

SEKU FREEMAN, et al., Petitioners, v.  
A. KINI, et al., Respondents.

PETITION FOR A WRIT OF ERROR TO THE CIRCUIT COURT,  
FIFTH JUDICIAL CIRCUIT, GRAND CAPE MOUNT COUNTY.

Decided May 24, 1974.

1. The sheriff's return showing service is presumed to be correct, but the presumption is rebuttable and not conclusive.
2. A certificate of counsel is not a document which is subject to a stamp tax.
3. An application for a writ of error must have an affidavit submitted therewith by the petitioner verifying that the writ is not being sought for mere harassment or delay.
4. An appellate tribunal can only take cognizance of the record and not of other matters placed before the appellate court.
5. The procedure related to obtaining remedial writs must be strictly observed by the petitioner.

Plaintiffs in error instituted an action in the lower court objecting to the probation and registration by the defendants of a public land deed. The plaintiffs applied for a writ of error on April 21, 1971, on the principal ground that they had not been served with notice of assignment and they condemned the return of the sheriff attesting to due and proper service as false.

The defendants in error in their return argued primarily that service was made and that no affidavit verifying that the application had not been made for mere harassment or delay was not submitted, thereby rendering the application invalid.

The Justice in his ruling was regretful that the contention of defendants in error as to the invalidity of the application for failure to append the required affidavit had to be sustained. However, he had doubts as to proper service by the sheriff and, reinforced by the inequities possible in a dispute over an area so large, therefore, although he *denied* the petition he ordered the lower court to conduct an investigation into the issue of service

of notice of assignment and proceed in the matter thereafter in accord with the lower court's findings, contemplating a day in court for plaintiffs in error if service was found lacking. The petition, as aforesaid, was denied but costs were disallowed because of the petition's merit.

HENRIES, J., presiding in chambers.

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 Garwular 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 any 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 names: 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*,  
"First 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.

"1. Because respondents say that the petition is defective and bad and the writ should be quashed because the petition is not verified in keeping with law, that is to say, there is no verification to the petition stating that the petition has not been applied for, . . . the mere purpose of delay or harassment.

"2. And also because respondents submit that the petition should be dismissed for the further reason that the purported certificate of counsel does not bear the required revenue stamp of 50 cents.

"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 three of the return 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). This Court has also held in *Perry v. Ammons*, 17 LLR 58 (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.

With respect to the second count of the returns of the defendants in error, concerning the absence of a fifty-cent revenue stamp on the certificate of counsel, they have cited the Revenue and Finance Law which provides that a "certificate, notarial or court" should have affixed to it a revenue stamp of 50 cents. 1956 Code 35:570(10). It is our opinion that a certificate of counsel does not fall within the category of a certificate issued by a notary public or a clerk of court and, therefore, this contention cannot be sustained. A certificate of counsel is not one of the documents that are subject to the revenue stamp tax.

Finally, as to the 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.

Our Civil Procedure Law contains the procedure for the application for a writ of error and states clearly that the application should be verified. Rev. Code 1:16.24(1)(a). This Court in *Harmon v. Republic*, 4 LLR 195 (1934), and *Montgomery v. Kandakai*, decided May 3, 1974, has held that the procedure relating to remedial writs should be strictly followed. Under the

circumstances we cannot grant the writ of error requested in the application since it has not met all of the legal requirements.

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 the 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.

Because we feel that the petition was meritorious, although not verified, we have disallowed any costs in these proceedings. It is so ordered.

*Petition denied; investigation ordered.*