ISHMAEL GOODRIDGE, Appellant, *v.* SARAH C. KENNEDY, J. SAINTE LUCE, His Honor, JAMES W. HUNTER, Assigned Judge of the Circuit Court of the Sixth Judical Circuit, Montserrado County, et al., Appellees.

APPEAL FROM RULING IN CHAMBERS ON APPLICATION FOR WRIT OF ERROR.

Argued October 11, 1966. Decided December 16, 1966.

An application for a writ of error will be denied when the petition and affidavit fail to conform with the statutory requirements.

On appeal to the full Court, a *ruling* in Chambers denying an application for a writ of error in an injunction action was *affirmed.*

William A. Cisco and *Michael Johnson* for appellant.
Jacob H. Wills for appellee.

MR. CHIEF JUSTICE WILSON delivered the opinion of the Court.

These proceedings grew out of an action of injunction filed in the Circuit Court of the Sixth Judicial Circuit, Montserrado County, by the present appellant against Sarah C. Kennedy et al., followed by a suit of ejectment, to restrain further occupation of a piece of real property. The writ of injunction is alleged to have been issued and served but, allegedly in disregard of this restraining writ, appellees continued to occupy and operate on said property, whereupon appellant filed an information against appellee for disobeying the restraining writ.

Appellees moved for dissolution of the injunction. For reasons which we at this point cannot state, the court dissolved the injunction. This the appellant felt was

prejudicial to his interest; hence error proceedings were sued out of the Chambers of Mr. Justice William E. Wardsworth. Because of the inability of the Chambers Justice to pass upon the merits of the petition, Mr. Justice Pierre was requested to dispose of the matter.

The appellee made the following returns against the granting of the petition.

"1. Because defendants in error submit that the petition of plaintiff in error is a fit subject for dismissal, in that plaintiff has failed to state the mandatory provision required to be laid in said petition. He should have averred in said petition that the execution of the decree of judgment had not been completed and his affidavit should have averred that he had not filed said action for the mere purpose of harrassment or delay. The failure to make mandatory averments makes the petition bad and defective, and same should be dismissed.

"2. And also because defendants in error submit that the said petition should be dismissed in that Count 2 is totally false and misleading, in that defendants, having filed their verified answer, filed a motion for dissolution of the injunction. Copies of both pleadings were served on plaintiff by the defendants. (See records in this case.)

"3. And also because defendants in error submit that Count 3 of plaintiff's motion is also false in that plaintiff's counsel signed the notice of assignment and wrote a letter to the court stating his own time when he would appear (October 22, 1963) to defend his client's interest in the dissolution proceedings; and since he did not appear on that day, nor did he notify the court of his alleged engagement in the Supreme Court, especially so when the case was not heard until 1:30 to 2:30 in the afternoon of the 22nd of October, 1963 (the hours when the Supreme Court was not sitting), the trial judge committed no error to decree the

dissolution of the injunction under the rules of this court governing the failure of parties to appear at the call of a case for trial.

"4. And also because defendants in error aver that there has not been served on defendants in error any bill of information up to the filing of these returns; hence Count 5 is false and should be overruled.

"5. And also because defendants in error submit that under the rule governing failure of parties to appear, there is no exception made as to equitable causes as stated in Count 5 of plaintiff's petition and since, in our jurisdiction, the procedure of our legal practices governs also our equitable practices, it was not incumbent on the trial judge to get in touch with any other party or lawyer so long as the lawyer of record had acknowledged the service on him of the notice of assignment, backed by this letter of October 22, 1963; hence the trial judge committed no error when he granted the motion of defendants in error for the dissolution of the injunction.

"6. And also because defendants in error submit that the plaintiff's petition is further fatally defective when he fails to assign any cause why he was not able to take an appeal from the ruling of the trial judge. This provision is mandatory, the lack of which makes a writ of error fatal and should be dismissed."

We would like to remark here that the omission complained of as having been made in the petition is borne out by the record in this case; hence it is not necessary to recite word for word the petition against which these returns were made.

On the 30th day of April, 1964, Mr. Justice Pierre, in the determination of the matter, limited his ruling to Count 1 of said returns. For the sake of this opinion we quote as follows from the concluding and relevant portions of the ruling of the Chambers Justice, to wit:

"The respondents have filed returns, in the first count of which they have raised the question of fatal defects in the petition and affidavit. . . .

"An inspection of said petition and affidavit will show that this allegation of the respondents is true and correct; so we inquired of the petitioner's counsel as to his reaction to the strong point raised by his adversary; and he argued that this was a mere technicality. But our statute authorizing application for the writ of error is mandatory in its command for what the petition and the attached affidavit should contain; and here is the relevant statute:

"Such application shall contain the following:

"(a) An assignment of error, similar in form and content to a bill of exceptions, which shall be verified by affidavit stating that the application has not been made for the mere purpose of harrassment or delay;

"(b) A statement why an appeal was not taken;

"(c) An allegation that execution of the judgment has not been completed. . . ." 1956 CODE 6:1231.

"The omission of these requirements and averments in a petition for a writ of error is fatal and will result in a denial of the petition and a refusal to grant the writ.

"Therefore, as much as we would have liked to pass upon the several issues raised in the pleadings, we are prevented from doing so in face of the serious defects appearing in the petition and called attention to in the returns. The petition is therefore denied with costs against petitioner."

Appellant appealed from the ruling of the Chambers Justice to this Court *en banc.*

In his argument before this Court, appellant's counsel was not vocal or courageous in stressing the claimed illegality and consequently erroneous ruling of the Chambers Justice, but dealt strongly on a denial of his day in

court because, at the time the case was called, heard, and decided against his client, he, the counsel, was busy in the Supreme Court defending a case in this Court and therefore could not be in both courts at the same time.

Probed from this bench to say whether or not the trial judge was informed by him of his being engaged in the Supreme Court at the time, he said he could not say. This is of course beside the point, since this Court intended to go into the merits of the appeal as succinctly recited in the ruling of the Chambers Justice with particular reference to and insistence on Count 1 of said petition. We share the regrets of the Chambers Justice in not being able to pass upon the merits of the proceedings and the ruling of the trial judge in the injunction matter as well as the contempt of court alleged in the information complaining against the appellee for disobeying the injunction; and we must determine first if the Chambers Justice was in error in denying the petition.

The statute authorizing the Supreme Court to entertain an application for a writ of error reads as follows:

> "A person (hereinafter sometimes called the plaintiff in error) who has failed for good reason to take an appeal from a judgment, decree or decision of a trial court, may, within six months of the day thereof, file an application for a writ of error with the Clerk of the Supreme Court. Such application shall contain the following:
>
> "(a) An assignment of error, similar in form and content to a bill of exceptions, which shall be verified by an affidavit stating that the application has not been made for the mere purpose of harrassment or delay;
>
> "(b) A statement why an appeal was not taken;
>
> "(c) An allegation that execution of a judgment has not been completed; and
>
> "(d) A certificate of a counsellor of the Supreme Court, or of any attorney of the Circuit Court if no counsellor resides in the jurisdiction where the trial

was held, that in the opinion of such counsellor or attorney real errors are assigned." 1956 CODE 6:1231.

By reference to the petition, as was done by the Chambers Justice, it is clearly and distinctly observed that these essential and mandatory requirements to be contained in a petition for a writ of error were omitted and therefore no premise is laid for the Supreme Court to inquire into and decide on the merits of said petition.

We are consequently obliged to, and hereby do, affirm the ruling of the Chambers Justice, same being in harmony with the statute and justified by the record before us, with costs against appellant. And it is hereby so ordered.

Ruling affirmed.