HON. S. B. DANBAR, SR., Circuit Judge, Sixth Judicial Circuit, and RASAMNY BROTHERS, INC., by and through its General Manager, Appellants, *v.* ALHAJI SEK TARAWALLY, Appellee.

APPEAL FROM RULING OF JUSTICE IN CHAMBERS GRANTING A WRIT OF ERROR TO THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Argued November 16, 1967. Decided January 19, 1968.

1. In all matters which tend to substantially affect a party, a judge should exhaust all measures to insure a regular, fair and impartial trial, as in the instant cause, where, during the pendency of the proceedings giving rise to this appeal, a party became ill and his attorney of record was temporarily disbarred, leaving him unrepresented as the case proceeded to judgment.

Upon appeal by the defendant from the judgment of the Stipendiary Magistrate Court, a motion to dismiss the appeal was brought in the Circuit Court by the prevailing plaintiff, at the return date appellant being ill and without counsel, due to his suspension from practice, at which time a short continuance was granted, but adjournment further refused upon written request of new counsel, the motion being granted after argument by moving party, without exception to the order possible under the circumstances. Affected party, therefore, as plaintiff in error, obtained a writ of error from the Justice in chambers, from which ruling defendants in error appeal, the *ruling* being *affirmed* and the writ of error ordered issued.

Dunbar, Horace and Tuning for appellants. *Michael M. Johnson* for appellee.

MR. JUSTICE ROBERTS delivered the opinion of the Court.

This case arose in the Stipendiary Magistrate Court of the City of Monrovia, on November 15, 1965, when

Rasamny Brothers, Inc., operating on Monrovia, Liberia, entered an action of debt against one Alhaji Sek Tarawally of Roberts Alley, Monrovia, for the recovery of $1,833.46. This case was assigned to, and presided over, by Associate Magistrate C. A. Benson, one of the Associate Magistrates of said court. On the 3rd day of December, the month immediately following the filing of the case, the trial was held, resulting in a judgment against the defendant, rendering him liable in the aggregate amount of $2,277.40. To this ruling of the court, the defendant took exceptions and prayed an appeal before the Circuit Court, Sixth Judicial Circuit. Examining the ruling of the court, it seems rather unusual that defendant joined issue, by denying the allegations set forth in the complaint, yet, during the trial waived the production of evidence on his behalf, not even taking the stand himself to deny these allegations, and, nonetheless, indicated his intent to appeal from the judgment. The judgment reads,

> "After several assignments of the within case, trial came up for hearing on the 3rd day of December, 1965. Upon the call of the case, the plaintiff was represented by counsellor Tilman Dunbar and the defendant was represented by counsellor M. M. Perry. Witnesses for the plaintiff were called to the witness stand, they were qualified and deposed. Defense counsel cross-examined the witnesses and plaintiff rested evidence.
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> "At this stage, defendant was called upon to produce witnesses in his behalf, which was waived by him and he offered to take the judgment of the court. Accordingly, the court rules that defendant is justly indebted to plaintiff in the sum of $1,833.46, plus interest at 6% amounting to $440.00 for four years beginning in the year 1961, August, making a grand total of $2,273.46, which defendant is ruled to pay the plaintiff.

"Dated December 3rd, 1965.
"[Sgd.] C. A. BENSON,
Associate Magistrate."

To which ruling and judgment of court defendant took exceptions and prayed an appeal before the Circuit Court.

Defendant having taken the judicial steps for perfection of the appeal, was confronted with an embarrassment occasioned by the suspension of his counsel, counsellor MacDonald M. Perry, who was suspended from the legal practice, directly or indirectly, by this Court. According to the records forwarded to this Court, several assignments were made for the hearing of the cause in the Circuit Court. But service seems not to have been made on the appellant or his counsel. The defendants in error filed a motion to dismiss the appeal on the grounds that the sureties to the appeal bond were not freeholders and householders as the law contemplates. When the hearing of the motion was assigned, the defendant, being deprived of his counsel who had represented him from the origin of the case, was compelled to represent himself and file a motion for continuance, due to ill health. The minutes of the 15th day's session of the court sitting in its June 1966 Term disclose the following:

"Sekou Tarawally, appellant, *versus* Rasamny Brothers, Inc., appellee, motion to dismiss appeal called: The appellee is represented by counsellor Tilman Dunbar.

"Following an assignment of this cause, motion to dismiss appeal, assigned for hearing on the 7th day of July, 1966, at 9:00 o'clock, the appellant served upon us a copy of a motion for continuance of the hearing until the September Term of Court, and made profert with his motion a copy of a medical certificate in which Dr. Sirleaf certifies that he has examined the appellant and found him unfit for work for two weeks.

"In resisting the motion, appellee says, that illness of a party is good grounds for continuance, but inas-

much as the two weeks' period stated in the medical certificate expires during the present Term of Court, your Hon. is respectfully asked to continue the cause until the 21st day of July, 1966, which makes it two weeks and a day from the start of the two weeks' disability stated in the medical certificate. And submit.

"Based on the fact that illness is one of the good grounds for continuance of causes, especially so when the petition is supported by a medical certificate, the court is compelled to give cognizance to said petition but refuses to go along with the period requested by appellant, since, indeed, this court will be sitting in session up until the 20th day of August, 1966, which is over and above two weeks from date. Therefore, the two weeks requested is granted, but immediately thereafter the case will be assigned for hearing. And it is hereby so ordered."

Consequent to this ruling, at the expiration of the time set by the court, the case was assigned. At this time an investigation shows that the records in the case had been lost and could not be found. At the close of the investigation into the missing records, appellee's counsel made this statement for the record.

"In view of the record having been made by the clerk of court, to the effect that the case file of Rasamny Brothers vs. Tarawally Sekou, Action of debt, on appeal before this court, having been lost, we are respectfully requesting this court to substitute the Rasamny Bros. file, which includes all documents in the case, all true and certified copies. That is to say, that the appeal bond, the writ of summons, and judgment of the lower court, have all been certified by the clerk of the lower court, and the appeal bond at the time the appeal was perfected was certified by the clerk of the Circuit Court. The file will be surrendered to court if it pleases your Honor to grant this request.

"THE COURT: In view of the circumstances ex-

isting in the above entitled cause, the request made by counsel for appellee is granted."

At this time, it would appear that Attorney J. Edwin Swen, who apparently had been retained by the defendant, addressed a letter to the trial judge in the interest of the appellant, now appellee. Due to the missing file, we are unable to quote the letter written by Attorney Swen. But it is apparent that this letter requested a postponement of the hearing, and after being read in court, appellee's, now appellants', counsel, again made these remarks on the record,

"Counsel for appellee, in opposing the relief requested in the letter addressed to the court requesting a postponement of the above entitled cause for another time, says, as follows,

"1. That in this case, and during the sitting of the court, the assignment was issued and served for the hearing of this matter on the 6th day of July, 1966, when Sekou Tarawally, representing himself, filed a motion for continuance with a medical certificate attached, stating that the said Tarawally was ill and should not work for two weeks. The motion was granted and your Hon. in your ruling, stated it was to be the period for which the medical certificate showed that the plaintiff was incapacitated to attend court, but since this court was sitting beyond that period of two weeks, the case would be assigned for hearing definitely after the 20th day of July, 1966.

"2. Several assignments since that time have been sent out which are all attached to the record in this case, and were returned by the Sheriff, stating that the appellant could not be found. It impressed us that as soon as an assignment was served upon appellant, he engaged the service of attorney Swen to put forward a very flimsy reason for the postponement of a matter that has been pending since November 15, 1965. Moreover, appellee's counsel says that a mere letter

addressed to the judge requesting a postponement of the case is insufficient, as the law requires that all postponements of matters must be done by regular motions for continuance. In view of the foregoing reasons, we respectfully request this court to deny the request and to proceed with the motion to dismiss."

"THE COURT: The reason stated in counsel's letter for a continuance of this matter, not being one of the causes tenable under the law for postponement of a cause, said request is denied, and the court shall proceed to pass upon the motion as filed. (Appellee proceeded to argue his motion to dismiss.)

"He continues: In keeping with the statutes, the sureties on the bond shall be householders or freeholders in the Republic of Liberia. The bond, the basis for the appeal, shows two sureties who have not been freeholders or householders within the Republic of Liberia as verified by the Bureau of Internal Revenues over the signature of Mr. C. T. H. Dennis, Sr.; therefore, for such legal defect, the motion to dismiss the appeal is granted and the clerk is commanded to issue an execution and place same in the hands of the Sheriff for the collection of the amount of $2,277.46, together with costs of court. The clerk is also commanded to issue a commitment in the event the appellant fails to show property in satisfaction of said execution. And it is hereby so ordered."

As a result of the ruling quoted above, appellant, now appellee, proceeded to the chambers of Mr. Justice Mitchell, applying for a writ of error so that the judgment of the court below could be heard on review.

The defendants in error opposed the application, as follows:

"1. That the preliminary writ upon which they were brought into these chambers ordered their return filed on a *dies non:* hence, the entire proceedings by that are rendered void and of no legal significance.

"2. That since counsellor M. M. Perry, who represented plaintiff in error in the Magisterial Court, was suspended later from the practice of law, if plaintiff in error retained the legal service of other counsel, formal notice of change of counsel should have been filed and served on defendants in error, and not having been done, these proceedings growing out of a petition for assignment of error are a legal nullity.

"3. That plaintiff in error having waived the right to introduce any evidence, in his behalf in the Magisterial Court, and offering to take the court's judgment and appealing therefrom to the Circuit Court indicated that his only object was to kill the case so that it would never be called on appeal.

"4. Plaintiff in error's appeal bond was defective because sureties thereto are not freeholders and householders, on which ground the motion to dismiss was filed, and he failed to appear after six assignments had been made by the court below to defendant on the motion, error will not lie.

"5. That the trial judge below did grant the motion for continuance for the period specified in the medical certificate made profert with the motion for continuance, and this was done before the motion to dismiss was considered and, hence, error does not lie."

Thereafter, Mr. Justice Mitchell, who heard the case in chambers, ordered the alternative writ issued, and having heard argument in the case was convinced that errors did exist and granted the peremptory writ. We have carefully explored the proceedings of the court below, and its various rulings, to discover the basis for the ruling of the Justice and to satisfy ourselves that this ruling conforms with the applicable statutes. This appeal arises from a petition, in error proceedings, where the plaintiff in error alleged that he was not notified of the assignment of the case for hearing, that he was ill, and in consequence filed a motion for continuance of his cause

to the September Term of the court below, from the June Term, and made profert a medical certificate. This motion was heard and such continuance denied, unknown to him; that because of the suspension from the practice of law of his counsel who had conducted the case from the Magistrate Court, he was without representation by counsel, but regardless of this fact he still made effort to procure the service of other counsel in the person of attorney Swen, and this right was denied because he had failed to file a notice of change of counsel. A very close inspection of the record certified to this Court shows that the several notices of assignment referred to in the defendant in error's return, as well as the argument before the Justice in Chambers, show no indication on the face that they were served on plaintiff in error. And, moreover, we have not been convinced of any legal measure, or justification, for the denial of the motion for continuance. A continuation of the case for only the two weeks specified in the medical certificate was an abuse of the court's prerogative, which renders his act reversible. The law makes it mandatory that attorney Swen should have filed a subsequent motion for continuance, but this was not the point of attack made against the attorney's letter before the court, but rather the question of notice of change of counsel, which was to all purpose inapplicable, because counsellor Perry had not been changed as counsel for the defendant as the word imputes, but, rather, his suspension rendered him unable to defend the cause of his client. A writ of error may be granted to an applicant certifying to the appellate court that he had failed to take the regular appeal as provided by law from the judgment, decree or decision of the subordinate court because such decision or judgment was made in his absence and without his knowledge, and full satisfaction of the judgment had not been made. See AM. JUR., *Appeal and Error;* also see Revised Rules of the Supreme Court, Rule IV, Part 7. Besides these allegations made in the petition, the record

substantiates the fact that plaintiff in error's motion in the lower court for continuance was determined in his absence, and there is no indication that a notice of assignment was served on him for the hearing thereof. Again, a communication from attorney Swen to the trial judge requesting continuance was also denied in his absence, nor was he apprised of this by the court. In this case, counsellor Perry, although not ill, had a dilemma which impeded the exercise of his profession far greater than illness, suffering an embarrassment at the time the case was heard, which obviously incapacitated his appearance in court. On the other hand, the law also says that the illness of counsel which prevents his appearance at a trial is generally considered a ground for a continuance for the length of time occasioned thereby. In such cases, the party is not required to serve notice in order to obtain the relief of a continuance.

Since the amount involved is not trivial, the trial judge should have been more circumspect. In fact, in all matters which tend to substantially affect a party, a judge should exhaust all measures to insure a regular, fair and impartial trial, for haste makes waste to the victim of such procedure.

It is, therefore, the opinion of this Court that the ruling of the Justice is sound and is upheld by this Court, with costs against appellants. And it is hereby so ordered.

Affirmed.