Ezumah K. Zayzay, of the City of Monrovia, Liberia Movant/APPELLANT Versus **Mohammed M. Sheriff**, Administrator of the Intestate Estate of the late Jarbeh Manden and Joe Fahn Bargun also of the City of Monrovia, Liberian RESPONDENT/APPELLEE

APPEAL MOTION FOR RELIEF FROM JUDGMENT. JUDGMENT REVERSED

Heard: October 25, 2007 Decided: January 11, 2008

MRS. JUSTICE JOHNSON DELIVERED THE OPINION OF THE COURT

This case is one of the many land dispute matters that have overcrowded the docket of the judiciary. It became a matter of record in March of 1998 when the Respondent/Plaintiff addressed a letter of complaint to the Commissioner of Virginia, Montserrado County, to the effect that the Movant/Defendant, Col. Ezumah Zayzay of the National Police Force had un-authorizedly allowed some named persons to carry on farming on his parents' property located in Lower Virginia and was thereby pleading for the Commissioner's intervention. What happened thereafter is not recorded except that in his testimony when he finally filed an action of ejectment, the Respondent/Plaintiff stated that the Township Commissioner cited the Movant/Defendant to a conference, but that he did not attend. Thereafter exchanges of communications/complaints from both parties to each other, and to the Ministry of Lands, Mines and Energy, requesting for survey, and lines of demarcation and for conferences to find amicable resolutions, and so forth, were made. When resolutions were not forthcoming because of the alleged unwillingness of Col. Zayzay to cooperate, the Respondent/Plaintiff, instituted an Action of Ejectment against him in the Plaintiff's capacity as administrator of the Intestate Estate of Yatta Jarbeh-Mandeh and Joe Fahn-Bareun, for recovery of the real property of the estate, subject of this litigation. It must be noted that before this suit was finally instituted, the County Attorney of Montserrado had also invited the Movant/Defendant to a conference touching the subject property and upon his failure to attend, a Writ of Arrest was issued and served by the County Attorney's Office. According to testimony he was detained by the County Attorney for refusal to respond either by attending or providing an excuse for not attending the conference.

Finally on February 7, 2002, quite four years after the wrangling over the real property commenced, the Respondent/Plaintiff filed an Action of Ejectment against the Movant/Defendant venued before His Honour Winston O Henries, Resident Judge for the Sixth Judicial Circuit, Montserrado County, sitting in its March Term. The Respondent/Plaintiff made profert of a certified copy of a public land sale deed purportedly executed by President Alfred F. Russell, of the Republic of Liberia in 1883 to Jarbeh Mandeh and Joe Fahn-Baraun.

The records reveal that as per the procedure, when the Ejectment Suit was filed, the Clerkissued the necessary summons along with a copy of the complaint and the exhibits and placed same in the hands of the Sheriff for service on the Movant/Defendant, Col. Ezumah Zayzay. It is this service of the Writ of Summons that has become the bone of contention in this Ejectment Case. The Movant/Defendant denied been served with a copy of the complaint and the writ of Summons.

On March 18, 2002, Respondent/Plaintiff obtained a certificate from the Clerk's office substantiating Respondent/Plaintiff's allegation that no answer to the complaint had been filed with the clerk. Thereafter several notices of assignments were issued for the disposition of the law issues, but could not be served because the Defendant could not be found. Orily one of these was reportedly served on the Movant/Defendant. But he failed to attend upon the hearing. Again the Court issued

another notice of assignment for disposition of law issues on July 15, 2002. The Sheriff's returns again shows that the Movant/Defendant could not be found; therefore, was not served. To years later, that is, on June 10, 2004, a notice of assignment was issued for hearing on June 16, 2004, which notice was also not served on Movant/Defendant because he could again not be found. When the case was called for hearing on June 16, 2004, pursuant to the June 10, 2004 notice of assignment, counsel for Respondent/Plaintiff noting the absence of the Movant/Defendant due again to failure to fmd him, made a submission stating in effect that there being no answer to the complaint, the Judge should rule the Movant/Defendant to a bare denial and rule the case to trial. The submission was granted on July 7, 2004, and the trial commenced.

A petty jury was empanelled and the Plaintiff presented his case. The jury returned a verdict in favor of the Respondent/Plaintiff. The Judge having handed down his ruling, exceptions were noted and an appeal announced on behalf of the absent Movant/Defendant. When the Court attempted to serve a Writ of Possession it was then that the Movant/Defendant through his Counsel filed a motion for relief from judgment stating essentially that the Defendant was denied his right to protect his property by not being summoned and served with copy of the complaint against him and that the Sheriffs returns was fraudulent. An investigation of the fraud allegation was conducted in which counsel for both parties participated. At the conclusion of the investigation the Judge ruled that the Sheriff's returns were truthful. The motion for relief from judgment was therefore denied. The Judge ordered that the Defendant be ousted and evicted from the premises. It is from this judgment that the Movant/Defendant has appealed, submitting a 10 count Bill of Exceptions.

Movant/Appellant's Bill of Exceptions

1. That the Judge committed reversible error when he denied his motion of relief from judgnient. We shall address this count later.

2. That in the process of conducting the investigation into the validity of the Sheriff's Returns, the Judge did not permit ,the Defendant the opportunity to take the stand and refute the averments made by the Bailiff.

From the records herein, we notice that counsels for both parties participated in the investigation, redirecting and cross examining the witness, the Bailiff, who served the process. There is no record that counsel for Movant/Defendant requested the Judge to put his client on the stand after the Bailliff had testified and was discharged, and that the Judge denied the request to which denial Counsel noted his exception. The said counsel having acquiesced in the proceeding then, cannot now come on appeal and raise that issue for the first time. It has been stated in several opinions that the function of the Supreme Court is to review the decisions of the lower Courts. The issues must first be raised and disposed of in the Court below before they become proper subject for appellate review. **Flood vs. Alpha, 15LLR331, 335 (1965), Karout vs. Peal, 28LLR 254, 260 (1979).**

3. That the Judge took evidence only from one side and did not hear testimony from the Defendant in support of his denial that he was never seen and served with the summons, that the Judge based his ruling solely on the testimony of the Bailiff and that this was reversible error.

We hold as we did in count two of the bill of exceptions, that there is no showing on the minutes of that day's sitting and throughout the investigation that counsel for Defendant made an application or request for his client to testify or that he called the Judge's attention to what could have been an inadvertence. He instead went along to the end of the investigation. The exception now should have first been noted in the Court below and then forwarded here for review.

4. That the Judge disallowed the following question: Mr. Witness, in your statement just given, you said the Defendant was identified to you, meaning that before that day, you had not seen the Defendant; what then made you to believe that the person you served with the writ was indeed the Defendant named in the writ taking into account the Defendant's statement he has never seen you or been served with the Writ of Summons from this Court?

After the Judge had overruled the objection to the question, the Bailiff answered and said that the Plaintiff accompanied him and identified the Defendant who was on his farm in the Hotel Africa area, the site of the land dispute. Our emphasis.

Counsel for the Movant/Defendant would have us assign error to the Judge for allowing an answer to this question. We hold no. In this jurisdiction and under our Civil Procedure Law, Bailiffs are not expected to know personally the designated persons in the Court processes that they serve and return. No reasonable man should have such expectation, because it is unrealistic and impracticable. So, and because of the above, Bailiffs rely on clients to lead them to the adversary, the named person in the complaint. Now to say that the Bailiff in this case should not have relied on the Plaintiff whose interest in the matter led him to Court in the first place, for positive identification of the Defendant, but on some other source is asking too much. Would it be a sound and practicable suggestion that Bailiffs carry cameras along to photograph those they serve with summons and notices of assignment? Who will foot the bill? Or have several witnesses to attest to the service of process? It is because of these and other considerations that the principle has been developed that the Sheriff's Returns is presumed to be correct until the contrary is proven and especially so when the Returns shows that the Defendant was identified by the Plaintiff. In our opinion, the question posed by counsel, how sure was he, the Bailiff, that the person pointed out by the Plaintiff was in fact the Defendant, was unreasonable. The Judge therefore rightly disallowed it.

5. That the Judge erred when he disallowed a question in which counsel for Movant/Defendant attempted to ascertain from the Bailiff on the witness stand which notices of assignments the Movant/Defendant refused to receive. The judge in ruling on the objection stated that his role was to investigate and determine whether the Writ of Summons was served on the Defendant and nothing else because to do otherwise would be a review of the preceding Judge which is not authorized by law. We are inclined to agree with the position of the Judge. We base our decision to agree with the Judge on this portion of the preceding Judge's "Ruling on the Motion for Relief from Judgment. The relevant part of the judgment states, "In this light, this Court hereby order an investigation to be conducted on the 14th day of February A.D. 2005, at the hour of 2:00 P.M. for the **sole and only purpose** of determining whether the Movant herein was properly summoned and notified of these proceedings." Emphasis ours. It is an accepted practice for the cross examination to cover a wide range of areas especially 'areas touched on by the witness. However, in this restricted investigation to determine whether there was service of the summons or not, the question about service of notices of assignments had no relevance.

6. The Judge disallowed another question in which Counsel for the Movant/Defendant questioned the glaring difference between the signature on the Writ of Summons and that on the notice of assignment and yet the Bailiff contended that the Movant/Defendant signed both. Again we are in agreement with the Judge for disallowing the question. Bailiffs do not carry signature specimen to compare signatures. They are not concerned whether the person served signed with his left hand at one time and with his right the other time. The question of signature should be left to experts in the field and to the one who is alleged to have signed. In this case counsel for Movant/Defendant should have had his client testify and challenge the authenticity of the signature or, he should have brought in an expert witness to verify whether the two documents carry the same signature. The burden was not that of the disinterested and unqualified Bailiff.

7. In this count counsel for Movant/Defendant noted exception to a statement in the Judge's Ruling in which he said: "Of course the question as to who was present during the service of the Writ of Summons on the Defendant, (if asked) it would not have been entertained by the Court." This statement counsel for Movant/Defendant considered a demonstration of the Judge's bias. We fail to see the harm or how the statement prejudiced the Movant/Defendant's case. We do not quite understand though, why the Judge anticipated a question which was never asked, but still decided to let the parties-know what ruling he would have made if the question had been asked. We can only: say that the Judge misspoke but not to the prejudice of the Defendant.' We must state in passing that judges are also human. They must be , sometimes entitled to make blunders such as happened at this point in the proceedings. However, as long as their human blunders do no harm to the party litigant, they should be ignored.

8. Counsel for Movant/Defendant further contended that the Judge ignored the principle of law that the Sheriff's Returns is merely presumed to be correct and that the Judge said in his ruling that the Defendant did not prove that he was not served, that this was an error because the burden was on the Bailiff to prove service not on the Defendant to prove non-service. In deciding this contention we shall revisit Counts 2 and 3 of this Bill of Exceptions in which counts counsel stated that the investigating Judge did not give his client the opportunity to present his side of the case; that only the Bailiff testified at the service of summons investigation. Now, if after the alleged one sided investigation, the Judge ruled that indeed service was made as per the Sheriff's Returns, is it any surprise that the Judge based his decision on the evidence that was provided? As we stated earlier in this opinion, the investigation was done in the presence of and with the participation of both parties. Whatsoever requests were not made and exceptions noted thereto cannot now form a part of this Appellate review. We still uphold the old established maxim that Courts will not do for parties what they can and ought to do for themselves. We also hold that issues neglected are considered waived and will not be reviewed on appeal.

Now, on the issue of burden of proof, we hold that the burden of proof does not always lie only with the one making the allegation. It shifts some times. It shifted in this case at bar when the Bailiff took the stand and exhibited two documents, the Writ of Summons, and a notice of assignment which documents the Bailiff alleged were signed by the Movant/Defendant. Proof that the documents were not signed by the Movant/Defendant such as a showing, that he was not in the area on the dates said documents were allegedly served, or that the signature on either document was not his, became his burden. Counsel for said Movant/Defendant had the responsibility to see that his client presented his evidence of non-service. The Bailiff had already borne his side of the burden. In the absence of any evidence contrary to the Sheriff's Returns, the said Returns is presumed to be correct, and we so hold. Counsellors of this bar know much, and, just too well how not to allow trial Courts get away with any procedure that does not conform to the rules that should be observed at all times. They need no coaching from the presiding Judge and should expect no sympathy from the Appellate Court when they fail to take advantage of the several remedies provided by law to protect their client's interest during trial.

9. The final exception for our review was that the Judge ruled that the Court's final judgment be enforced to the letter without affording the Defendant full opportunity to defend his property rights guaranteed under Article 20(a) of the Constitution. We hold that there is a remedy available to a losing party after a judgment and that remedy is an appeal to the Appellate Court for review. If for any reason the Trial Judge from whose decision the appeal is taken proceeds wrongly, there is yet another remedial process to correct the Judge's error. Counsel for Movant/Defendant failed or neglected to take advantage of that remedy. Nevertheless he completed the appeal process. The result of which appeal will settle the controversy.

We shall now revert to Count 1 of the Bill of Exceptions in which counsel of Movant/Defendant assigned error to the Judge's denial of his Motion for Relief from judgment. We hold that because the said Movant/Defendant neglected to overcome the presumption of the truthfulness of the Sheriff's Returns, the Judge was correct in ruling as he did, denying the Motion for Relief from judgment. It is therefore our considered opinion that the case be remanded to the Trial Court for further proceedings, not because we have any doubts about the accurateness or truthfulness of the Sheriff's Returns to the Writ of Summons, but because (1) after a careful search of the records, we were unable to find proof that a notice of assignment was first issued and served on the Movant/Defendant prior to the empanelling of the jury and commencement of the trial. Counsel for Movant/Defendant rightly observed as we also did that there is no record showing that after the Movant/Defendant was ruled to a bare denial for failure to file an answer to the complaint, the trial commenced, and proceeded to its conclusion, that the court ordered issuance of a notice of assignment. Judges must remember that ruling a party to a bare denial does not take away his right to be cited to appear and be heard, and cross examine witnesses against him before judgment against him is rendered. **Salami Brothers vs. Wahaab 15LLR 32, 38 (1962)** when a party is not cited to a hearing any judgment resulting there from cannot be binding on him. This is the rule, not only in this case but in a long line of cases in this jurisdiction. Further to this, we are remanding this case also because (2) we noted that there was no survey done to establish whether the deeds in support of the claims to ownership cover the same parcel or portion of the land in dispute. Only a land survey can establish that fact. We therefore reverse and remand the case with specific instruction to the Court below to constitute a board of arbitration constituting public land surveyors according to law and that the parties present their title deeds to said board of arbitration to conduct a survey of the land in contention so as to establish ownership and file their report with the Clerk of the Civil Law Court of Montserrado County, and the Judge of said court to proceed thereon according to established rules of law in such cases made and provided.

The Clerk of this Court is therefore hereby ordered to instruct the Court below to resume jurisdiction and proceed according to instructions contained in this Opinion. AND IT IS HEREBY SO ORDERED.

Counsellor M. Wilkins Wright of the Wright, Jangaba Associates appeared for the Appellant while,
Counsellor Fomba O. Sherif of the Tuley & Associates appeared for the Appellee