

MONDAY JOH and KAY JOH, Appellants v.
SAMUEL VON-YE-GAH HILL and His Honor,
JOHN A. DENNIS, Judge of the Circuit Court of the
Fourth Judicial Circuit, Maryland County,
Presiding over the December 1962 Term of the
Circuit Court of the Sixth Judicial Circuit,
Montserrado County, Appellees.

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

Argued March 22, 1965. Decided June 18, 1965

1. A writ of error will not lie after the return of the writ of possession in execution of the judgment in an ejectment action.
2. A writ of error will not lie where the only respect in which the judgment remains unsatisfied is nonpayment of costs.

Appellants were defendants in an ejectment action in the circuit court which rendered judgment against them. Their application for a writ of error was denied by the Justice presiding in Chambers in a *ruling* which the full Court *affirmed*.

Michael Johnson and *Richard Diggs* for appellants.
James H. Smythe for appellee.

MR. JUSTICE MITCHELL delivered the opinion of the Court.

This case grows out of an action of ejectment that was tried and determined in the Circuit Court of the Sixth Judicial Circuit, Montserrado County, at its December 1962 term.

After judgment had been entered in the court below, one Monday Joh and his sister, Kay Joh, defendants, fled to the Chambers Justice of this Honorable Court at

its March 1963 term with their petition praying for the writ of error to be issued as the remedial course for a hearing of the matter before the Supreme Court. The petition was filed on March 4, 1963. Plaintiffs in error alleged that the trial judge below had denied them their day in court on the hearing of the proceedings and that, not being aware of the judgment then rendered, they could not then and there enter exceptions and prosecute a regular appeal and that hence the judgment of the court had not been executed because the writ of possession had already been issued and was about to be executed to their prejudice and embarrassment.

The necessary preliminary writ having been issued and served and returns filed by the defendant, Mr. Justice Pierre, then presiding in Chambers, entered upon the hearing and made the following ruling.

"Growing out of an action of ejectment brought by respondent Hill against Monday Joh and his sister, Kay Joh, in the Circuit Court of the Sixth Judicial Circuit, Montserrado County, three surveyors were appointed as arbitrators to investigate on the spot the dispute between the parties. The arbitrators made their report on the 14th day of February, 1963, before John A. Dennis, the judge then presiding over the Sixth Judicial Circuit. Judgment was rendered on the report of the said arbitrators in favor of the plaintiffs on the 22nd day of February, 1963, and 5 days thereafter, that is to say, on the 27th day of the aforesaid February, 1963, the writ of possession was issued, served and returned by the sheriff.

"Notwithstanding this finalization of the ejectment case, the defendants in ejectment applied to the Chambers of Mr. Justice Mitchell in March of 1963 for a writ of error, claiming that they were not present when judgment was rendered against them, nor was their counsel in court to have taken appeal from the said judgment. Upon this one point this matter might be

decided, even though there were several other issues raised on both sides. The point has been raised in Count 4 of the returns in these words:

“4. Defendants in error further say that error will not lie against the aforesaid judge because the judgment has been satisfied in that defendants in error have been put in possession of said property, the subject matter of the ejectment proceedings.’

“In support of this allegation, the writ of possession is annexed to the returns, and filed therewith and is in the record; but what is more, the petitioners have admitted in their petition that the writ of possession was served and returned. (See Count 2 of the petition.)

“According to the statutes and the revised rules of the Supreme Court, a writ of error will not issue where the judgment has been completed, or is fully satisfied. (See 1956 CODE 6:1231(c) and Rule IV(7) of the Supreme Court.)

“In view of the foregoing and the law controlling as we have cited it hereinabove, we have no alternative but to allow the judgment rendered to remain in full force and effect and to refrain from disturbing the writ of possession which completely satisfied the said judgment. The petition for the writ is therefore denied and issuance of the writ refused. Costs against the petitioners.”

To this ruling respondents excepted and took an appeal to the bench *en banc* for a review thereof.

At the call of the case, both sides were represented by counsel and proceeded into the argument of the grounds of their respective briefs. Appellants' counsel mainly argued the point that the Chambers Justice should have granted the peremptory writ because the judgment of the court below had not been fully satisfied when they made their petition for the assignment of error in that the costs involved had not been paid; and that hence error would lie and a denial of their petition by the Chambers Justice

from whose ruling their appeal was processed was prejudicial to them. They also contended that they had strictly complied with the statutes with respect to the filing time of their petition and that the question of the alternative writ being issued and served several months after the filing of their petition was no fault attributable to them but, rather, an act of the court which should not affect or prejudice their interest against the relief they sought. They lastly contended that the rendition of judgment by the lower court in favor of appellees was a violation of appellants' fundamental right because the said judgment was manifestly against the findings of the arbitrators; hence, if they had been given their day in court they would have prosecuted a regular appeal.

Appellees' counsel, countering the many grounds of argument advanced by appellants' counsel, said among other things that they were not denied their day in court because they were regularly served with notice of assignment and failed to appear; moreover, that they neglected and refused to conform with the statute by filing objections to the award of the arbitrators; and that the Chambers Justice's ruling should not be disturbed because error would not lie since the judgment of the court had been completely executed before they came forward on error.

Considering all of these issues argued before us, there is but one material phase of the proceeding which we feel is worthy of our close consideration; but before exploring this phase, we will first take recourse to the law controlling error proceedings. Our Civil Procedure Law contains the following definition of a writ of error.

"A writ of error is a writ by which a superior court calls up for review a judgment, decree, or decision of an inferior court which has not been reviewed on appeal and which has not been completely executed. It shall be issued by the Supreme Court or a Justice thereof sitting in chambers." 1956 CODE 6:1230.

This statutory provision is specific and mandatory and

leaves no necessity for an interpretation to be made thereon. When judgment has been completely executed and error is prayed for to review the said judgment, the writ will not lie.

The question that has given us concern in and about this case is that, although appellants argued on the appeal that the judgment had not been completed because the costs had not been paid, yet they failed to make this an issue in their petition for error and also failed to argue that ground before the Chambers Justice on the hearing of their petition; and hence it is our opinion that this could not have been made a ground for the granting of a writ by our colleague when it was not a ground formally raised before him.

This Court has ever and anon pronounced emphatically that courts will not do for parties that which is incumbent upon them to do for themselves.

The only main ground raised by plaintiffs in error in their petition was that the writ of possession had not been executed at the time they fled to the Chambers Justice for relief by error; and this was countered by defendants in their returns, because they verified that the writ of possession had been issued, served, and they possessed of the property in question.

This Court will not give cognizance to issues raised before it on appeal unless they have been originally raised, argued and denied.

In our opinion, when the payment of costs is made a part of a judgment, decree, or decision, it presents a ground for error if the nonpayment remains outstanding up to the time of the filing of plaintiff's petition, but this does not serve as an exclusive ground if the other necessary prerequisites are not apparent.

Our law requires that, for error to obtain, plaintiff must satisfy the Court, and not by mere allegations, that there was no negligence on his part in his failure to prosecute a regular appeal; and must also substantially prove that

the judgment he seeks to have reviewed is not fully executed.

From the records before us, we have not been satisfied that these necessary requirements of the law were fully met, since it is a fact that mere allegations and averments do not amount to proof. Rule IV(7) of the Revised Rules of the Supreme Court found at 13 L.L.R. 693, 698, outlines clearly the principles under which error might obtain, and this rule finds support under our statutes in 1956 CODE 6:1230, 1231(c).

It is our opinion, therefore, that the ruling of the Chambers Justice which denied the issuance of the peremptory writ of error and from which this appeal is taken is legal and should not be disturbed; hence it is hereby affirmed with costs against the plaintiffs in error. And the clerk of this Court is hereby ordered to send a mandate to the court below to the effect of this judgment. And it is hereby so ordered.

Ruling affirmed.