice of assignment, especially in cases involving real property. There must be at least two notices of assignment issued, served and returned served and if the defendant fails to appear, then the granting of default judgment shall be proper or justified.

Moreover, the records show that the case was not concluded. In other words, the co-respondent had not rested with the production of evidence required by law. In the face of this act, counsel for the co-respondent requested this Honourable Court to mandate the trial

judge in the court below to enter judgment in accordance with law. The question now is what judgment should the court below render?

It is indeed a legal maxim in the dispensation of justice that the judge that hears a case must decide. The co-respondent has not rested evidence and Judge Kontoe who presided over the case is not presiding over the Sixth Judicial Circuit, and even if he was currently presiding, it should be noted here that the term of court is over. How can we mandate the trial judge to resume jurisdiction and enter judgment? The co-respondent having prayed for default judgment, which was granted by the court below, was ordered to make the imperfect judgment perfect by presenting all of the evidence as required by law. The fact that the co-respondent did not present the required evidence and no ruling/judgment was made by the trial court, this Honourable Court is at a loss as to how it can mandate the trial judge to resume jurisdiction and enter judgment. In the supreme interest of justice we cannot do so. We think it would be proper and legal that a new trial be held.

In view of the above circumstances and the law citations, Judge Kontoe's ruling is hereby reversed, and the peremptory writ of certiorari is granted. The Clerk of this Court is ordered to send a mandate to the judge presiding over the Sixth Judicial Circuit Court, commanding him to resume jurisdiction over this case and to proceed with the trial *de novo*. Costs are disallowed until the final determination of this matter. And it is hereby so ordered.

Petition granted; ruling reversed.