RULINGS IN CHAMBERS

1974

LOTICO LOGGING COMPANY, Petitioner, *v.* CARL S. STEWART, et al., Respondents.

PETITION FOR A WRIT OF ERROR TO THE CIRCUIT COURT, EIGHTH JUDICIAL CIRCUIT, NIMBA COUNTY.

Decided March 29, 1974.

1. The filing of a bond by the petitioner as a prerequisite to the issuance of the writ of error is discretionary.
2. In determining whether the official administering an oath acted within his jurisdiction, it is sufficient if the place where it is taken is indicated expressly or implicitly by the rest of the affidavit.
3. Liberal presumptions in resolving ambiguities as to the place where the affidavit is taken will prevail in favor of validating the authority of the official administering the oath.
4. He who alleges a fact must prove it.
5. Entertaining a motion for a continuance by counsel not officially of record is in fact recognition by the court of such counsel and constitutes error to proceed, as the court did here upon denial of the motion, in the absence of counsel or client without further notice.
6. It is error for a court to render judgment prior to four days after the return of the jury's verdict.

Plaintiff in error was the defendant in an action of damages for personal injuries, whose counsel withdrew from the case. When the case was assigned for trial two days after the court's ruling on the issues of law, defendant retained other counsel, but the law firm was not formally substituted as counsel of record. A motion for continuance was made by the law firm on the date assigned for trial and was denied by the judge presiding, and an imperfect judgment was entered, the jury returning a verdict of $30,000.00 against defendant company the next day, final judgment being rendered by the court two days thereafter, when neither defendant or its counsel was

present in court. An application for a writ of error was thereupon submitted to the Justice in chambers.

The principal contentions raised before the Justice by the plaintiff in error were that by entertaining the motion for continuance the court had actually recognized representation by the law firm and was, therefore, required to assign a new trial date before proceeding with the case. Moreover, the court rendered final judgment before the time imposed by statute.

Defendants in error argued mainly that the jurat of the affidavit accompanying the application for a writ of error, was defective in that two counties appeared therein, and the Justice of the Peace taking the oath was not qualified in one of the two counties, as a consequence rendering the affidavit defective.

The Justice found the affidavit valid and the argument of plaintiff in error sound. In consequence he granted the application for a writ of error and remanded the case for a new trial. The petition was *granted*.

HENRIES, J., presiding in chambers.

Plaintiff in error was the defendant in an action of damages for personal injury. It appears that Attorney Kpahn, who was first retained as counsel by plaintiff in error, later withdrew from the case. In the meantime, after the ruling on the issues of law on December 5, 1973, the case was assigned for December 7. The Company then retained the Morgan, Grimes & Harmon law firm to represent it. On the assigned day counsel filed a motion for a continuance, asking to be given time to study the case since they had just been retained and had previous engagements. The motion was resisted on the grounds that the law firm was not counsel of record; that a notice of change of counsel had not been served; and that the motion did not contain any legal ground which would justify granting it. The motion was denied, an

imperfect judgment was entered, and the case was ruled to trial by jury on the same day. On December 8, the jury brought in a verdict of $30,000.00 against the defendant, and final judgment was rendered on December 10, 1973, when neither plaintiff in error nor its counsel was present. It is from this judgment that the defendant in the action has applied for a writ of error.

The errors assigned by the plaintiff in error resolve basically into the following: (1) that the judge abused his discretion in denying the motion; (2) that if the court did not recognize Morgan, Grimes and Harmon as counsel it should have ignored the motion, but once it entertained the motion this was tantamount to recognizing representation by the firm, and therefore, the court should have served another notice of assignment on either the party or its counsel; or it should have informed at least one of them of the denial of the motion if the firm's representation was unacceptable; and (3) that the court proceeded to try the case and render final judgment within two days instead of the four days imposed by statute.

Aside from the issues of notice and change of counsel and the resistance to the motion for continuance, the defendants in error contended in their return that (1) the affidavit accompanying the application for the writ of error was venued in Nimba and Montserrado Counties; (2) the Justice of the Peace, James Reeves, before whom the oath was taken, was not a Justice of the Peace for Nimba County, because there exists no Justice of the Peace by that name in Nimba County; (3) there was no bond attached to the petition to indemnify defendant in error Stewart; and (4) the plaintiff in error had not paid the accrued costs in the lower court.

We regret that the last three issues were not argued during the hearing in chambers. However, we shall pursue all of the issues which were raised by the parties. We shall begin by combining the last two contentions of the defendants in error.

The statute relied upon by the defendants in error is found in our Civil Procedure Law.

"1. Application. A party against whom judgment has been taken, who has for good reason failed to make a timely announcement of the taking of an appeal from such judgment, may within six months after its rendition file with the clerk of the Supreme Court an application for leave for a review by the Supreme Court by writ of error. Such an 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 harassment or delay;

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

"(c) An allegation that execution of the 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.

"As a prerequisite to issuance of the writ, the person applying for the writ of error, to be known as the plaintiff in error, shall be required to pay all accrued costs, and may be required to file a bond in the manner prescribed in section 51.8. Such bond shall be conditioned on paying the costs, interest, and damages sustained by the opposing party if the judgment complained of is affirmed or the writ of error is dismissed." Rev. Code 1:16.24.

It is our opinion that the use of the word "may" makes the filing of a bond discretionary; that the payment of accrued costs is applicable only after the Justice has granted the application and ordered the issuance of the writ as provided in paragraph two of the section quoted. Moreover, if the plaintiff in error is not required to pay

costs upon the issuance of the writ, the defendant in error loses nothing, since he will still be awarded costs, in accordance with paragraph four of this section if the judgment is affirmed. Furthermore, if the Justice does not insist upon this requirement being met, the party should not suffer for this omission.

The next issue relates to the affidavit. It is our opinion that the insertion of the word "Monrovia" after the words "Nimba County" in the caption, did not invalidate the affidavit, especially since in the body of the affidavit it is stated that the oath was taken in Nimba County before a Justice of the Peace of that County. This Court has held in *Kennedy* v. *Morris,* 2 LLR 134 (1913), that the place where an affidavit is taken must be stated to show that it was taken within the officer's jurisdiction. In *Gray* v. *Ware,* 6 LLR 61 (1937), the Court also held that an affidavit is not defective where the jurat shows that an affidavit was taken in a County by a Justice of the Peace of the same County. In *Tuning* v. *Thomas,* decided April 21, 1972, the Court held that "the (function) of an affidavit is simply to verify the truthfulness of the contents of the pleading or document to which it is annexed. It must show that the affiant [was] under oath before an officer of the law authorized to administer oaths, [and] testified to what is contained in the document as being the truth within his personal knowledge; or, upon information given him by another; or, that he verily believes the same to be the truth."

The criteria insofar as the relationship of the affidavit to the document which it is to support are the following: (a) It must be administered by an authorized official of the law; (b) It must be a written statement and contain the oath of the affiant or deponent that what is written in the annexed document is true; (c) It must carry the exact title of the cause as the title is stated in the pleading to which it is annexed; (d) It must show on its face the place where the oath was taken, so that the correct county

in which the administering officer functions might be ascertained; and (e) The deponent must sign the oath as an indication that he verily made it. Affidavits to pleadings must also show that the deponent is either a party, or of counsel for a party. *Blacklidge* v. *Blacklidge,* 1 LLR 371 (1901); BOUVIER'S LAW DICTIONARY.

Defendants in error alleged, but made no attempt to prove, that the Justice of the Peace who signed the affidavit was not from Nimba County. He who alleges a fact must prove it.

> ". . . venue is the designation of the place where the affidavit was taken. It is prima facie evidence of such fact. Its purpose is to show whether or not the official administering the oath or affirmation acted within his jurisdiction. . . . An affidavit is sufficient if the place where it is taken is indicated expressly, or by implication, by the rest of the instrument." 1 AM. JUR., *Affidavits,* § 16.
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> "Where a formal venue is attached, or where the caption recites a venue it is generally presumed that the officer was of the venue recited and there administered the oath, the venue being prima facie evidence of the place where the affidavit was taken. Where there is a conflict on the face of the affidavit as to its venue, according to some authorities the variance is not fatal, since the presumption that the officer acted within his jurisdiction will prevail over any doubts arising on the face of the instrument. So where the caption or venue recites a county or state different from that affixed to the officer's signature, the liberal presumptions will prevail in upholding the affidavit." C.J.S., *Affidavits,* § 140.

In view of the law cited herein we find no defect in the affidavit sufficient to warrant the dismissal of the application on these grounds.

With respect to the motion for continuance we are in accord with the contention of defendants in error that

since the firm of Morgan, Grimes & Harmon was not counsel of record it could not under our Civil Procedure Law represent plaintiff in error without first filing a notice of change of counsel. Rev. Code 1:1.8(a); *Findley* v. *Weeks,* 18 LLR 245 (1968). Nor could it file a motion for continuance. This being true, the court should have ignored, instead of entertained, the motion. Taking cognizance of the motion was in fact recognizing Morgan, Grimes & Harmon which had filed the motion. In any event, it is our opinion that where the motion had been denied when neither counsel or party was present, it was incumbent upon the court either to inform the party of its ruling on the motion or to issue another notice of assignment. *Geeby* v. *Geeby,* 12 LLR 20 (1954). The filing of a motion of continuance, even though by a counsel not of record, is not a clear indication of abandonment that justifies proceeding with the case in the absence of the plaintiff in error and, therefore, the court did err. In *Franco-Liberian Transport Co.* v. *Bettie,* 13 LLR 318 (1958), and *Wahab* v. *Sonni,* 17 LLR 105 (1965), it was held that it is when a party fails to appear in person or by counsel, or to move for continuance, that the court may proceed to try the case in his absence.

Finally, it was error for the court to render judgment in the case two days after the verdict, instead of four days as required by our Civil Procedure Law. Rev. Code 1:41.2(1).

In view of the foregoing, we have no alternative but to grant the application of plaintiff in error and remand the case for a new trial, and the Clerk of this Court is ordered to send a mandate to the court below ordering it to resume jurisdiction over this matter and to proceed with the hearing of this case beginning from ruling on the issues of law. Costs are ruled against defendant in error. It is so ordered.

Petition granted.