

AKAPOE A. TOGBE and GEORGE TOGBE,
Plaintiffs-In-Error, v. HIS HONOUR VARNEY D.
COOPER, Assigned Circuit Judge, Civil Law
Court, Sixth Judicial Circuit, Montserrado
County, and THE INTESTATE ESTATE OF THE
LATE VOLDER L. MILLER, represented by and
thru its Administrator, JAMES S. MILLER,
Defendants-In-Error.

PETITION FOR A WRIT OF ERROR AGAINST THE CIVIL LAW COURT FOR THE
SIXTH JUDICIAL CIRCUIT, MONTSERRADO COUNTY.

Heard: March 26, 2003. Decided: May 9, 2003.

1. A writ of error is a writ by which the Supreme Court calls up for review a judgment of an inferior court from which an appeal was not announced on rendition of judgment.
2. The specific purpose of a writ of error is to review a judgment, decree, or decision of a trial court from which an appeal has not been announced at the time of rendition of judgment.
3. The writ of error is the proper remedy for a party seeking relief from a judgment rendered in his absence.
4. A petitioner for a writ of error must always be able to show that due to no fault or neglect on his part, his absence from court at the time of rendition of judgment against him was unavoidable.
5. A party who was never made a party to an action in a lower court, either by the service of summons or by his personal appearance as to have the court acquire jurisdiction over him is not entitle to any relief by a writ of error; the appropriate remedy in such a case being prohibition and not error.
6. As a prerequisite to the issuance of a writ of error, the persons applying for the writ shall be required to pay all accrued costs, and may be required to file a bond.
7. The statutory provisions for payment of accrued costs by a petitioner for a writ of error as a prerequisite for the issuance of the writ is mandatory.

8. The taking of exceptions to a judgment by a court-appointed attorney in the absence of the defaulting counsel weighs as a factor against the issuance of a writ of error.

Petitioners filed a petition for a writ of error, alleging that the trial court had rendered judgment against them without appointing an attorney to take and except to the judgment for the purpose of enabling them to appeal the judgment to the Supreme Court, thus denying them of their day in court and due process of law. The Supreme Court, however, denied the petition and the issuance of the writ, holding that the records showed that as to one of the plaintiffs-in-error the lower court had appointed counsel to take the judgment and that exceptions had been taken thereto and an appeal announced therefrom; and that as to the other plaintiff-in-error, he was never made a party to the action nor had a writ of possession been issued against him. If he felt therefore that the judgment was affecting his interest, the proper and appropriate remedy was prohibition, not error. Moreover, the Court held that as the records revealed that no accrued costs had been paid by the petitioners, as mandatorily required by statute, the writ could not be granted.

Charles Abdullah of the Watch Law Chambers, Inc. appeared for plaintiff-in-error. *James W. Zotaa* of the Liberty Law Firm appeared for defendants-in-error.

MR. JUSTICE SACKOR delivered the opinion of the Court.

This case is before us on a petition for a writ of error filed by Akapoe A. Togbe and George Togbe, praying this Honourable Court to review and reverse the final judgment of the trial court rendered on October 16, 2000 in an action of ejectment.

According to the certified records before us, co-defendant-in-error herein, the Intestate Estate of the late Volder L. Miller by and thru its administrator, James S.

Miller, instituted an action of ejectment on February 4, 1999 against George Togbe and Edwin Freeman in the Civil Law Court for the Sixth Judicial Circuit, Montserrado County. A writ of summons was served and returned served.

The records also revealed that the defendants, plaintiffs-in-error herein, filed a motion for enlargement of time which was resisted, heard and granted, thereby giving them the grace period of 45 days to file their answer. However, they failed and neglected to file their answer within the time granted. Hence, they were ruled to a bare denial. When this case was assigned for hearing on October 6, 2000, the plaintiffs-in-error and their counsel failed to appear for hearing. The trial court, upon application of the co-defendant-in-error, granted a default judgment which was made perfect by the co-defendant-in-error upon the production of evidence.

The empanelled jury brought a verdict in favor of the co-defendant-in-error, adjudging the Co-plaintiff-in-error Akapoe A. Togbe liable and awarding the co-defendant-in-error the sum of L\$15,000.00 as general damages. On the 16th day of October, A. D. 2000, His Honour Varnie D. Cooper, Sr. Assigned Circuit Judge, presiding over the September, A. D. 2000 Term of the trial court, confirmed the verdict of the trial jury to eject and oust the co-plaintiff-in-error and place the co-defendant-in-error in possession of the subject property. A writ of possession was duly issued, served and returned served. The sheriff's returns indicate that Co-plaintiff-in-error George Togbe was ousted and that the co-defendant-in-error was placed in possession of the premises. However, Co-defendant-in-error George Togbe repossessed himself of the disputed property.

On the 19th day of March, A. D. 2001, Plaintiffs-in-error Akapoe A. Togbe and George Togbe filed a 6-count petition for writ of error wherein Co-plaintiff-in-error Akapoe claimed ownership of 4.5 acres of land in Jacob Town, Paynesville City. We deem count 6 of the petition germane to the determination of this case and hereunder quote same for the benefit of this opinion.

“That because and since Co-plaintiff-in-error Akapoe A. Togbe was not named in the complaint of co-defendant-in-error, summoned by the Civil Law Court, named in the court’s October 16, A. D. 2000 final judgment and neither is the name of Co-plaintiff-in-error Akapoe A. Togbe found anywhere on the face of the writ of possession of the Civil Law Court. A writ of error, as a matter of law shall and must lie against defendant-in-error and dispossess it from the lawful property of co-plaintiffs-in-error, being 4.5 acres of land. Hence, error shall lie.”

The defendants-in-error contended in count 4 of their returns and also argued in their brief that a petition for a writ of error is not the proper remedy for a person who has not been made a party in the court below. They argued that prohibition should have been the proper remedy to restrain the enforcement of the final judgment of the trial court. Our statute clearly provides that “A writ of error is a writ by which the Supreme Court calls up for review a judgment of an inferior court from which an appeal was not announced on rendition of judgment.” Civil Procedure Law, Rev. Code I: 16.21(4). Thus, this Court says that the specific purpose of a writ of error in this jurisdiction is to review a judgment, decree, or decision of a trial court from which an appeal has not been announced at the time of rendition of judgment. The extraordinary writ is the proper remedy for a party seeking re-lief from a judgment rendered in his absence. *Union National Bank, Inc. v. Hodge*, 20 LLR 635 (1971). Also, in the case *Nigerian Ports Authority v. Brathwaite*, 26 LLR 338 (1977), Syl. 6, this Court held that a “petitioner for a writ of error must always be able to show that due to no fault or neglect on his part, his absence from court at the time of rendition of judgment against him was unavoidable.” We perceive no parity of legal reason to grant the relief sought by the petitioner who, during the trial of this case, was never made a party in the court below, either by the service of summons or by his personal appearance to acquire jurisdiction over him. The appropriate remedy in such case is prohibition and

not a writ of error.

Another important argument made by the of defendants-in-error that had claimed our attention is that the plaintiffs-in-error have failed to pay accrued costs. A careful perusal of the records before us indicates that the said records clearly support the said argument. There is no showing that the plaintiffs-in-error in these error proceedings paid the accrued costs, a prerequisite for the issuance of the writ or error. The relevant portion of our Statute provides that “as a prerequisite to issuance of the writ, the person applying for the writ of error, to be known as plaintiff in error, shall be required to pay all accrued costs, and may be required to file a bond. Civil Procedure Law, Rev. Code 1: 16.24(d). This Court held in the case *Nigerian Ports Authority v. Brathwaite*, 26 LLR 338 (1977), Syl. I, that “the statutory provision for payment of accrued costs by a petitioner for a writ of error as a prere-quisite to issuance of the writ is mandatory.” The plaintiffs-in-error were statutorily required to pay all accrued costs, failing which this Court must decline to grant the relief sought by them in their petition.

It was also argued by the defendants-in-error that Co-plaintiff-in-error George Togbe cannot apply for a writ of error on the ground that he was a party to the proceedings and the trial court had appointed counsel who had excepted to the court’s judgment and announced an appeal therefrom to this Court. The records show that Co-plaintiff-in-error George Togbe was one of the defending parties in the trial court against whom final judgment was rendered, and that an appeal was taken to this Court from the said judgment. In *Mulba et al. v. Dennis et al.*, 22 LLR 46 (1973), Syl.3, this Court held that “exceptions to judgment by court-appointed attorney, in the absence of defaulting counsel, weigh as a factor against the issuance of a writ of error.” The Supreme Court cannot grant a writ of error when a court-appointed counsel excepted to and appealed from a final judgment of an inferior court in the absence of a defaulting counsel, as in the instant case.

Wherefore, in view of the facts and the controlling law, it is the holding of this Honourable Court that the petition for a writ of error is hereby denied, the alternative writ quashed, the peremptory writ denied, and the judgment of the lower court confirmed. The Clerk of this Court is hereby ordered to send a mandate to the court below informing the judge presiding therein to resume jurisdiction over the case and enforce its judgment. Costs are ruled against plaintiffs-in-error. And it is hereby so ordered.

Petition denied.