

**J. T. MASSAQUOI, Petitioner, v.
ALHAJI SEKU SWARAY, et al., Respondents.**

**PETITION FOR A WRIT OF ERROR TO THE CIRCUIT COURT,
SIXTH JUDICIAL CIRCUIT, MONTERRADO COUNTY.**

Decided April 20, 1974.

1. Partial payment of a judgment does not preclude issuance of a writ of error, for to justify denial of the writ on the ground of satisfaction of the judgment, all that the judgment required to be done must have been completely done.
2. A defendant who has not answered the complaint or filed a notice of appearance, will be considered as having appeared when he makes a motion at the beginning of the trial.
3. In the instant case, the requests made before trial by plaintiff in error which have been set forth in the statement of facts, constituted a motion in view of the fact that the plaintiff in error was a layman and evidenced thereby the intent not to abandon his defenses.
4. A general appearance fully sufficient to establish the jurisdiction of the court over the defendant so intending can be determined by the Court from matters of substance and not only by the formal methods prescribed by statute and rules of practice.
5. When a defendant has appeared in a proceeding and has not served an answer he is relegated to a general denial of the facts alleged in the complaint, with all rights attendant to a general denial.
6. Due process of law has been denied to a party when the fundamentals of a fair trial and the opportunity for him to be heard have not been afforded by the trial court.

Petitioner, the plaintiff in error herein, was sued in an action for damages in the Sixth Judicial Circuit Court. He served no answer to the complaint nor formally appeared. At the time the case was called for trial, his counsel was away on Government business and the defendant so informed the court. He requested a postponement, or an opportunity to retain other counsel, or to be allowed to represent himself. The judge denied all the requests made by the defendant in the action and he ordered a jury empaneled, which returned a verdict for plaintiff. The court rendered its judgment on September 28, 1973. The defendant, under the circumstances, could not announce an appeal.

Thereupon, he applied for a writ of error to the Justice presiding in chambers. Among the arguments advanced by the respondents in opposition to issuance of the writ were the partial payment of the judgment by the petitioner and his failure to have appeared in the lower court, which would have barred the relief herein sought.

The Justice discounted the respondents' arguments and *granted* the petition, primarily because the plaintiff in error had not been afforded his day in court and thereby had been denied due process of law. The Justice ordered the writ of error *issued*.

HENRIES, J., presiding in chambers.

Plaintiff in error was sued in an action of damages in the Circuit Court of the Sixth Judicial Circuit. When the case was called he was present in court, but his counsel, J. Dossen Richards, was not present because he was out of the country on Government business. Prior to this, no answer was filed nor a formal appearance made. However, plaintiff in error informed the court of the absence of his counsel and asked for postponement or an opportunity to retain other counsel, or to be allowed to represent himself. The court did not grant any of these requests. The record does not show this, but counsel for defendant in error admitted that plaintiff in error was in court and made the requests above stated, but he contended that the court was correct in denying the requests because there had been no appearance, as required by statute. It should be pointed out here that this was the second time this case had been initiated; the first time it was withdrawn, and plaintiff in error was represented by counsel. He later changed counsel.

Having denied these requests the court proceeded to empanel a jury and try the issues of fact. The jury brought in a verdict awarding the plaintiff \$2,335.31, and the judge rendered judgment affirming the verdict

on September 28, 1973. Plaintiff in error, although in court, did not take an appeal because he had not been recognized by the court, hence, he has applied for a writ of error.

The main issues were raised in chambers:

- (1) What constitutes an appearance to warrant recognition by the court? and
- (2) That a writ of error will not be issued where the costs of court and a portion of the judgment have been paid.

We shall determine these issues in reverse order of their presentation. On the issue of satisfaction of judgment our Civil Procedure Law requires that an application contain among other things an allegation that execution of the judgment has not been completed. Rev. Code 1:16.24(1)(c). The defendant in error contends that the remedy sought cannot be granted because plaintiff in error had paid the costs of court and filed a payment bond on which he has already made three payments. In our opinion these payments cannot be deemed as having completed the execution of the judgment. In *Geeby v. Geeby*, 12 LLR 20, 23 (1954), this Court held that "A judgment to be fully executed, must be satisfied in every respect." In *Gray v. Macauley*, 17 LLR 157, 162 (1966), this Court said that "if all that the judgment or decree requires to be done shall have been completely done, the judgment is said to have been fully executed, precluding the probable issuance of the writ."

With respect to what constitutes an appearance, defendant in error relied upon the definition found in our Civil Procedure Law. "Service of an answer or a notice of appearance or the making by the defendant of a motion constitutes an appearance by him." Rev. Code 1:3.61. Defendant in error contended that physical appearance is not the appearance contemplated by this statute. Plaintiff in error argued that he is entitled to be represented in person, by counsel, or both, and relied on a

long line of decisions of this Court espousing this view, and on our Civil Procedure Law.

“Who may represent a party. A party, other than an infant or incompetent person, may prosecute or defend a civil action in person or by attorney or both, except that (a) a corporation or voluntary association shall appear by attorney, and (b) a party may be represented in a court of a stipendiary magistrate or justice of the peace by a husband, wife, father, mother, brother, sister, son, daughter, or guardian. If a party appears by attorney, he may not act through another person not an attorney except by consent of the court and after notice of the change has been served on the other parties.” Rev. Code 1:1.8(1).

At the outset it should be pointed out that the two statutes do not conflict but rather complement each other, for either a party or his counsel may make an appearance as stated by section 3.61. However, it is our opinion that although the failure to file an answer might signify nonappearance, yet, this does not necessarily deprive the defendant of his day in court, which is the underlying reason for applying for a writ of error. Where a defendant fails to file an answer, the defendant is deemed to have denied only the truth of all allegations of fact and to rest on that defense alone. *Solomon v. Sherman*, 1 LLR 317 (1897); *Coffah v. Pyne*, 8 LLR 380 (1944). And he may cross-examine the plaintiff's witnesses under our Civil Procedure Law and introduce evidence in support of his denial, but he may not introduce evidence in support of any affirmative matter. Rev. Code 1:9.1(2).

According to the record, no notice of appearance was given. If this were the only criterion to determine appearance then it would be clear that the plaintiff in error did not appear.

The last determinant of appearance is the making by the defendant of a motion. The defendant in error contended that where there is no formal appearance or no

pleading filed, there is no appearance. This means then that only one who has formally appeared or filed a pleading can make a motion. This in our opinion removes one of the criteria, the making of a motion, set forth in section 3.61, and unduly restricts the definition of appearance. We construe this section to mean that where a defendant at the beginning of the trial makes a motion, even though he has filed no answer or notice of appearance, he can be considered as having appeared.

The next issue presented is whether plaintiff in error's request for a postponement because of absence of his counsel, or for the opportunity to retain another lawyer, or to represent himself, can be regarded as a motion. Considering the circumstances under which they were made it is our opinion that they can be regarded as such, remembering that the person making the aforesaid requests is a layman, not familiar with the language of the law or the rules and practice of the court. He has thereby given no indication that he intended to abandon his defense or be deprived of his day in court. Therefore, since these requests can be regarded as a motion, for all intents and purposes, there was an appearance by the plaintiff in error. We find support for this view in the legal citations hereunder.

"An appearance may be expressly made by a formal written or an oral declaration entered on the record, or it may be implied from some act done with the intention of appearing and submitting to the court's jurisdiction. While appearance in any manner prescribed by statute is sufficient, the statutory methods are not usually regarded as exclusive to establish an appearance." 6 C.J.S., *Appearance*, § 12.

"A general appearance fully sufficient to establish the court's jurisdiction over the defendant so intending, is often made otherwise than by the formal methods prescribed by statute or by rules of practice. The court should look to matters of substance rather than

form, and the party's conduct, as well as other circumstances, in determining whether he has actually appeared. A general appearance may arise by implication from the defendant's seeking, taking or agreeing to take some step or proceeding in the cause, beneficial to himself or detrimental to the plaintiff, other than to contest jurisdiction over his person only, or from some act done with the intention of appearing and submitting to the court's jurisdiction." AM. JUR., 2d., *Appearance*, § 12.

The seeking of some affirmative relief from the court, or requesting a favorable decision on some matter of a substantial character, or an endeavour to secure a continuance or postponement are some aids which should be employed by the court in determining appearance. Measured by these criteria, we hold that the plaintiff in error's request aforementioned could be considered a motion and by implication definitely could constitute a general appearance. Furthermore, since no answer had been filed, the plaintiff in error should have been relegated to a general denial of the facts alleged in the complaint and given the opportunity to cross-examine plaintiff's witnesses and introduce evidence to support his denial, as was done in *Coffah v. Pyne, supra*, where neither an appearance nor an answer was filed, nor counsel present. The plaintiff in error, therefore, did not have his day in court. Whatever disagreement there may be as to the scope of "due process" of law, there can be no doubt that it embraces the fundamentals of a fair trial and an opportunity to be heard. In dispensing justice, courts must act in such a way that justice must have clearly prevailed, not only for members of the legal profession but for the public as a whole. A trial must not only seem to be fair, but it must be fair if the public, the majority of whom are laymen, is expected to have confidence in our legal system.

In view of the error committed by the judge in not af-

forfeiting plaintiff in error his day in court, and the fact that the judgment has not been fully satisfied, the peremptory writ is hereby ordered issued and the case remanded; and the Clerk of this Court is ordered to send a mandate to the court below instructing it to resume jurisdiction over the case and proceed to dispose of it commencing from the ruling on the issues of law, costs to abide final determination. It is so ordered.

Petition granted.