

FRANKLIN N. BORBOR, et al., Appellants, v.  
J. S. GILLATEY, et al., Appellees.

APPEAL FROM RULING OF JUSTICE.

Argued April 28, 1976. Decided June 17, 1976.

1. The requirements for a writ of error imposed by statute must be strictly complied with or the Supreme Court will refuse relief.

After some notices of assignment had been made, counsel for plaintiffs in error was instructed by the trial court to positively appear the next time. He failed to do so and the complaint was dismissed. A writ of error was denied by the Justice to whom counsel submitted a petition. An appeal was taken.

The Supreme Court found the petition lacking mandatory requirements imposed by statute and *affirmed* the ruling.

*A. Lorenzo Weeks* for appellants. *O. Natty B. Davis* for appellees.

MR. JUSTICE AZANGO delivered the opinion of the Court.

The plaintiffs in error, plaintiffs in the court below, instituted an action of ejectment against defendants in the court below on August 25, 1972. Plaintiffs in error also filed an action of injunction against the defendants, adding as a party to the injunction Kofar Sayon Thompson, who was not a party to the ejectment suit. The injunction sought to enjoin the defendants from interfering with the property which is the subject of the ejectment suit. On November 1, 1972, plaintiffs in error filed a bill of information averring that the defendants had disobeyed the injunction, particularly Kofar Sayon Thompson, who had

entered upon the property in defiance of the court's order. A writ of arrest was issued against the said Kofar Sayon Thompson, who filed a bond.

The issues of law in the ejectment suit were disposed of on October 12, 1973, by Judge John A. Dennis, presiding over the September Term of the Civil Law Court, Sixth Judicial Circuit, Montserrado County. Subsequently, on the same day, October 12, 1973, the plaintiffs in error filed a motion requesting Judge Dennis to recuse himself on the ground of interest. They alleged that Judge Dennis had purchased a portion of the disputed property from one Henry V. Logan during the pendency of the case. No profert of any deed was made to support this allegation.

The motion to recuse was assigned for hearing on November 9, 1973. When the notice of assignment was sent out, counsel for plaintiffs in error, Counsellor A. Lorenzo Weeks, made a notation thereon that he was "sick." At the call of the case on November 9, 1973, the following was recorded:

"The Court: More than two assignments have been made in this case and it has been stated that Counsellor A. Lorenzo Weeks is sick. By Monday the 12th instant upon his failure to file a medical certificate, the case shall be proceeded with. And it is hereby so ordered."

On November 12, 1973, when the case was called, counsel for plaintiffs in error was again absent, and apparently had not up to that time filed a medical certificate. The record, however, contains a medical certificate issued to him by Dr. A. Kasas on November 12, 1973, stating that he was suffering from acute dysentery and was advised to rest for two weeks. There is no showing, however, either on the face of the medical certificate or otherwise in the record, that the certificate was filed prior to the call of the case.

The motion to recuse was called for hearing on Novem-

was filed by the plaintiff against the defendant on the ground of abandonment. Cost against the plaintiff.

“And it is therefore so adjudged.”

The following day, November 13, 1973, the trial judge entered the following final judgment:

*“Court’s Final Judgment*

“At the call of this case, the plaintiff having been notified, failed to appear whereupon the said case was reassigned, at which time the plaintiff appeared and gave notice of the illness of his counsel in the person of Counsellor A. Lorenzo Weeks. The court informed him that a medical certificate should be produced accompanied with the motion for continuance by the following day, which was Monday, the 12th instant.

“When the case was called on Monday the 12th instant, the plaintiff failed to appear, and to have filed a motion for continuance in keeping with rule 7 of the Circuit Court, which was invoked by the defendant.

“Wherefore, the plaintiff having abandoned the said case, the clerk of the court is hereby ordered to issue a writ of possession in favor of the defendant, place same in the hands of the sheriff of this court to have the defendant put into possession of his land in keeping with the metes and bounds of his deed, exhibit ‘A,’ which is attached to his answer.

“And it is, therefore, so adjudged. Cost against the plaintiff.”

On December 13, 1973, plaintiffs in error filed a petition for a writ of error, in the chambers of Mr. Justice Wardsworth.

The returns were followed by an answering affidavit of the plaintiffs in error, without denying that portion of defendant in error’s contention that he was not licensed to practice law and making profert of proof to that effect. It raised a new issue, that defendants in error had violated appellate procedure by operating on the property.

Otherwise it simply reiterated at some length the positions taken in his petition; a reply affidavit by the defendants in error was submitted.

The error proceedings were heard in the chambers of Mr. Justice Horace, who, on April 21, 1975, ruled quashing the alternative writ and dismissing the petition, on the ground that the petition was defective, lacking the statutory requirement necessary to entitle a plaintiff in error to a consideration of the case by this Court. To which exceptions were noted and an appeal announced to this forum.

In our attempt to review the ruling of Mr. Justice Horace, we note that the following points were raised in the returns of the defendants in error as to the legal sufficiency of the petition of the plaintiffs in error: (1) that the petition did not state the reason for the failure of plaintiffs in error to take an appeal; (2) that the petition failed to show that the plaintiffs in error had paid the accrued costs in the court below; (3) that the petition failed to aver that the judgment in the court below had not been fully satisfied; (4) that the affidavit of the plaintiffs in error contained no averment that the writ was not sought for the mere purpose of harassment or delay; (5) that counsel for plaintiffs in error who signed the petition had not obtained his annual license in keeping with the law and therefore was not qualified to practice law.

An examination of the record shows that the petition contains an averment that the judgment in the court below had not been fully satisfied. The record also shows that counsel for plaintiffs in error had obtained his lawyer's license for the year, evidenced by a photocopy of a revenue receipt dated April 24, 1973.

The record shows, however, that the petition does not state the reason why an appeal was not taken, nor does it show that the accrued costs in the court below had been paid. As to the nonaverment in the affidavit that the writ was not for the purpose of mere delay, the record

reveals that two affidavits were filed, one containing, and the other lacking, the averment. This is obviously an attempt at sharp practice. We can only conclude that the affidavit filed with the petition does not state that the application was not made for the mere purpose of harassment or delay.

Civil Procedure Law applies to writs of error and the requirements to be met.

*"1. Application.* A party against whom judgment has been taken, who has for good reason failed to make a timely announcement of the taking of an appeal from such judgment, may within six months after its rendition file with the clerk of the Supreme Court an application for leave for a review by the Supreme Court by writ of error. Such an application shall contain the following:

"(a) An assignment of error, similar in form and content to a bill of exceptions, which shall be verified by affidavit stating that the application has not been made for the mere purpose of harassment or delay;

"(b) A statement why an appeal was not taken;

"(c) An allegation that execution of the judgment has not been completed; and

"(d) A certificate of a counsellor of the Supreme Court, or of any attorney of the Circuit Court if no counsellor resides in the jurisdiction where the trial was held, that in the opinion of such counsellor or attorney real errors are assigned.

"As a prerequisite to issuance of the writ, the person applying for the writ of error, to be known as the plaintiff in error, shall be required to pay all accrued costs, and may be required to file a bond in the manner prescribed in section 51.8. Such bond shall be conditioned on paying the costs, interest, and damages sustained by the opposing party if the judgment complained of is affirmed or the writ of error is dismissed."

Rev. Code 1:16.24.

These provisions of the statute are mandatory, except for the one relating to the filing of a bond which may lie within the discretionary power of the Justice in chambers. Failure to meet any one of the mandatory requirements of the statute renders the application defective. This Court has adhered to this view in several opinions.

The question to be resolved, then, is whether the petition of plaintiffs in error is properly before this Court. It was held by this Court in *Harmon v. Republic*, 4 LLR 195 (1934), that the steps prescribed for a writ of error are mandatory and if not strictly followed, the Court cannot take jurisdiction.

As already indicated above, we find that the petition of the plaintiffs in error fails to meet three of the statutory requirements: (a) verification by affidavit that the application has not been made for the mere purpose of harassment or delay; (b) a statement why an appeal was not taken; (c) payment of the accrued costs of the trial court.

Despite these patent defects, when this case was called for hearing, the record revealed that Counsellor A. Lorenzo Weeks, counsel for plaintiffs in error, had prepared and filed a bill of information, which led us to believe that it was a proceeding instituted against defendants in error to preserve the power of this Court, or it was instituted to preserve and enforce the rights of some private parties to this suit in order to compel obedience to orders. But to the contrary, we found it not so. It tended to restate what was said in the petition and was otherwise inappropriate.

In view of the foregoing, the denial of the petition of a writ of error by the Justice presiding in chambers is affirmed. It is so ordered.

*Ruling affirmed.*