

JEREMIAH Y. SACKIE, Plaintiff-In-Error, *v.* **HIS HONOUR YUSSIF D. KABA**, Assigned Circuit Judge, Sixth Judicial Circuit Court, Montserrado County, and **SACKIE GBARGBEA, SR.**, Defendants-In-Error.

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

Heard: December 16, 2004. Decided: February 28, 2005.

1. It is the duty of the lawyer to be punctual in his attendance at court, and to be prompt and faithful in answering assignments received by him, notifying the time for hearing of his clients' case.
2. A lawyer has a duty to the public and to his profession to avoid tardiness in the performance of his professional duty.
3. A lawyer must faithfully, honestly and consistently represent the interest and protect the rights of his client.
4. It is improper for a lawyer without a valid excuse to fail to appear on the date set forth in a notice of assignment for trial.
5. Lawyers are to see well to it that their clients' matters are attended and handled by them with the highest degree of precision and fidelity that will insure the protection of their interest, whether the interest be in respect of property, liberty or life.
6. No person shall be deprived of life, liberty, security of the person, property, privilege or any other right except as the outcome of a hearing judgment consistent with the provisions laid down in the Liberian Constitution and in accordance with due process of law; and justice shall be done without sale, denial or delay.
7. A lawyer who, having received and signed several notices of assignment, fails to appear in court for the trial of his client's case without notice to the court, violates his professional oath and his act is contemptuous of court.
8. Every person against whom a final judgment is rendered shall have the right to appeal from the judgment of the court except from that of the Supreme Court. The decision of the Supreme Court shall be absolute and final.
9. An appeal shall be taken at the time of rendition of the judgment by oral announcement in open court. Such announcement may be made by the party if he represents himself or by the attorney representing him, or, if such attorney is not present, by a deputy appointed by the court for this purpose.
10. Where there is an abandonment of a case by a litigant, the court is not required and should not appoint a counsel to defend that party by either taking a ruling or excepting thereto.
11. A litigant who, after receiving and signing several notices of assignment, fails to

appear in court, either personally or through counsel, without notice to the court, is deemed to have abandoned his case.

12. The entry of a final judgment prior to the granting of a default judgment by the trial court is an act which is contrary to the law, practice and procedure in this jurisdiction.

13. A trial judge errs when he enters a final judgment prior to granting of a default judgment.

14. The judge of a court is not merely appointed to an office, but he is also elevated to a dignity. As such, he is dedicated and consecrated to the adjudication of the rights of litigants, and hence, must avoid any course of conduct which would cause his impartiality to be questioned.

15. The preparation of final judgment by a trial judge prior to the entry of default judgment raises question as to the judge's impartiality.

Plaintiff-in-error filed a petition before the Justice in Chambers praying the issuance of a writ of error against the trial judge and the co-defendant-in-error (plaintiff in the lower court), contending that he was deprived of the opportunity of taking an appeal because the trial judge, in rendering final judgment in the case in the lower court, had failed to deputize counsel to take the ruling and except thereto for the plaintiff-in-error. The plaintiff-in-error, who was defendant in the magisterial court in an action of summary proceedings to recover possession of real property brought against him by co-defendant-in-error Sackie Gbargbea, had lost the case in that court and had appealed the matter to the Sixth Judicial Circuit, Montserrado County.

Although several assignments had been issued and served and returned served on his counsel on several occasions, neither the plaintiff-in-error nor his counsel had made an appearance before the court on previous dates or on the assigned date on which the trial was held. No excuse was provided by the plaintiff-in-error or his counsel for their absence. Counsel for co-defendant-in-error had therefore prayed the circuit court for default judgment. The request was granted and the co-defendant-in-error allowed to present evidence, after which the perfect judgment was read by the trial judge. In entering the judgment if liable against the plaintiff-in-error, the trial judge did not deputize counsel to take the judgment or to except thereto and announce an appeal to the Supreme Court.

The Supreme Court, in disposing of the plaintiff-in-error's contention, determined that the plaintiff-in-error's counsel was in violation of the Rules of Court and the Code of Ethics in not appearing for the hearing of his client's case and not providing an excuse for his non-appearance, an act which the Court regarded as contemptuous. The Court held that in the face of such failure by the counsel for

plaintiff-in-error to appear for the hearing, the trial judge was under no legal duty to appoint or deputize a counsel to take the ruling of the court, to except thereto, or to announce an appeal therefrom.

Notwithstanding, the Supreme Court reversed the judgment of the lower court on the ground that the trial judge had acted improperly in preparing a final judgment in the case before the application for a default judgment was made and granted, and before evidence was presented by the plaintiff-in-error to substantiate the allegations made in his complaint. The Court noted that such irregularity on the part of the judge, in preparing final judgment before the plaintiff-in-error had made application for a default judgment, evidenced by the records of the trial court, brought into question his impartiality and the dignity of the court. The Court therefore ordered that a new trial be conducted by the lower court.

Cooper W. Kruah of the Henries Law Firm appeared for the plaintiff-in-error. *Marcus R. Jones* of the Jones & Jones Law Firm appeared for the defendants-in-error.

MR. JUSTICE CAMPBELL delivered the opinion of the Court.

The records in this case show that the plaintiff-in-error, Rev. Jeremiah Y. Sackie, and defendant-in-error, Sackie Gbarbeah, Sr., jointly leased house spots from Mrs. Marcia Eddie. On one of the house spots, the plaintiff-in-error constructed a motel that is referred to as 'Eye to Eye', while the co-defendant-in-error also had a house constructed on the same leased properties. Both the plaintiff-in-error and the co-defendant-in-error jointly paid rent for the house spots to the owner of the property through her attorney-in-fact, Mr. Osman Kanneh.

When the joint lease agreement expired, both parties approached Mr. Osman Kanneh, attorney-in-fact for Mrs. Eddie, to prepare separate lease agreements for the parties due to some misunderstanding between them. The plaintiff-in-error alleged that while negotiations were going on as to the amount to be paid by each party, the co-defendant-in-error went to the attorney-in-fact of Mrs. Mercia Eddie and procured a single lease agreement for the properties on the three house spots in his sole name as lessee.

On December 8, 2000, the co-defendant-in-error, based on the strength of the lease agreement signed, wrote the plaintiff-in-error to pay to him an amount of Five Hundred United States Dollars (US\$500.00) per month for the motel that the plaintiff-in-error had constructed, demanded that the plaintiff-in-error pays One Thousand Five Hundred United States Dollars (US\$1,500.00) in advance for the first three months and attached copy of the lease agreement to said communication. The plaintiff-in-error refused to honor the communication, and as a result, the co-

defendant-in-error, on February 16, 2001, filed an action of summary proceedings to recover possession of real property against the plaintiff-in-error, in the Monrovia City Court, on grounds that the plaintiff-in-error was a tenant at will who was withholding and occupying his premises, Sackie's Inn Motel, situated and lying in Saye Town, City of Monrovia. The complaint stated that the plaintiff-in-error was an undesirable tenant due to his inability to pay his rental. The co-defendant-in-error therefore prayed the court to enter judgment against the plaintiff-in-error and have him ousted and ejected from the premises, and to make him pay the amount of Three Hundred United States Dollars (\$300.00) as damages for the wrongful withholding and detention of the co-defendant-in-error's premises.

Predicated upon the aforesaid complaint of the defendant-in-error, a writ of summons was issued, served and returned served, thereby placing the plaintiff-in-error under the jurisdiction of the Monrovia City Court. When the case was called on April 6, 2001, it could not be proceeded with because the plaintiff-in-error's counsel requested for adjournment. Thereafter, several notices of assignment for the hearing of the case were issued, served and returned served on both parties, but as a result of change of counsels on several occasions by the plaintiff-in-error, the hearing of the case was delayed. Finally, the trial started on June 15, 2001, with Counsellor J. D. Baryougar Junius representing the plaintiff-in-error and Counsellor Marcus R. Jones represented the co-defendant-in-error.

Prior to the plea of not liable, counsel for the plaintiff-in-error filed a motion for the dismissal of the co-defendant-in-error's action of summary proceedings to recover possession of real property on the ground that the plaintiff-in-error was not properly notified as to what the co-defendant-in-error intended to prove. The motion was heard and denied, and the request of the co-defendant-in-error's counsel for the qualification and sequestration of witnesses was granted. Thereafter, the co-defendant-in-error himself took the witness stand. He testified in substance that by virtue of a lease agreement made and entered into by and between him and Mrs. Marcia Eddie, represented by her attorney-in-fact Osman Kanneh, he is the lease holder of the parcel of land on which the motel that the plaintiff-in-error occupied was situated. He further testified that subsequent to obtaining the lease agreement, both he and the plaintiff-in-error had earlier leased the property jointly; that they had operated same as a business prior to the 1990 war and that he had informed the plaintiff-in-error about his authority over said property, but that the plaintiff-in-error had failed to honour his authority. He testified to and identified the lease agreement, which was thereafter marked and confirmed by the court.

The second witness for co-defendant-in-error testified to the effect that he was the attorney-in-fact for Mrs. Mercia Eddie and that by virtue of the authority vested in him under the power of attorney, he entered into a lease agreement with the

co-defendant-in-error for the premises in question, located and lying in Saye Town, Monrovia, Liberia. He testified to the lease agreement and same was reconfirmed. The co-defendant-in-error thereafter rested evidence in *toto* with the admission of documents into evidence.

The plaintiff-in-error, by and thru his counsel, informed the court that he waived the production of evidence.

After hearing arguments *pro* and *con*, the court adjudged the plaintiff-in-error liable to the co-defendant-in-error and ordered him to vacate the subject property within seven (7) days, as of Wednesday, August 16, 2001. The court further ruled that upon his failure to vacate the said property, a writ of possession would be issued to have him ousted and ejected therefrom. Costs were ruled against the plaintiff-in-error. To this ruling, counsel for plaintiff-in-error excepted and announced an appeal to the Sixth Judicial Circuit Court, Montserrado County, sitting in its September Term, A. D. 2001. The appeal was granted.

On the 18th day of March, A. D. 2002, a written notice of assignment was issued by the Civil Law Court, served and returned served by the sheriff on the 20th day of March, A. D. 2002, for the trial of the summary proceedings to recover possession of real property on the 21st day of March, A. D. 2002, at the hour of 2:00 p. m. The notice of assignment was acknowledged by Sackie Gbargbea, co-defendant-in-error and Jones and Associates, while Counsellor J. D. Baryougar Junius signed said notice of assignment for the plaintiff-in-error.

At the call of the case for trial on the 21st day of March, A. D. 2002, Counsellor J. D. Baryougar Junius and the plaintiff-in-error did not appear for the hearing of the case. Hence, counsel for the co-defendant-in-error moved the court for default judgment and asked the court to proceed with the hearing of the case. There being no evidence, either written or verbal, that an excuse was sent to the court by counsel for plaintiff-in-error, the court granted the default judgment and ordered the sheriff to call the plaintiff-in-error three times at the door of the court. This which was done and thereafter the court proceeded with the hearing of the case. The co-defendant-in-error and his witness took the stand, testified in support of his complaint and were discharged.

The co-defendant-in-error, having rested evidence in *toto*, the court entered final judgment the same day, that is, March 21, 2002, adjudging the plaintiff-in-error liable to the co-defendant-in-error. The plaintiff-in-error was consequently ordered ousted and ejected from the premises. He was further adjudged liable to co-defendant-in-error for damages in the amount of Three Hundred United States Dollars (\$300.00) for the wrongful withholding of co-defendant-in-error's property.

Because no counsel was appointed by the court to take the ruling for and on behalf of the plaintiff-in-error, a petition for a writ of error was filed with the

Honorable Supreme Court. To this petition, returns were also filed. For the benefit of this opinion, we deem it important to quote counts 2, 3 and 4 of the plaintiff-in-error's petition and to also quote counts 2, 3, 4, 5 and 6 of the defendants-in-error's returns to the petition for a writ of error, and which we think are crucial for the disposition of this matter. Counts 2, 3 and 4 of the plaintiff-in-error's petition read thus:

“2. That on the 21st of March, A. D. 2002, the co- defendant-in-error judge, Yussif D. Kaba, rendered final judgment in the proceedings by default without appointing a counsel to take the ruling on behalf of the plaintiff-in-error whose counsel was absent due to some unavoidable circumstances, contrary to our practice and procedure. Copy of the said ruling is hereto attached and marked as plaintiff-in-error's exhibit P/1;

“3. That the neglect and/or refusal by the co-defendant-in- error judge to have appointed a counsel to take the ruling for and on behalf of the plaintiff-in-error deprived the plaintiff-in-error of the right to take advantage of his right to an appeal to the Honourable Supreme Court to review the erroneous ruling of the co-defendant-in-error judge in keeping with the spirit of our Constitution;

“4. Plaintiff-in-error further complains and says that error will also lie because the co-defendant-in-error judge entertained an action of summary proceedings to recover possession of real property in this matter which involved issue of title, in that both the plaintiff and the defendant in the original complaint were claiming title through lease agreement which would have been determined by a jury trial by action of ejectment.”

Counts 2, 3, 4, 5, and 6 of the defendants-in-error's returns read thus:

“2. Also because as to count two (2) of the petition, defendants-in-error deny that the counsel for plaintiff-in- error was absent allegedly due to some unavoidable circumstances. Defendants-in-error contend that were the allegations true, Counsellor J. D. Baryougar Junius, who signed the assignment, would have filed in an excuse, but that he neglected and failed to have appeared, thereby abandoning his defense in said matter. What are the alleged unavoidable circumstances as alleged? There are six (6) assignments on the case file with excuses from plaintiff-in-error's Lawyer alone;

“3. Further to count three (3) herein above, which traverses count two (2) of the petition as to Judge Kaba, co-defendant-in-error, rendering final judgment on the 21st day of March, A. D. 2002, defendants-in-error submit that Judge Kaba did proceed to render such judgment in keeping with law, and as such, he did not commit any error;

“4. That as to count three (3) of the petition, claiming alleged neglect or refusal by the co-defendant-in-error judge to have appointed counsel to take the ruling on behalf of the plaintiff-in-error, thereby depriving him of his right to take

advantage of his right to appeal in keeping with the Constitution, this is far from the truth. Defendants-in-error, on the contrary, submit that summary proceedings to recover possession of real property do not concern title and as such, an appeal from a judgment in the circuit court cannot and does not serve as a stay to the enforcement of judgment. Therefore, defendants-in-error contend that the petition should be denied since indeed the appointment or non-appointment of a counsel to take the ruling on behalf of the absent counsel in an action of summary proceedings to recover possession of real property, under our law and Supreme Court opinions, does not grant or deny a party thereto the right to an appeal since it will not serve as a stay to enforcement. Count three (3) of the petition must be overruled and the entire petition dismissed for plaintiff-in-error has suffered no harm;

“5. Further to count four (4) herein above, which traverses count three (3) of the petition, defendants-in-error submit that given the fact that under the law and procedure since an appeal from a judgment in summary proceedings does not serve as a stay to the enforcement of said judgment, the Supreme Court must now lay down a rule of law which will dispense with the requirement of appointing another lawyer to take the judgment or ruling on behalf of the absent counsel who, though signed the notice of assignment, fails, refuses and neglects to appear for the hearing, without any excuse, written or otherwise, as in this case, after signing the notice of assignment. This will prevent the frustration of justice as plaintiff-in-error is now doing in this case

“6. That as to count four (4) of the petition which alleges that title is in issue for which error will lie because the co-defendant-in-error judge entertained summary proceedings which should have been tried by a jury in an action of ejectment, defendants-in-error submit that plaintiff-in-error is in contempt of this court for fabricating lies when indeed and in truth there is no title involved; nor was title an issue in this matter in the magistrate court. The defendants-in-error submit that plaintiff-in-error has had three other law firms representing him in this matter prior to the Henries Law Firm being the fourth law firm and at no time was title involved. Defendants-in-error hereby challenge plaintiff-in-error’s new counsel to exhibit the title he alleged exists in summary proceedings. Defendants-in-error say that it is the plaintiff who normally possesses the right of possession as in this case, a lease agreement, and not the defendant in this case. Hence, defendants-in-error contend that count (4) of the petition must be overruled and the petition dismissed.”

There are two cardinal issues which this case presents. They are:

1. Whether or not the lower court was required to appoint or deputize counsel to take the ruling or judgment on behalf of the absent counsel and his client where default judgment was granted and made perfect?
2. Whether or not error would lie?

Before we proceed to discuss the issues mentioned above, this Court deems it necessary to pass on the attitude of the counsel for the plaintiff-in-error, namely, his failure to appear and represent the legal interest of his client on March 21, 2002, at 2:00 p.m. after having signed the written notice of assignment for the trial of the case on its merits.

Rule Twenty-One (21) of the Revised Rules Governing Procedure in the Courts and for Regulating the Moral and Ethical Conduct of Lawyers in the Republic of Liberia, at page 5, provides that: “It is the duty of the lawyer to be punctual in his attendance at court, and to be prompt and faithful in answering assignments received by him, notifying the time for hearing of his clients’ case. It is also his duty to the public and to his profession to avoid tardiness in the performance of his professional duty”.

Further, this Court held in the case *Thompson et al. v. Hassan et al.*, 25 LLR 168 (1976) that “A lawyer must faithfully, honestly and consistently represent the interest and protect the rights of his client. It is improper for a lawyer without a valid excuse to fail to appear on the date set forth in a notice of assignment for trial.”

Also, in the case *Brooks v. Republic*, 11 LLR 3, 5 (1951), this Court held that: “It is indeed regrettable to observe that lawyers, members of our much esteemed and exalted profession, will permit helpless clients to fall into such a dilemma as this, clients charged with high offense in the catalogue of crimes, forgetting to realize that when a client is distressed or in trouble, and seeks legal aid, he throws himself unreservedly upon the confidence, integrity, and ability of his lawyer, and undoubtedly esteems him as a superman, a god. A note of warning is therefore sounded to lawyers, the country over, to see well to it that their clients’ matters are attended and handled by them with that degree of precision and fidelity that will insure the protection of their interest, whether be it interest in respect of property, liberty or life. Only then can they hope to justify the ‘silk’ they took and which they wear, and the oath to which they subscribed.”

This case is concerned with property rights, and the Constitution of the Republic of Liberia, under Article 20(a) (1986), provides that: “No person shall be deprived of life, liberty, security of the person, property, privilege or any other right except as the outcome of a hearing judgment consistent with the provisions laid down in this Constitution and in accordance with due process of law. Justice shall be done without sale, denial or delay...”

Hence, it was improper, to say the least, on the part of Counsellor J. D. Baryougar Junius, to have absented himself from the hearing of the case without notice to the court. We consider this act as a violation of the oath he took as a lawyer. We deem it necessary to state that it was contemptuous on the part of Counsellor J. D. Baryougar Junius to disregard the notice of assignment issued, served and returned

served for the hearing of the case on March 21, 2002 at 2:00 p.m.

We will now commence the discussion of the first issue, which is whether or not the lower court was required to appoint or deputize counsel to take the ruling or judgment on behalf of the absent counsel and his client, where default judgment was granted and made perfect?

Our law provides that: "Every person against whom any final judgment is rendered shall have the right to appeal from the judgment of the court except from that of the Supreme Court. The decision of the Supreme Court shall be absolute and final". See Civil Procedure Law, Rev. Code 1:51.2.

The law also provides that: "An appeal shall be taken at the time of rendition of the judgment by oral announcement in open court. Such announcement may be made by the party if he represents himself or by the attorney representing him, or, if such attorney is not present, by a deputy appointed by the court for this purpose". Civil Procedure Law, Rev. Code 1:51.6.

The records show that an action of summary proceedings to recover possession of real property was instituted against the plaintiff-in-error by the co-defendant-in-error in the Monrovia City Court. After hearing the case on its merits, His Honour Joseph Fayiah who presided over said case, entered final judgment against the plaintiff-in-error. To this final ruling, the plaintiff-in-error excepted and announced an appeal to the Civil Law Court for Montserrado County. Thereafter, he filed his appeal bond together with a notice of completion of appeal.

The records also reveal that several notices of assignment were issued and sent out by the Civil Law Court for the trial of the case. The notices of assignment were acknowledged and signed for by the counsel for plaintiff-in-error, but he failed to attend. The last notice of assignment for the trial of the case on March 21, 2002 at 2:00 p.m. was also signed for by the counsel for plaintiff-in-error, but he and his client again failed to appear for trial without written or verbal excuse to the court. In view of this, counsel for co-defendant-in-error prayed the court for default judgment. The request was granted by the court. The co-defendant-in-error having made the imperfect judgment perfect upon the order of the court through the production of both oral and documentary evidence, the court rendered final judgment holding plaintiff-in-error liable to the co-defendant-in-error. The court did not appoint a deputy counsel to take the ruling/judgment on behalf of the absent counsel for the plaintiff-in-error.

The plaintiff-in-error contends that the trial judge erred in not appointing a deputy counsel to take the judgment for and on behalf of the plaintiff-in-error. The defendants-in-error to the contrary contend that the plaintiff-in-error having abandoned his case, the court was not under any legal duty to appoint a deputy counsel to take the judgment on his behalf.

We are in agreement with the contention of the defendants- in-error that where a party litigant has abandoned his case, the court is not required to appoint a deputy counsel to take a ruling or to except thereto. The Supreme Court has held that “the procedural requirement for deputizing a lawyer in the absence of counsel of litigant to take a ruling or judgment on his behalf supports the view that the absent party desires to contest the issue. Where there is an abandonment of a case by a litigant, the court is not required and should not appoint a counsel to defend that party by either taking a ruling or excepting thereto.” See the case *National Port Authority v. Kpanyor*, 29 LLR 196 (1981), syl. 2, 198.

The attitude of the plaintiff-in-error and/or his counsel in this case clearly shows that he had abandoned his cause. The trial judge was right to rule that the plaintiff-in-error had abandoned the cause. It is therefore our holding that the court is not required to appoint a deputy counsel for the taking of a ruling or judgment where it is clear that the party litigant has abandoned his cause, as in this case.

We shall now decide the issue of whether or not error would lie? A review of the records of March 21, 2002, as it relates to the default judgment, including the court’s final judgment entered the same day, shows that the pages of the default judgment with the exception of the court’s final judgment are numbered up to page ten (10), while the court’s final judgment is numbered from pages one through pages three (3), separately. In our view, the court’s final judgment containing three pages should have been numbered pages 11, 12 and 13, if at all the court’s final judgment was made on the minutes of the court, and not numbered as pages 1, 2, and 3.

For the benefit of this opinion we deem it necessary to quote a portion of the court’s final judgment as follows:

“REPUBLIC OF LIBERIA) IN THE CIVIL LAW COURT, SIXTH
MONTSERRADO COUNTY) JUDICIAL CIRCUIT,
MONTSERRA-
DO COUNTY, REPUBLIC OF
LIBERIA, SITTING IN ITS MARCH

TERM, A. D. 2002.

“BEFORE HIS HONOUR: YUSSIF D. KABA, ASSIGNED CIRCUIT
JUDGE PRESIDING

“IN RE: Sackie Gbarbea, Sr. of the City of
Monrovia, Liberia..... PLAINTIFF) ACTION OF SUMMARY
Versus

) PROCEEDINGS TO
Jeremiah Y. Sackie, also of the) RECOVER POSSESSION

City of Monrovia,
) OF REAL PROPERTY
Liberia.....DEFENDANT)
COURT’S FINAL JUDGMENT”

In the mind of this Court, the final judgment was written prior to the granting of the default judgment by the trial court, which act is contrary to the law, practice and procedure in this jurisdiction. The court’s final judgment should have formed part of the minutes. In fact, the court’s final judgment should not have started with the heading “Republic of Liberia, Montserrado County...” as mentioned above, because the case had already been called, representations noted, default judgment prayed for and granted and the imperfect judgment was made perfect.

The records in the case file did not show that the court recessed after the co-defendant-in-error rested evidence in *toto*. Even if that were the case, the court’s final judgment will still not be separate from the minutes and with the heading as indicated above. We therefore hold that the court’s final judgment was rendered contrary to law and therefore the trial judge erred as to the manner in which he entered the court’s final judgment. Hence, because of the irregular manner in which the trial judge handled the case by preparing the court’s final judgment prior to the granting of the default judgment, we hold that he erred.

This Court held in the case *Ware v. Republic*, 5 LLR 50 (1935) that: “The judge of a court is not merely appointed to an office, but he is also elevated to a dignity. As such, he is dedicated and consecrated to the adjudication of the rights of litigants, and hence must avoid any course of conduct which would cause his impartiality to be questioned.”

Contrary to the above, the trial judge below proceeded to prepare a final judgment prior to the hearing of the case. This act raises question as to his impartiality.

Wherefore and in view of all the facts, circumstances and legal citations herein contained, it is our holding that the petition for a writ of error is hereby granted and the judgment of the lower court is hereby reversed. The Clerk of this Court is ordered to send a mandate to the lower court ordering the judge presiding therein to resume jurisdiction over the case and proceed to hear the case *de novo*. Costs are disallowed. And it is hereby so ordered.

Petition granted.