

MARITIME TRANSPORT OPERATORS,
GMBH, Plaintiff in error, v. E. S. KOROMA,
Assigned Circuit Judge, Second Judicial Circuit, and
NIGERIAN PORTS AUTHORITY,
Defendants in Error.

PETITION FOR A WRIT OF ERROR TO THE CIRCUIT COURT,
SECOND JUDICIAL CIRCUIT, GRAND BASSA COUNTY.

Argued November 22, 23, 1976. Decided December 3, 1976.

1. Certiorari proceedings can be heard only during the pendency of an action before a lower court or judge thereof.
2. A movant for intervention whose motion is denied and who then files an answer in the action on which the judge rules and in part bases his judgment, thereby becomes a party to the action.
3. One who is not a party to an arbitration agreement cannot obtain a court order directing the parties to arbitrate.
4. A court cannot pass on documentary evidence not testified to by witnesses, marked by the court, confirmed, and admitted into evidence.
5. Persons who might be inequitably affected by a judgment in an action are required by statute to be joined as parties.
6. A person who has a genuine interest in the subject matter of an action which interest could not be adequately represented by parties to the action, and who could be adversely affected by a judgment in the action or by disposition of property in the court's custody, has a right to intervene.
7. That a person has another and adequate remedy for the protection of his rights is no bar to his right to intervene.
8. Decision by a lower court on issues of law must be followed by trial of any issues of fact raised in the pleadings.

This was an application for a writ of error which arose out of action by one of the defendants in error to gain possession of five tugboats anchored in the Port of Buchanan. Plaintiff in error, a West German corporation, claiming a lien on the tugboats, was not made a party to that action. Its motion to intervene was denied by the Circuit Court and judgment rendered in that action permitting the tugboats to be removed to Nigeria. Plaintiff in error thereupon applied for a writ of error directly to the Supreme Court, which issued an alternative writ.

The Supreme Court held that plaintiff in error, though denied the motion for intervention, had been treated by the lower court as a party, and, since it was not present at rendition of final judgment, was therefore entitled to a writ of error. In reviewing the assignment of errors, the Court found that the lower court had erred in several respects, particularly in denying intervention to a person unrepresented before the court who would be adversely affected by its judgment. The Supreme Court therefore reversed the judgment of the lower court and remanded the case for trial *de novo* to include all interested parties. *Petition granted.*

The *Henries Law Firm*, by *Moses K. Yangbe* and *S. Edward Carlor*, of counsel, for plaintiff in error. *Joseph Findley* and *Raymond Hoggard* for defendant in error.

MR. JUSTICE HENRIES delivered the opinion of the Court.

These error proceedings have been brought as a result of a trial held in the Second Judicial Circuit Court, Grand Bassa County, presided over by His Honor E. S. Koroma, Assigned Circuit Judge.

Prior to the trial in the lower court of the case out of which these proceedings grew, this Court in the case *Union Maritime et Commerciale Corporation (UMARCO) v. Dennis*, decided in the October 1976 Term, 25 LLR 267, involving five tugboats allegedly purchased from American Marine Supply, Inc., by the Nigerian Ports Authority, held that, because of the several irregularities committed in the trial court, anyone who felt he had a legal right to the ownership of the five tugboats should be allowed to bring an action in a court of law for their recovery, "provided that any such action

should join all of the known parties who are shown to have an interest in the subject matter.”

As a result of this decision the Nigerian Ports Authority, who was not a party to the first action, brought an action to recover chattels against American Marine Supply, Inc., of Washington, D.C., Oligarex of Zurich, Switzerland, LAMCO, UMARCO, and Terra Marine Liberia, Inc., all of Liberia, but did not join plaintiff in error, Maritime Transport Operators, GMBH, of Bremen, West Germany. The plaintiff in error filed a motion to intervene alleging that it has material interest in the tugboats because of demurrage, deviation, and services rendered to the tugboats, for which it has a maritime lien of \$256,977.72. Plaintiff in error, then intervenor, also filed an answer with its motion. The motion was denied.

The plaintiff in error then applied for a writ of certiorari to the chambers of Mr. Justice Horace, who denied the petition. The petitioner excepted and appealed to the Court *en banc*. During the pendency of the appeal, judgment was rendered in the lower court. We wonder how the case could have proceeded to termination in view of the issuance of the alternative writ of certiorari. In any event, upon discovering that the lower court had rendered judgment in the matter, the plaintiff in error applied to the Supreme Court for a writ of error. The alternative writ was accordingly issued.

At the hearing of these proceedings, the defendants in error contended that there was already an appeal pending from the ruling denying certiorari by Mr. Justice Horace. This is true, but the Court decided not to hear the appeal because judgment had already been rendered by the lower court in the matter out of which the certiorari grew. Hence the hearing of the certiorari appeal would be of no avail at this stage. Certiorari proceedings can be heard only during the pendency of an action before a court or judge. Rev. Code 1:16.23(1)(a). The efficacy of a

writ of certiorari is terminated by adjudication of the case out of which it grows. *Republic v. Weafuah*, 16 LLR 122 (1964). This being so, it was clearly within this Court's prerogative to decide not to hear the appeal in the certiorari proceedings.

With respect to applying for a writ of error, the Civil Procedure Law states clearly that either "the Supreme Court or an assigned justice shall grant or deny the application." Rev. Code 1:16.24(2). The plaintiff in error, when asked why it applied to the Court instead of the Justice presiding in chambers, replied that the boats are deteriorating because they have been in the Port of Buchanan since December 1975; that approximately \$300 per day is charged for keeping them there; and that time is of the essence and that going through the Justice in chambers would take up considerable time because anyone appealing from him would have to come before the full bench, whereas appearing before the Court *en banc* would immediately reduce the time it would take to decide the matter.

Before going into the assignment of errors, let us see whether the plaintiff in error has a right to apply for a writ of error and whether the procedural requirements have been met. The defendant in error contends that error would not lie because the plaintiff in error was not a party to the suit in the lower court; that there is no evidence that the accrued costs have been paid; and that the plaintiff in error, having had knowledge of the assignment of the case and having been present in court, has had his day in court.

Taking these issues in the reverse order, we observe from the court's minutes, which were proferted by the plaintiff in error, that on September 30, 1976, the lower court denied plaintiff in error's motion to intervene, and that the plaintiff in error excepted and gave notice that it would take advantage of the statute. According to the plaintiff in error's counsel, he then left the court, to apply

for a writ of certiorari before the Justice presiding in chambers, which was done on October 1, 1976, not knowing that as soon as he left the court the trial judge would rule on the law issues and render judgment in the case. We are certain that had plaintiff in error known that the case had been terminated, it would not have applied for certiorari. We are equally certain that had the Justice in chambers known of the termination of the matter he would not have issued the alternative writ and heard the matter. We also note that the respondents in the certiorari proceedings did not mention in their return that certiorari would not lie because the action was no longer pending; and they should have known of the termination of the suit because the judgment was rendered in their favor. We wonder what would have happened had the Justice in chambers granted the writ of certiorari. So while it is true that the plaintiff in error was present on the day the case was assigned, it was not present at the rendition of the judgment because of the circumstances mentioned above. We cannot understand why the case was hastily determined in view of the notice given by the intervenor.

Furthermore, the court's ruling on law issues seems spurious for the following reasons: (1) plaintiff in error has not been able to obtain a copy of the ruling despite the fact that the Acting Chief Justice, Mr. Justice William E. Wardsworth, ordered the Clerk of the Court for the Second Judicial Circuit to give a copy to the plaintiff in error; (2) the original ruling has not been forwarded to this court; (3) the photocopy of the ruling proferted by the defendant in error shows that the ruling was on legal-ruled paper not normally a part of the court stationery; and (4) the date of the ruling is questionable since the photocopy of the ruling shows the following: "given officially in open court this 30th day of September, 1976." We observe here that the figure "30th" is written in the blank space, and the word "October" is scratched out and

the word "September" written above it. One wonders when the ruling was actually prepared and given. This also leaves us to conjecture why the return to the certiorari dated October 6, 1976, did not show that the case had been determined on September 30, 1976.

With respect to the payment of the accrued costs, we have found in the records certified to this court a photocopy of a certified check No. 49608 for \$100, dated November 19, 1976, payable to "the sheriff of the Second Judicial Circuit Court Re: Accrued costs *MTO vs. E. S. Koroma*, Writ of Error," drawn on the International Trust Company of Liberia. Since the defendant in error has not shown that the accrued costs have not been paid, we are satisfied that this requirement has been met.

Now to the question of whether plaintiff in error is a party. In order to determine this question we must look at the peculiar circumstances surrounding the trial in the court below. The plaintiff in error moved to intervene, but was denied the right to do so. Upon excepting to the judge's ruling and giving notice to the court of its intention, plaintiff in error filed and argued its petition for certiorari, which was resisted by the defendant in error, but by this time the case had already been determined. The trial judge did not wait until the certiorari proceedings had run its full course before giving his judgment. It is possible, indeed probable, that had the trial judge stayed the proceedings as is mandatorily required when remedial processes are applied for, the plaintiff in error would have been made a part.

As stated earlier in this opinion, the intervenor, now plaintiff in error, filed an answer along with its motion to intervene. The trial judge, not content with denying the motion, went on to pass on the intervenor's answer in his ruling on the issues of law. This act of the trial judge is inconsistent with his denying the intervenor the right to intervene, for the court passes only on pleadings submitted by parties to an action. The defendant in error

denied that the trial judge passed on the intervenor's answer, but in the certified records, we find the following in the court's ruling on law issues:

"M.T.O. Intervention:

"In the dilatory plea as to the names of parties in Admiralty this issue should have no effect on the findings of this court for there are no divisions of court provided for under Liberian law.

"The last count of the resistance is sustained and the petition denied because this court is of the opinion that since the parties agreed to take all disagreement to arbitration they should be bound by this understanding."

Recourse to intervenor's answer shows that the issue of designation of parties in Admiralty is raised in the second count of the answer, and not in the motion to intervene. Furthermore, the copy of the charter and the bill of lading which are referred to in the second paragraph of the court's ruling quoted above were exhibits proferted with the intervenor's answer. Under such circumstances, the intervenor to all intents and purposes was treated as a party and must be regarded as such. If the lower court did not feel that the plaintiff in error should have been given the right to intervene, it should have confined itself to the motion to intervene and not gone on to pass on the intervenor's answer. And where the court in its ruling on the law issues ruled on the intervenor's answer and based its judgment on all of the pleadings filed, including the answer, those who filed such pleadings must be regarded as parties, and where any of the parties were not present at the rendition of final judgment, that party has the right to apply for a writ of error; especially so where the judgment would adversely affect the intervenor as in this case by the removal of the tugboats from here to Nigeria.

Having determined that all of the requirements for bringing error have been met, we shall now turn our at-

tention to the assignment of errors. The first error is the judge's denial of the motion to intervene solely on the ground that the bill of lading contains a clause which provides that any dispute ensuing between the charterer and the owner must be carried to arbitration in London. There are several things wrong with using this as a ground for denial of the motion: (1) it does not show that the intervenor did not have an interest in the subject matter that would warrant intervention; (2) the defendant in error is not a party to the bill of lading or the charter party and therefore it cannot invoke the arbitration clause. Rev. Code 1:64.2(1) (a)-(d); (3) an agreement to arbitrate does not oust the court of jurisdiction, *Grant v. Foreign Mission Board, National Baptist Convention*, 10 LLR 209 (1949); and (4) a court cannot pass on documentary evidence not testified to by witnesses, marked by the court, confirmed, and admitted into evidence. The bill of lading and charter party were proffered with the intervenor's answer, but were never testified to, marked by the court, confirmed, and admitted into evidence, yet the court based its ruling on an allegation without proof contrary to several opinions of this Court. *King v. International Trust Co.*, 20 LLR 438 (1971); *Scott v. Sawyerr*, 24 LLR 500 (1976).

The lower court's denial of the motion to intervene is also erroneous for these additional reasons: The Civil Procedure Law, Rev. Code 1:5.61(1) (b), (c), allows the intervenor (plaintiff in error) to intervene as of right. That statute reads thus:

"In general. Upon timely application, any person shall be allowed to intervene in an action: . . .

"(b) When the representation of the applicant's interests by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or

"(c) When the applicant is so situated as to be adversely affected by a distribution or other disposition

of property in the custody or subject to the control or disposition of the court or of an officer thereof."

More than this, this Court ordered that any action brought with respect to ownership of the tugboats should join all of the known parties who are shown to have an interest in the subject matter. This order is in harmony with the provision of the Civil Procedure Law regulating joinder of parties. It provides as follows:

"When joinder required.

"I. Parties who should be joined. Persons (a) who ought to be parties to an action if complete relief is to be accorded between the persons who are parties to such action, or (b) who might be inequitably affected by a judgment in such action shall be made plaintiffs or defendants therein." Rev. Code 1:5.51 (1).

This order was not carried out; therefore the plaintiff in error moved to intervene. It is interesting to note that the Nigerian Ports Authority, which was given an opportunity to be heard in this matter because they were left out previously, decided to bring this action and leave out the plaintiff in error contrary to our decision of August 11, 1976. *Union Maritime et Commerciale Corporation (UMARCO) v. Dennis, supra.*

The fact that plaintiff in error has a genuine interest in the subject matter of the action; that it has a maritime lien on the boats; that existing parties could not adequately represent plaintiff in error's interest; and that it could be adversely affected by a judgment in the action or by disposition of the property in the court's custody are sufficient legal reasons for the granting of the motion to intervene. A lien upon property which is the subject of litigation generally gives a right to intervene in the action. 59 AM. JUR. 2d, *Parties*, § 151 (1971). "The purposes of intervention are to protect the interests of those who may be affected by the judgment, to avoid delay, circuitry of action, and multiplicity of suits, and to expedite and

economize in litigation by permitting parties interested in the subject matter to adjust the matter in one instead of by several suits." 59 AM. JUR. 2d, *Parties*, § 134 (1971). Therefore, generally "if one has a sufficient interest in the subject matter in suit to entitle him to intervene and become a party thereto, the fact that he has some other and adequate remedy for the protection of his property and rights is no bar to his right to intervene"; neither does the fact that he may bring a separate action defeat the right to intervene. 59 AM. JUR. 2d, *Parties*, § 142 (1971).

As far as the court's ruling on the law issues is concerned, insofar as it related to plaintiff in error's answer, the trial judge erred when he referred to count 2 of the intervenor's answer as a dilatory plea. Admiralty division still exists under the law, and one who brings an action in admiralty is called the libellant, and the person against whom it is brought is called the libellee. Rev. Code 1:5.1(2).

We have already ruled upon the arbitration issue. In addition to the legal issues raised in the intervenor's answer, there were several factual issues which should have been ruled to trial, since the trial judge passed on the legal issues. The factual issues were the allegation of agency; the ownership of the vessel which transported the tugboats; the assertion of a maritime lien for services, demurrage, deviation, and stevedore expenses; and allegations for additional services and expenses. This Court has continuously held that decision on issues of law must be followed by trial of issues of fact. *Williams v. Allen*, 1 LLR 259 (1894); *Thomas v. Dayrell*, 15 LLR 304 (1963). Where a judge rules on legal issues, he must thereafter rule to trial the factual issues, except where there are no factual issues raised in the pleadings.

In summary, this Court finds that the action was not brought in Admiralty; that the lower court erred by its arbitrary denial of the plaintiff in error's motion to intervene; that the trial court's hasty determination of the

main suit before the certiorari proceedings had run its course appears to be a deliberate attempt to prevent the plaintiff in error from becoming a party to the action and to circumvent this Court's mandate with respect to joinder of interested parties; that after denying intervention, the lower court treated the plaintiff in error as a party by ruling on the legal issues in plaintiff in error's answer and by basing its final decision in part on said answer; that the lower court erred when it based its ruling solely on the legal issues, and omitted to pass on the factual issues raised in the pleading, and when it passed on documentary evidence without such evidence being testified to, marked by court, confirmed, and admitted into evidence; and that the plaintiff in error would be adversely affected by the lower court's judgment if it does not have its day in court.

Therefore, in view of the irregularities mentioned above and the law controlling, and in order to accomplish substantial justice, the judgment of the lower court is hereby reversed, and the case is remanded for trial *de novo*, which will include all known interested parties. The Clerk of this Court is ordered to send a mandate to the court below ordering it to resume jurisdiction over this matter immediately and proceed to determine same, giving it preference over all other cases. Costs to abide final determination. And it is hereby so ordered.

Petition granted.