A. KINI FREEMAN for himself and the people of Mani, Grand Cape Mount County, Appellants, *v.* GEORGE B. CAINE, et al., Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, GRAND CAPE MOUNT COUNTY.

Argued November 2, 3, 8, 1976. Decided November 19, 1976.*

1. Where, on remand of a case to the lower court by a Supreme Court Justice in chambers, the ruling of the lower court judge does not obey the mandate of the Justice and creates uncertainty as to the procedure to be followed to resolve the case, the Supreme Court on appeal will again remand with instructions to correct the error.

This case was previously before the Supreme Court on a petition for a writ of error based on failure of petitioners to receive notice of assignment for hearing in the matter of their objections to probation and registration of a public land grant to respondents. The Justice in chambers to whom the case was referred denied the writ of error for lack of a required affidavit, but doubting proper service by the sheriff of notice of assignment, directed the Circuit Court judge to investigate whether the questioned service had in fact occurred and to correct the error if the investigation revealed that service was lacking.

On remand, the lower court judge concluded after investigation that no notice of assignment had been served on petitioners and, in accordance with the mandate of the Supreme Court, ordered "the proceedings . . . to be corrected." Respondents in the former proceedings excepted to the judge's ruling and appealed, objecting principally to the judge's omission of any directive as to what corrections should be made. The Supreme Court decided that inasmuch as the judgment of the lower court judge did not carry out the mandate of the Justice in

* Mr. Chief Justice Pierre did not participate in this decision.

chambers, and created uncertainty, the case should be remanded to be handled in accordance with its instructions. The *judgment* was *reversed*.

M. Fahnbulleh Jones for appellants. *Nete-Sie Brownell* for appellees.

MR. JUSTICE HORACE delivered the opinion of the Court.

Some years ago—the record before us does not show exactly when—petitioner obtained from the Government a public land grant for 2,325 acres of land situated in Garwalar Chiefdom, Grand Cape Mount County. When the deed was offered for probate, application was made by the caveator to interpose objections, but the judge presiding over the Fifth Judicial Circuit Court, Grand Cape Mount County, overruled the application and ordered the deed probated and registered. On appeal to the Supreme Court, the judgment was reversed and the case remanded to give caveator the statutory time allowed him to interpose his objections. *Caine* v. *Freeman,* 18 LLR 238 (1968).

After the caveator had filed his objections, respondents filed an answer and simultaneously filed a motion to dismiss. The case was taken up by Honorable Alfred B. Flomo, the judge presiding over the February 1971 Term of the Circuit Court for the Fifth Judicial Circuit, Grand Cape Mount County. The record shows that an assignment was allegedly made for the case to be heard on March 3, 1971, and a radiogram was sent to Counsellor Nete-Sie Brownell, counsel for respondents notifying him of the assignment. He replied asking for postponement of the case stating the reasons for his request. The trial judge never sent a reply to Counsellor Brownell's radiogram, but he took up the matter on the assigned day and dismissed the objections of respondents in these proceedings.

Having heard of the action taken against his clients, counsel for respondents on April 21, 1971, filed an application for a writ of error before the full bench of the Supreme Court. Because of a decision taken by us that all remedial processes must originate in the chambers of the Justice presiding at the time application is made, this matter was referred to the chambers of Mr. Justice Henries, who after a hearing entered his ruling on May 24, 1974. *Freeman* v. *Kini,* 23 LLR 413 (1974). We quote from that ruling as follows:

"Plaintiffs in error applied for a writ of error on the ground that they had not had their day in court in an action concerning objections to the probation and registration of a public land grant for 2,325 acres of land in the Garwalar Chiefdom, Grand Cape Mount County, filed on February 26, 1969, in the Fifth Judicial Circuit Court of that County, presided over by Hon. Alfred B. Flomo, Assigned Circuit Judge. Incidentally this case was first heard by this Court in 1968. See *Caine* v. *Freeman,* 18 LLR 238 (1968). The plaintiffs in error denied being served with notice of assignment after that of May 1, 1970, until the disposal of their objections in a ruling adverse to them by the trial judge on March 3, 1971, and, therefore, contended that the sheriff's return on the notice of assignment issued on February 23, 1971, was false. The sheriff's return has been quoted:

" 'By virtue of the within Notice of Assignment, I have duly served same on the within named Seku Freeman, Varney Manoballah, Lasini Manoballah, with the exception of George B. Caine who is dead. And now have them before this Court. Dated this 2nd day of March, 1971.

" '[Sgd.] S. M. DAVID,
Deputy Sheriff, 5th Judicial Circuit Court, Grand Cape Mount County, R.L.'

"The plaintiffs in error, after the disposition of the case, filed an affidavit on April 20, 1971, swearing the sheriff's return was false.

"This was the situation as it existed when they filed their application for a writ of error on April 21, 1971.

"The defendants in error filed returns consisting of three counts. . . .

"3. Respondents hereby refute the facts stated in the petition that the petitioners were not served with process. The records belie this assertion and the attention of this court is respectfully drawn to the return of the sheriff and the certificate of the clerk of court.

"We shall resolve the issues raised in the returns in reverse order. Count 3 of the returns refers to the sheriff's return, which we have already quoted above, and the certificate of the clerk of court, which is totally irrelevant to the issue of service.

"More important, however, is the sheriff's return which shows service of process. This Court has consistently held that a sheriff's return is presumed to be correct, *Perry* v. *Ammons,* 16 LLR 268 (1965) . . . that in an application for reargument, the sheriff's return is proof of service unless shown to be false. It is our opinion that the affidavit of the plaintiffs in error raised a doubt as to service of notice of assignment which should warrant an investigation for three reasons: (1) the tract of land which is the subject of the action is very large, 2,325 acres, and a judgment thereon should be thoroughly considered before rendition; (2) the parties to the action are two or more clans composed of persons perhaps numbering in the hundreds, in Grand Cape Mount County, all having a keen interest in the land and, therefore, should not be unjustly deprived of the right to enjoy all of the uses and benefits that can accrue from the land; and (3) in order to be just the service of the notice of assignment should be conclusively established. . . .

"Finally, as to first count, which relates to the absence of an affidavit to the petition for a writ of error verifying that the application was not made for the purpose of mere harassment, it must be stated that there is none, even though plaintiffs in error contend that they did file one.

"This Court can only take cognizance of the record before it, and therefore, much to our regret must give credence to what appears before us in the record and not the verbal assurance of counsel for the plaintiffs in error. . . .

"In view of the foregoing, we must deny the issuance of the writ of error on the application as filed. However, relying on *Kanawaty* v. *King,* 14 LLR 241 (1960), it is our opinion in the interest of justice that the question of the service of the notice of assignment should be looked into in order to establish clearly that the plaintiffs in error were not denied their day in court. It is, therefore, our orders that the Clerk of this Court send a mandate to the court below, commanding the judge assigned therein to resume jurisdiction over the action and to investigate whether or not the notice of assignment was actually served on the plaintiffs in error. If, after the investigation, it is found that there was no service of notice of assignment, the court will proceed to correct this error in the interest of justice. If the sheriff's return to service is correct, then the court will proceed to enforce its judgment."

In keeping with this ruling, His Honor Galimah Baysah, presiding over the May 1975 Term of the Fifth Judicial Circuit Court, investigated the matter of the return of the sheriff, and the conclusion of his findings was as follows:

"The court therefore rules and adjudges that there was no service of notice of assignment in these proceedings and the action taken by the former sheriff is criminal in nature and according to the mandate of the Supreme

Court the proceedings are hereby ordered to be corrected. And it is hereby so ordered."

Being dissatisfied with the judge's ruling, appellants took exceptions and announced an appeal to this Court. The case is now before us for review on a ten-count bill of exceptions. Most counts deal with exceptions taken to rulings of the trial judge overruling objections of appellees to questions put to witnesses on the cross-examination. For the purpose of this opinion we think it necessary to consider only count 9 of the bill of exceptions: "9. And also because Your Honor ruled that the proceedings are hereby ordered corrected without stating what corrections should be made. Hence respondents-appellants excepted to said ruling and findings."

Both appellants and appellees filed exhaustive briefs on the whole case. But we are not considering the whole case as such. The point for consideration is whether or not Judge Baysah carried out the instructions of Justice Henries in the investigation conducted by him. We have carefully examined the record of the investigation and we must say that we find some merit in count 9 of the bill of exceptions.

To our mind the investigation was properly conducted up to a point, and that point is the concluding part of the trial judge's ruling. Mr. Justice Henries specifically instructed in his ruling that "it is, therefore, our orders that the Clerk of this Court send a mandate to the court below, commanding the judge assigned therein to resume jurisdiction over the action and to investigate whether or not the notice of assignment was actually served on the plaintiffs in error. If, after the investigation, it is found that there was no service of notice of assignment, the court will proceed to correct this error in the interest of justice. If the sheriff's return to service is correct, then the court will proceed to enforce its judgment." Those instructions were very clear.

From the findings of the trial judge, it is obvious that

he concluded from the investigation that no notice of assignment was actually served on the appellees. Instead of proceeding to correct the error in the interest of justice as commanded by the Justice in chambers, he merely stated that "the proceedings are hereby ordered corrected." We wonder who was being ordered to correct the proceedings, when his specific instructions were to correct the error if he found that no notice of assignment was actually served on the appellees.

In their arguments at this forum, appellants contended that the investigating judge erred both in his conduct of the investigation and ruling and therefore the ruling should be reversed and the judgment enforced in their favor, that is, the probation and registration of the deed *nunc pro tunc* should be upheld. Appellees on their part argued that the ruling of the investigating judge should be confirmed and the appeal dismissed.

We find it impossible to grant either of these contentions in their entirety. We agree, however, that Judge Baysah's ruling did not set the matter at rest as was intended by the instructions of the Justice in chambers. To our mind if he found that no notice of assignment had been served, as he said he did, then he should have either proceeded to hear and pass on the law issues of the objections *de novo,* or instructed the clerk of court to re-docket the case for disposition of the law issues. His mere statement that the error is to be corrected left an element of uncertainty as to what was to be actually done.

Taking all the circumstances into consideration, we have no alternative but to uphold count 9 of the bill of exceptions. As to the other counts of the bill of exceptions we need only state that assignment by radiogram is one of the ways of making assignments in this jurisdiction, but where the return to a notice of assignment stated definitely that the notice had been served on the parties—not the counsel only—and that they were before court, but

then turned out to be false, we must conclude that the parties were not served with the notice of assignment.

We hold, therefore, that inasmuch as the investigating judge did not carry out the instructions of the Justice in chambers, his ruling is set aside, and any judge assigned to that circuit shall proceed to carry out these instructions, that is, reconduct the investigation ordered by Mr. Justice Henries, and upon its conclusion either correct the error as hereinabove indicated, or enforce the judgment if no error has been committed; and the Clerk of this Court is hereby directed to send a mandate to the court below to the effect of this decision. Costs disallowed. And it is hereby so ordered.

Reversed and remanded.