

EMMETT HARMON, Informant/Defendant-In-Error,
v. SEKOU BILITY, Respondent/Plaintiff-In-Error.

APPEAL FROM THE RULING OF THE JUSTICE IN CHAMBERS DENYING ISSUANCE
OF THE WRIT OF ERROR.

Heard: June 3, 1981. Decided: July 31, 1981.

1. A day in court simply means that no one should be personally bound until he has been duly cited to appear, and has been afforded an opportunity to be heard.
2. For error to obtain, the plaintiff-in-error 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.
3. Complaints against the conduct of counsel for defendant-in-error are not sufficient to warrant the granting of the writ of error.
4. An allegation that a party was unable to take an appeal because he could not pay the costs until he secured expected employment is insufficient to permit him to alter the method of procedure from appeal to writ of error.
5. A writ of error will not lie where appeal has been taken from a judgment.
6. The office of the writ of error is to review, scrutinize and correct any material error of law committed in the proceedings and during the trial of the case.

Defendant-in-error, instituted an action of ejectment against plaintiff-in-error in the People's Civil Law Court for the Sixth Judicial Circuit Court for Montserrado County. During the trial, plaintiff-in-error submitted his case without production of any evidence. After hearing arguments *pro et con*, the case was accordingly submitted to the jury who, after deliberations, returned a verdict in favour of defendant-in-error. The plaintiff-in-error excepted to the verdict and gave notice to take advantage of the statutes but did nothing towards this end. Consequently, final judgment was rendered, to which plaintiff-in-error noted his exceptions and announced an appeal to the Supreme Court. Notwithstanding these pronouncements, the plaintiff-in-error failed to file his bill of exceptions, whereupon defendant-in-error moved the court to resume jurisdiction, dismiss the appeal, and enforce its judgment for failure on the part of plaintiff-in-error to proceed. The motion, not having been resisted, same was granted and a writ of possession issued in favour of defendant-in-error. It was in the process of the service of the writ of possession, that

respondent/plaintiff-in-error, applied to the Justice in Chambers for a writ of error, contending that he did not have his day in court.

In his returns, defendant-in-error contended that plaintiff-in-error, having participated in the trial from the beginning up to and including the rendition of final judgment, to which final judgment he excepted and announced an appeal, is estopped from contending that he did not have his day in court. He also maintained that the judgment had been executed. The petition was heard and denied and from the denial, plaintiff-in-error appealed to the Full Bench.

The Supreme Court held that the reasons stated in the petition are complaints against defendant-in-error's counsel and are therefore not sufficient to warrant the granting of the writ of error. The Court opined that plaintiff-in-error's contention that he was denied his day in court cannot be maintained, for his counsel was physically present in court at each and every stage of the trial, including final judgment, and he did also sign the notice of assignment for the motion but failed to appear for the hearing. Under the circumstances, plaintiff-in-error has no one to blame but his counsel or himself for their failure to perfect the appeal. Accordingly, the ruling of the Chambers Justice was *affirmed*.

J. K. Burphy appeared for plaintiff-in-error. *J. Dossen Richards* and *James Doe Gibson* appeared for defendant-in-error.

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

The plaintiff, now defendant-in-error, sued the defendant now plaintiff-in-error in an action of ejectment in the People's Sixth Judicial Circuit Court for Montserrado County. Pleadings progressed as far as to the answer and rested. The case was tried by a special jury upon mandate of His Honour the late Chief Justice Pierre. The defendant-in-error produced oral and documentary evidence to substantiate his allegations as laid in his complaint. The plaintiff-in-error submitted his case without production of any evidence. After hearing arguments *pro et con* the case was accordingly submitted to the jury who returned, after

deliberations, with a verdict in favour of defendant-in-error. The plaintiff-in-error excepted to the verdict and gave notice to take advantage of the statutes made and provided in such cases, but did nothing towards this end. Consequently, final judgment was rendered and plaintiff-in-error appealed to this Court. Notwithstanding these pronouncements, the plaintiff-in-error remained conveniently silent without filing his bill of exceptions as the statute provides. Thus, defendant-in-error moved the court to resume jurisdiction and enforce its judgment for failure on part of plaintiff-in-error to proceed. The motion, not having been resisted, was granted and a writ of possession issued in favour of defendant-in-error.

Later on, plaintiff-in-error petitioned the Chambers Justice for a writ of error and contended in his petition that he did not have his day in court and that the judgment had not been enforced. In the returns defendant-in-error contended that counsel for plaintiff-in-error having participated in the trial from the beginning of the case up to and including the rendition of final judgment, to which final judgment he excepted and announced an appeal, he is estopped from contending that he did not have his day in court. He also maintained that the judgment had been executed. The petition was heard and denied and it is from the denial that this appeal is before the full bench for review and final decision.

A day in court simply means that no one should be personally bound until he has had his day in court, meaning until one has been duly cited to appear, and has been afforded an opportunity to be heard. We have carefully examined the records of this case and scrutinized the evidence adduced in full at the trial. We note with care the points raised by the plaintiff-in-error and the defendant-in-error, but the defendant-in-error submits for our consideration that the verdict and the judgment of the trial court should be affirmed because plaintiff-in-error has entirely failed to contest or rebut any portion of the said claim of title, or perfect his appeal, as announced.

We regard this point raised by defendant-in-error as setting forth both the entire legal and factual question in the case. Our law requires that for error to obtain, plaintiff-in-error 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. He must also substantially prove that the judgment he seeks to have reviewed is not fully executed. Civil Procedure Law, Rev. Code 1: 16.24. From the records before us, we have not been satisfied that these necessary requirements of the law were fully met by plaintiff-in-error. Indeed, it is a fact that mere allegations and averments do not amount to proof.

The reasons stated in the petition are complaints against plaintiff-in-error's counsel and are therefore not sufficient to warrant the granting of the writ of error. In *Wodawodey v. Kartiehn*, 4 LLR 102 (1934), the Court held that:

“An allegation that a party was unable to take an appeal because he could not pay the costs until he secured expected employment is insufficient to permit him to alter his method of procedure from appeal to writ of error.”

Similarly, after careful consideration, this Court, while regretting the circumstances, finds that plaintiff-in-error's reasons are not within the exceptions found in the statutes relative to writ of error. Plaintiff-in-error has prayed for a writ of error because he alleged he did not have his day in court; yet, in count two (2) of his petition he stated that his counsel, Counselor M. Fahnbulleh Jones, had informed him that his case had ended and the records support this fact. Unfortunately no further step was taken to perfect the appeal.

In keeping with the foregoing, we are of the holding that plaintiff-in-error's contention that he was denied his day in court, cannot be maintained. His counsel was physically present in court at each and every stage of the trial, including final judgment, and he signed the notice of assignment for the motion but failed to appear for the hearing. Plaintiff-in-error has no one to blame but his counsel or himself for their failure to perfect their appeal.

A writ of error will not lie where appeal has been taken from a judgment. *Joh and Joh v. Hill and Dennis*, 17 LLR 122 (1965).

The office of the writ of error is to review, scrutinize and correct any material error of law committed in the proceedings and during the trial of the case: *Logan v. James*, 3 LLR 360 (undated).

Under the circumstances and in the light of the law cited

above, the ruling of the Chambers Justice, which denied the issuance of the peremptory writ of error and from which this appeal is taken, being sound in law, should not be disturbed. Hence, it is hereby affirmed with costs against plaintiff-in-error. And the Clerk of this Court is hereby ordered to send a mandate to the trial court to the effect of this judgment. And it is hereby so ordered.

Ruling affirmed; error granted.