TOM DOLLAR, et al., Appellants, *v.* A. B. COLE, et al., Appellees.

APPEAL FROM RULING OF JUSTICE IN CHAMBERS DENYING ISSUANCE OF A WRIT OF ERROR.

Argued March 28, 1976. Decided April 23, 1976.

1. The Court will not do for parties what they ought to do for themselves.
2. An application for a writ of error must state that the application is not for a dilatory purpose and that accrued costs have been paid.
3. Misnomer of a party is not by itself a ground for dismissal of a claim for relief or of a defense.
4. A notice of assignment served upon counsel is required for each appearance.

Appellants were the plaintiffs in an action of ejectment. After much delay, the judge notified appellants by letter that counsel was to be in court on a day named to provide the long-awaited name of a surveyor. On that day, counsel did not appear, and the judge dismissed the action, taking the position that the letter sufficed as a notice of assignment. Plaintiffs sought a writ of error, contending they had been denied their day in court. The Justice in chambers denied the writ, and an appeal was taken to the full Court.

The Supreme Court held that the letter was insufficient to constitute a formal notice of assignment which is always required as a basis for dismissal if no appearance is made by a party or counsel. The ruling of the Justice in chambers was *reversed,* and the case was *remanded* to the lower court.

MacDonald C. Acolatse for appellants. *D. W. B. Morris* for appellees.

MR. JUSTICE HORACE delivered the opinion of the Court.

Plaintiffs in error, plaintiffs in the trial court, instituted an action of ejectment in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, on June 14, 1972, against co-defendant in error A. B. Cole, defendant in the court below. When the case was first called to dispose of the issues of law, the parties to the ejectment suit agreed to submit the controversy as to the true owner of the land in dispute to a Board of Surveyors, one surveyor to be nominated by each party and the third by the court. The Board of Surveyors, after considerable delay, brought in a report to which plaintiffs objected; their objections were sustained.

At this point it was again agreed by the parties that another Board of Surveyors be appointed. It appears that because plaintiffs neglected to nominate a surveyor after being required to do so several times by the trial judge, the court allegedly wrote counsel for plaintiffs on July 1, 1974, that if they had not nominated the surveyor for their side by July 5, 1974, the case would be dismissed. Counsel for plaintiffs in error claims that he never received such a letter, although he did not attempt to explain his negligence in nominating a surveyor for his side after repeated requests from the trial court to do so.

On July 9, 1974, the trial judge, true to her word, entered a ruling dismissing the ejectment case. Neither plaintiffs in error nor their counsel were present.

On August 1, 1974, plaintiffs in error applied to the Justice in chambers for a writ of error. They claimed that their day in court had been denied them. The defendants in error denied this. They also contended that the name "Cole" had been used for the defendant rather than "Coleman," though their opposition was filed three months late.

The work done by counsel on both sides, incidentally, has been of very poor quality. We must here mention that this is not an exception to the rule; it is in fact typical of what goes on generally in practice now.

The statute governing writs of error states clearly what an application for such a writ should contain. It must be observed that absent from the petition are the following requirements which should have been stated therein: (1) an averment in the affidavit that the application has not been made for the mere purpose of harassment or delay; (2) an averment that accrued costs in the action have been paid.

Although there are numerous reported cases where application for writs of error have been denied because of the absence of these basic requirements, since it has been held that the statutes relating to these special proceedings must be strictly complied with, counsel for defendants in error failed to take advantage of these blatant errors in the petition. Rather he deemed it important to deal with the point of misnomer and to make profert copies of assignments of the case in the court below, which plaintiffs in error had ignored.

We would like to pass on the patent errors in the petition, but we find ourselves unable to do so because the issues have not been raised in the returns. Where an applicant for a writ of error has failed to aver that the application is not for a dilatory purpose and the defendant in error has not raised the issue, the Court will not deny the writ on said grounds, for courts will not do for litigants what they ought to do for themselves. *Pratt* v. *Phillips,* 9 LLR 446 (1947).

The petition for a writ of error was taken up by our distinguished colleague, Mr. Justice Wardsworth, who on September 2, 1975, ruled, quashing the alternative writ and denying issuance of the peremptory writ, with costs against plaintiffs in error.

Our colleague based his ruling on the point of misnomer, stating among other things that plaintiffs in error instituted an action of ejectment using the name now stated in the petition in these proceedings, and withdrew the action in the court below, and refiled using the right

name of co-defendant in error, that is, A. B. Coleman, instead of A. B. Cole. To use the same wrong name in their application for a writ of error, said error was either intentional or due to negligence. Our distinguished colleague further took the view that although it was error for the trial court to have disposed of the matter on a day when no assignment had been made, there were equal right and wrong on both sides and, therefore, the defendants in error should be preferred, in keeping with the dictum of this Court on the point in *Republic* v. *Muller & Co.*, 1 LLR 201, 203 (1886).

While we feel the same way as our colleague, that the misnomer was gross carelessness on the part of counsel, we cannot in the face of the plain wording of the statute on the point of misnomer agree with his conclusion.

We have set forth the section in our Civil Procedure Law, which we consider pertinent to the case at bar.

> "*1. Not ground for dismissal.* Misnomer of a party shall not, unless it affects substantial rights of other parties,, constitute grounds for dismissal of a claim for relief or of a defense; but the names of the parties may be corrected at any time, before or after judgment, on motion, upon such terms and proof as the court may require. . . .
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> "*3. Misnomer of defendant.* If the name or the capacity of a defendant is erroneously stated, the error shall similarly be considered one of misnomer only; provided, however, that the proper defendant, personally or by his attorney, defended in the name of the named defendant or that the proper defendant actually did learn or should have learned of the commencement of the action and, from all the facts within his knowledge, did know or reasonably should have known what claim or relief the plaintiff was suing for; and provided further that the service of summons or other jurisdictional act relied upon would have given the court jurisdiction of the proper defendant if

he had been properly named in the complaint and summons.

"4. *Procedure.* In the cases set forth in paragraphs 2 and 3 above the defendant or any other party may suggest the existence of the error by motion, or an interested person may intervene to make such suggestion; and the court shall order all pleadings, process, and other papers to be amended or to be deemed amended accordingly. The court's order shall protect the defendant and any other interested persons from unfair prejudice; if the error is timely suggested, ordinarily both the costs and the expenses necessarily resulting to the named or proper defendant or to the interested person shall be taxed against the person who made the error as terms for permitting the amendment.

"5. *Applicability of section.* The provisions of this section shall apply to all civil actions *and special proceedings* [emphasis supplied] and to all parties to such actions and proceedings, however denominated, including persons who seek to intervene." Rev. Code 1:5.4.

We call particular attention to paragraph 5, which states specifically that the provisions of this section shall apply in all civil actions and special proceedings. Error being a special proceedings under our statutes, there is no doubt that the rule applies and the question of misnomer should have been handled and disposed of in accord with the foregoing section quoted.

We now come to the point of whether or not plaintiffs in error had their day in court. In this connection we observe that defendants in error made profert of several assignments of the ejectment case to which plaintiffs in error never responded. The trial judge apparently became exasperated with the dilatory tactics of counsel for plaintiffs in error, and rightly so, and allegedly had the clerk of court write him on July 1, 1974, that if the name

of his surveyor was not submitted by the 5th of the month the case would be dismissed. Counsel for plaintiffs in error denies ever receiving the letter, but his ignoring so many previous assignments of the case leaves us with grave doubts about his assertion in this respect. On July 9, the trial judge entered a ruling dismissing the case. We must remark here that although counsel for defendants in error made profert of many notices of assignment which had been ignored by counsel for plaintiffs in error, there is no showing that an assignment had been issued and returned for hearing of the case on the day it was dismissed. All that the record shows is that trial judge ruled on July 9, 1974, that because counsel for plaintiffs in error had failed to comply with her letter of July 1, 1974, the case should be and was dismissed.

We find ourselves unable to agree with the position of the trial judge. In the first place, we do not consider her letter to the party an assignment of the case. We admit that it was outright disrespect to the court for counsel to ignore such a letter, but that, we feel, was an act of contempt toward the court and should have been handled as such.

Coming back to the case in point, there being no showing that the case was assigned for hearing on the day it was dismissed, we declare its dismissal reversible error. We have always held that in all courts, especially courts of records, before a case is disposed of there must be a showing that an assignment was made, notice of assignment signed by the counsel for the parties or the parties themselves, and returns to that effect made by the ministerial officer. We adhere to this procedure.

Consequently, we are compelled to reverse the ruling of our distinguished colleague in denying the peremptory writ of error, and hereby order that the trial court resume jurisdiction in the ejectment case out of which these proceedings grow, and dispose of it in accordance with the law. This case is to take precedence over all cases pend-

ing in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County, and the Clerk of this Court is hereby ordered to send a mandate to the court below to the effect of this decision. Costs to abide final determination. And it is hereby so ordered.

Reversed and remanded.