A. W. MORGAN, represented by his Agent, MASSA MORGAN-RICHARDS, Appellant, v. ISAAC BARCLAY, Executor of the Estate of the Late AUGUSTA BARCLAY, and PRINCE BARCLAY, Appellees.

APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: October 17, 2001. Decided: December 21, 2001.

1. No postponement of a trial shall be allowed to obtain witnesses unless it is shown to the satisfaction of the court that (a) the proper due diligence has been employed to secure their attendance, and (b) their testimony will be material, relevant and competent.

2. A motion for continuance based upon the absence of a material witness should, if supported by an affidavit of the moving party, he granted for at least one term unless the court reaches the conclusion that said motion is made only to baffle the suit or defeat justice, or the party in opposition thereto will admit the facts that the absent witness is expected to prove.

3. A request for the attendance of a material witness cannot be said to be intended to either defeat justice or baffle a case where title to the property in litigation is in dispute and is claimed by both parties.

4. A motion for continuance should be granted upon a showing that a party who is a material witness would be physically unable to attend the proceedings in question.

5. A motion to continue a case based on the absence of a material witness or other cause is addressed to the discretion of the court, but an improper or unjust abuse of such discretion may be remedied by the superior court.

The appellees, executor of and beneficiary under the Last Will and Testament of the late Augusta Barclay, instituted an action of ejectment against the appellant, alleging that he was wrongfully withholding the property of the estate and depriving them of the use thereof. The appellee, in response to the complaint, claimed that he had purchased the said property from the beneficiary of the estate whom he alleged had come into ownership of the property by virtue of an executor's deed issued to him by the executors of the estate.

Prior to the called of the case for trial, the appellant filed a motion for continuance, contending that he was his own material witness, that his presence was required to defend against the suit, that he was ill and could not attend the trial in the term in which the case had been assigned, and that he therefore required the continuance of the case to another term of the court. The trial court denied the motion, stating that the appellant had appointed his daughter as his attorney-in-fact and that she was therefore capable of defending him. A trial was had, a verdict returned against the appellant, and judg-ment rendered thereon.

On appeal to the Supreme Court, the Court ruled that the trial judge had erred in denying the appellant's motion for continuance. The Court noted that while the granting or denial of a motion for continuance is within the discretion of the trial court and should be denied where the court concludes that the purpose for the request is to baffle the suit or defeat justice or the opposing party admits of the facts sough to be proved by the absent witness, the motion should be granted where the testimony of the witness is material, relevant and competent, especially where the case involves a dispute as to title to property and evidence is presented regarding the illness of the witness which renders him physically unable to attend the trial at the time. The Court observed that in the Liberian jurisdict-ion it has been the practice to grant at least one continuance, and that a trial court had abused its discretion when it denied the appellant's request for continuance under the circumstan-ces presented in the instant case where the appellees had denied the facts which were to be proved by the witness. The Court therefore reversed the judgment of the trial court and ordered a new trial.

B. Anthony Morgan of the Morgan Grimes and Harmon Law Firm appeared for the appellant. Francis Y. S. Garlawolo and F. Musah Dean, Jr. appeared for the appellees.

MR. JUSTICE JANGABA delivered the opinion of the Court.

The brief history of this case is, as follows:

The appellees herein, Isaac Barclay, the executor designated in the Last Will and Testament of the late Augusta Barclay, and Prince A. Barclay, sole beneficiary under the said Will, instituted an action of ejectment against the appellant, A. W. Morgan, on the 4th day of February, A. D. 1998, in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County. The certified records in the case showed that the premises, subject of the litigation, were purchased by Augusta Barclay from her sister, Elizabeth Barclay Cooper, who had

executed a warranty deed in favour of Augusta Barclay. On the 1st day of July, A. D. 1959, Augusta Barclay made and entered into a lease agreement with Salami Brothers for the lease to the latter of the property which comprised two vacant lots. The lease agreement provided for a certain lease period of twenty (20) years, with an optional period of another twenty (20) years. The lessee, Salami Brothers, subsequently constructed a building on the subject property. However, prior to the death of Augusta Barclay on July 10, 1967, she executed a Last Will and Testament in which she named Isaac Barclay as executor and her minor grandson, Prince Barclay, as the sole beneficiary of her estate.

In the complaint, the appellees claimed ownership to the subject premises by virtue of the Last Will and Testament of the late Augusta Barclay. The appellees also alleged that they were out of the bailiwick of this Republic during the period between the 1980's and 1990's due to the political upheaval in Liberia. They further alleged that Appellant A. W. Morgan, had illegally, unauthorizedly and unwarrantedly entered upon and took possession of the said premises, and had refused to surrender the same to them despite several demands made to him in 1996, 1997 and 1998 to vacate the said premises.

On the 16th day of February, A. D. 1998, Appellant Morgan filed an eight-count answer, along with a one-count motion to dismiss the appellees' complaint, asserting that the appellees lacked the capacity to sue because of the lack of any title or right of possession to the said property being vested in the appellees. The appellant conceded the fact that Isaac Barclay was designated and qualified as executor of the Augusta Barclay Estate and that Prince Barclay was named sole beneficiary in the Last Will and Testament of the late Augusta Barclay. The appellant contended, however, that Isaac Barclay, the named executor in the aforesaid Will, had executed a warranty deed to Prince A. Barclay in 1976, thereby transferring the 16th Street, Sinkor, property to the beneficiary in fee simple. The appellant also alleged that Prince A. Barclay, the beneficiary, had sold the subject property to the Sinkor Lease Hold Company whose shareholders are appellant and his brother, Lafayette K. Morgan. In addition, the appellant alleged that the latter sale was done with the full knowledge of Isaac Barclay who had witnessed the deed conveying the subject property to the Sinkor Lease Hold Company. The appellant alleged moreover that the company had subsequently purchased the leasehold rights to the property and paid off the balance loan when Salami Brothers defaulted on the loan. The appellant claimed that it was the proceeds from this transaction that were used to build the first building on the land, and that by virtue of the foregoing the Sinkor Lease Hold Company possessed owner-ship to the disputed property.

The appellees filed a twelve-count reply on the 27th day of February, A. D. 1998 denying that Co-appellee Isaac Barclay, the executor named in the Last Will and Testament of

Augusta Barclay, ever executed a deed to Co-appellee Prince A. Barclay, beneficiary of the property, giving him fee simple ownership thereto. Co-appellee Prince A. Barclay also denied ever conveying the property to Sinkor Lease Hold Company, whose shareholders were Alford W. Morgan and Lafayette K. Morgan. Additionally, in their resistance to the motion to dismiss, the appellees contended that they had the capacity to sue by virtue of the Last Will and Testament of the late Augusta Barclay. Pleadings in the case rested with the filing of the reply and the resistance.

During the September Term, A. D. 1998 of the trial court, the assigned circuit judge, His Honour Wynston O. Henries, heard and denied the motion to dismiss on September 24, 1998. The appellant noted exceptions to the ruling and thereafter filed a motion for the sequestration of rent. The motion was resisted but was granted by the trial court. The law issues were thereafter disposed of and the case was ruled to trial on mixed issues of law and facts.

On the 13th day of December, A. D. 2000, counsel for the appellant filed a motion for continuance, praying the trial court to continue the matter to the next term of court due to the absence of his material witness, Alford W. Morgan, the principal defendant in the case in the trial court. In their resistance to the motion, the appellees contended that the appellant was represented by his attorney-in-fact, Massa Morgan-Richards, daughter of the appellant. The trial judge denied the appellant's motion for continuance on the ground that Appellant Alford W. Morgan had appointed his daughter, Massa Morgan-Richards, as his attorney-in-fact to transact all matters concerning the property.

The jury trial in the case was subsequently commenced with the production of evidence by the appellees. At the conclusion of the appellees' evidence in toto, the appellant filed a motion for judgment during trial. The motion having been resisted and denied, the agent of Appellant Morgan then took the stand, testified, and was cross-examined. However, while the trial was proceeding, counsel for appellant filed in the office of the Clerk of this Court a petition for a writ of certiorari to review and correct the ruling of the trial judge denying the motion for continuance. Mr. Justice Morris, then presiding in the Chambers of this Court, denied the petition on ground that it was belatedly filed. He nevertheless ordered the lower court to permit counsel for the appellant to subpoena his material witness, in the person of Alford W. Morgan, and to subsequently proceed with the trial of the case in keeping with law. In obedience to the directive of the Chambers Justice, the trial court subpoenaed the appellant, requesting him to appear before the court on January 27, 2001. Alford W. Morgan, the appellant, could not appear, and therefore sent a fax message to the court requesting it to postpone the trial of the case to the next term of court due to his illness in the United States

of America. The trial judge ignored the request and proceeded with the trial. At the conclusion of the evidence, the trial jury brought a verdict in favor of the appellees. The appellant thereafter filed a motion for a new trial, which was resisted by the appellees and denied by the court, which then confirmed the verdict and rendered judgment thereon. The appellant excepted to the judgment and appealed therefrom to this Honourable Court upon a sixteen-count bill of exceptions.

This Court deems count 7 of the bill of exceptions to be the only count worthy of its attention and therefore hereunder quotes the same verbatim for the benefit of this opinion. The count states:

"Because within the eight days allowed, supra, counsel for defendant endeavored to have the material witness come to Liberia, but defendant, finding that he could not come, sent a fax message to Your Honour giving reasons why he could not come to Liberia before March 2001, and praying for postponement until the March Term of court, but Your Honour, having received the said fax message from defendant's material witness, denied the request, thereby strangulating defendant from testifying in his own behalf; to which defendant there and then excepted."

Two (2) issues were raised by the appellant in his brief and argued before this Court. We deem only the first issue to be determinative of this case. In regard to the said issues, the appellant's counsel contended that the defendant in the trial court, Alford W. Morgan, was his own material witness in the case and that no other person could fully and satisfactorily present the proof that he wanted or desired to establish in his own behalf. The appellant's counsel also argued that an agent of a party to a case is not necessarily a material witness for the principal, and that having an agent is not a legal ground upon which a motion for continuance should be denied.

The appellees, for their part, raised and argued three (3) issues before this Court. However, we consider only the third issue to be relevant to the determination of the case. With regard to the said issue, the appellees contended that a matter involving real property cannot indefinitely be postponed due to the absence of the appellant after he had issued a power of attorney to another person to act in his behalf. They maintained that counsel for the appellant had failed to prove the materiality, relevance, and competence of the subpoenaed witness.

The facts and circumstances enumerated above present only one salient issue for determination. That issue is whether or not the trial judge committed a reversible error when he denied the appellant's motion for continuance.

We begin our determination with an examination of the appellant's motion for continuance, filed on the 14th day of December, A. D. 2000 and denied by the trial judge on the 27th day of December A. D. 2000. We note that the denial of the motion was prior to Appellant Morgan's message of January 23, 2001. Counts 1 and 2 of the said motion, quoted verbatim hereunder, state:

"1. That Alford W. Morgan, who is the defendant and also a material witness in his own behalf in this case, was without the Republic of Liberia at the time this case was instituted and is still out of the Republic and in the United States of America, and in the circumstances will be unable to attend the trial and to testify in his own behalf if the trial was to proceed on the date assigned, and therefore defendant hereby prays for a continuance of this cause to the ensuing term of court to enable the defendant/material witness to return to Liberia and to testify in his own behalf. See writ of subpoena testificandum returned by the sheriff, which is part of the records of this case.

2. That defendant's intent is to prove by the testimony of defendant, Alford W. Morgan, that he (Alford W. Morgan) is the owner of the property, subject of these proceedings, which he acquired by bona fide purchase from the self-same Prince Barclay, one of plaintiffs in this case; and that plaintiffs, by this action, are attempting to fraudulently deprive defendant of the said real property."

In count 1 of the motion for continuance, the appellant requested the trial court to postpone the hearing of the case to the ensuing term of court due to the inability of his material witness to attend the trial and to testify on his own behalf, his absence being evidenced by the writ of subpoena testifican-dum returned by the sheriff. Count 2 of the motion stated that the defendant intended to prove by the presence of the material witness that he was the bona fide owner of the subject property which was acquired by purchase from Co-appellee Prince Barclay.

In the ruling on the motion for continuance, His Honour Varnie Cooper denied the same, stating as the grounds there-for that said motion was addressed to his sound discretion, that the then defendant, Alford W. Morgan, was represented by his daughter as his attorney-in-fact, and that the motion was filed purposely to delay the hearing of the case.

In paragraph 1 of the fax message addressed to the trial judge, the appellant informed the trial judge that his physical presence was necessary. He also informed the judge that the case was "high profile because it relates to a parcel of land" that he had purchased 24 years earlier, and that he could not be present at the time the case was scheduled for hearing on January 26, 2001 due to his illness. Hence, he requested the trial judge to defer hearing of the

case to the next term of court, at which time he would be present. The judge also ignored the request of the appellant.

Our Civil Procedure Law provides: "No postponement of a trial shall be allowed to obtain witnesses unless it is shown to the satisfaction of the court that: (a) proper and due diligence has been employed to secure their attendance, and (b) their testimony will be material, relevant, and competent." Civil Procedure Law, Rev. Code 1:21.5., Adjournment of Trial to Obtain Witness.

The language of the above quoted statutory provision clearly shows that a trial court shall allow the postponement of a trial purposely to obtain a witness subsequent to a proper and diligence effort to secure the attendance of such witness, and that the testimony of the said witness should be material, relevant and competent. In the case Snetter v. Snetter this Court held that "a motion for continuance based upon the absence of a material witness should, if supported by an affidavit of the moving party, be granted for at least one term unless the court reaches conclusion that said motion is made only to baffle the suit or defeat justice or the party in opposition thereto will admit the facts the absent witness is expected to prove." 2 LLR 372 (1920), Syl. 2, text at 373-374.

In the case at bar, the motion for continuance requested the trial court to defer hearing of the case to the next term of court so as to enable the appellant, who was the material witness, to appear and testify on his own behalf in establishing his owner-ship to the disputed subject property. This Court holds that the request of the material witness could not in any way have been intended to defeat justice or to baffle the case since title to the property in litigation was claimed by both parties and therefore in dispute. It is our opinion that the testimony of the material witness was material, relevant and competent in establishing his ownership to the disputed property, and that his request for continuance was to enhance the ends of justice. The appellant's fax message to the trial judge also indicated his inability to return to Liberia for the trial of the case on the scheduled date due to illness. This Court has held that "the motion for continuance should be granted upon a showing that a party who is a material witness would be physically unable to attend the proceedings in question. Samuel v. Samuel, 13 LLR 27 (1937), text at page 29. We therefore disagree with the ruling of the trial judge denying appellant's request, contained in his fax message to the trial judge, indicating his physical inability to return to Liberia and to proceed to trial. In the case Wright v. Tay, 11 LLR 164 (1952), Syl. 1 & 2, citing Appleby v. Freeman, reported in 2 LLR 272 (1916), text at 274, this Court held: "A motion to continue a case based upon the absence of a material witness or other cause is addressed to the discretion of the court, but an improper and unjust abuse of such discretion may be remedied by the superior court. The

practice in Liberia is to grant the continuance for one term at least, unless the opposite party will admit the facts to be proved by the witness."

We uphold our decision in those cases, and reaffirm that a motion for continuance is addressed to the sound discretion of the trial judge. This Court will, however, remedy an improper and unjust abuse of a discretion in denying the motion where the material witness has shown to the court a physical incapacity that prevents him attending and proceeding to trial, as in the instant case.

Wherefore, and in view of the foregoing, the ruling of the trial judge denying the motion for continuance is hereby reversed and the case remanded for a new trial during the March, A. D. 2002 Term of Court. The Clerk of this Court is hereby ordered to send a mandate to the lower court ordering the trial judge presiding therein to resume jurisdiction over this cause and proceed with the trial thereof de novo. Costs are to abide the final determination of the case. And it is hereby so ordered.

Judgment reversed.