

JOSEPH A. WALKER, Appellant, v. SAMIR
KAZOULA, Appellee.

APPEAL FROM RULING IN CHAMBERS GRANTING ISSUANCE OF A
WRIT OF ERROR TO THE DEBT COURT, MONTSERRADO COUNTY.

Argued October 25, 1976. Decided November 19, 1976.*

1. Absence of counsel at the hearing of a case and rendition of judgment is excusable if the absence is due to an engagement before a superior court.
2. No one shall be personally bound by the ruling of a court until he has been duly cited to appear and has been afforded an opportunity to be heard.
3. A presumption may be invoked only if evidence or averments respecting the facts presumed are absent.

In an action of debt in the Debt Court, neither the defendant Kazoula nor his counsel was present on the day fixed for the hearing of the case because, he contends, notice of assignment was not received. The court rendered judgment against the defendant, who applied for a writ of error. This was granted by the Justice in chambers, who found that Kazoula had not in fact had his day in court. On an appeal by the defendant in error to the full court, the *ruling* of the Justice in chambers was *affirmed* and the case was remanded for trial to the court below.

Nete Sie-Brownell for appellant. *M. P. Perry* for appellee.

MR. JUSTICE AZANGO delivered the opinion of the Court.

On an application for a writ of error before our colleague, Mr. Justice Henries, the plaintiff in error, Samir Kazoula stated that in an action of debt instituted against him by the defendant in error, Joseph A. Walker, the court proceeded to dispose of the case and rendered judg-

* Mr. Chief Justice Pierre did not participate in this decision.

ment against him without due notice to him or his counsel to appear and be heard on the day of assignment, and that the court further proceeded to record that after final judgment, he, the defendant, noted exceptions and announced an appeal to the Supreme Court of Liberia, but that this notation of the trial judge was untrue. Plaintiff in error further contended in his application that it is a requirement of our statutes that written notices of assignment be sent to party litigants in a case and be signed by them or their counsel before hearing is had and be verified by the return of the sheriff, a requirement which the court below failed to carry out, thus depriving plaintiff in error of his constitutional rights and the privilege to produce witnesses to testify in his defense or to know the claims of the opposing party and to meet them. Consequently he has challenged the validity of the judgment.

The defendant in error in his resistance to the application argued that his opponent had failed to take any of the jurisdictional steps required by law to perfect his appeal; that several written notices of assignment were duly sent out, some of which were signed by counsel for plaintiff in error, citing both counsel to appear for the rendition of final judgment; that where plaintiff in error and his counsel were served with notice of assignment for the rendition of final judgment and both failed to appear, the court committed no material error by appointing a counsel for plaintiff in error to receive final judgment; that the appointed counsel announced an appeal, which was granted, giving plaintiff in error the same constitutional right of appeal which he would have if present in court, especially so when counsel for plaintiff in error has not denied receiving a copy of the minutes of the court which contained final judgment. Defendant in error concluded that the facts appearing in the record amply support the determination of the case in keeping with the judgment of the court below.

The Justice in chambers, having heard argument on the petition and the resistance, rendered the following opinion:

"On November 20, 1974, a judgment was entered against the defendant, now plaintiff in error, who contends that he did not have his day in court. The records before us show that there were two notices of assignment. The first notice of assignment was for November 19 and it bears the signature of the counsel for the defendant in error and that of counsel for plaintiff in error, who made the following notations:

"Counsellor M. M. Perry, who represents the defendant will be engaged in the Supreme Court until (probably) the ensuing Thursday, 18/11/74.

"M. M. PERRY."

"In addition the sheriff's return also shows that both parties were duly served with this notice. The other notice of assignment for November 20, 1974, was signed only by counsel for defendant in error, and there is no indication to show that it was served on the plaintiff in error. There is no return to this assignment.

"Recourse to the minutes of this Court for November 18, to 21, 1974, shows that Counsellor M. M. Perry was present apparently for the cases of *C. A. Benson v. Daily Johnson*, and *Moses Ginger v. Samdo Bai*. His absence due to engagements in the Supreme Court was excusable; as such engagements take preference over those of the subordinate court.

"But we wonder why, since the defendant in error was represented by the Dukuly and Perry Law Association, another lawyer from that firm was not present to represent their client after the service of the notice of assignment. Although appeal was announced from the final judgment, plaintiff in error contends that neither he nor his counsel was present and the records do not show that either was present or who substituted

for counsel. Judges when asking an attorney to take a ruling for an absent counsel should put in the records the name of the attorney who is so designated.

"Since the records do not show that the case was heard on November 19 in keeping with the assignment, or that the notice of assignment for November 20, 1974, was ever served on the plaintiff in error, we must conclude that the plaintiff in error was not given that notice necessary for him to be given his day in court."

The Justice in chambers therefore granted the petition and from that ruling the defendant in error, Joseph Walker, appealed.

We are in complete agreement with the conclusion reached by our colleague in his ruling, which should be affirmed. The rule of a day in court is as old as the law, and never more to be respected than now, meaning that no one shall be personally bound until he has been duly cited to appear and has been afforded an opportunity to be heard, and that judgment without such citation and opportunity may result in oppression and injustice. This Court has observed, however, that there has been and continues to be a great abuse of this right by lawyers in this jurisdiction by resorting to excuses for nonattendance that are frivolous and dilatory, with the result that they also infringe upon the rights of parties litigant before the courts by defeating the very Constitutional principles relating to fairness in the trial of cases they were intended to promote. These practices contribute to delay in trials and thus bring about congestion of trial dockets. Hence the Court takes the opportunity to warn lawyers against the abuse of this right. This principle of law operates on a double edge sometimes and when wrongly invoked may defeat the ends of justice.

Additionally, commenting on the issue regarding the notice of assignment allegedly issued and served on appellee's counsel, we must observe that presumptions are only invoked to supply the absence of evidence or aver-

ments respecting the facts presumed. There is no place for their consideration when the evidence is disclosed or the averment is made. When therefore the record states the evidence or makes an averment, it will be understood to speak the truth on the point, and it will not be presumed that there was other or different evidence respecting the fact. *Fisher v. Jordan*, 32 F.Supp. 608, 613 (N.D., Tex., 1940). In the instant case, there is no evidence indicating that appellee and his counsel were served with notice of assignment for November 20, 1974, the day of rendition of judgment, as earlier observed by our colleague. Since this is so, this reviewing court cannot assume correctness of a recital that notice was given and judgment rendered in keeping with law, or sustain the contention that previous notices and assignments were given or that the notation of announcement of an appeal was not false and untrue. We have noted that there is no statement or return which adequately complies with the requirement of the statute by notifying appellee to appear on the day of the rendition of the final judgment in this case.

In view of the above recitals, it is our holding that appellee not having had his day in court at the time of the rendition of the final judgment in this case, the judgment given thereon is hereby set aside; and the ruling of the Justice in chambers affirmed. The Clerk of this Court is ordered to send a mandate to the court below informing it of this judgment with instructions that it will immediately resume jurisdiction over the cause of action and proceed to have complete trial thereof, giving either party the right of appeal to this Court before its March 1977 Term commences. And it is so ordered. Costs to abide final determination of the cause.

Ruling affirmed.