

**FELOMENA, MARIA, GREGORIO, ANTIPAS, TEODORA, TERESITA, VICTORINA, ESTELITA, SOTERA AND FELICISIMO, ALL SURNAMED FABIO, PETITIONERS, VS. HON. COURT OF APPEALS, TEOFILO FABIO, LIL...**

*G.R. No. L-30434. August 31, 1981*

Ponente: GUERRERO, J.

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**GUERRERO, J.:**

This is a Petition for Mandamus to compel respondent Court of Appeals to give due course to the appeal filed by herein petitioners docketed as C.A.-G.R. No. 36416-R, from a decision of the Court of First Instance of Leyte, Branch V, Ormoc City, in Civil Case No. 587-0.

Private respondents, in their Answer[1] to the Petition, do not dispute the following background facts set forth in the Petition:

Petitioners were defendants in a case filed by private respondents in the Court of First Instance of Leyte. Judgment was rendered against petitioners who filed with respondent Court of Appeals, within the reg-lementary period, sufficient copies of their record on appeal. In a Notice dated April 23, 1968, the Clerk of Court of respondent Court required petitioners, as appellants, to file their appeal brief within a period of forty-five (45) days from date of receipt thereof. Said Notice was received by petitioners' counsel of record in the Court of Appeals, Atty. Victorino C. Teleron, on May 11, 1968.

On June 19, 1968, or before the expiration of the 45-day period granted, Atty. Teleron sent by registered mail to respondent Court a "Petition for Leave to Withdraw as Counsel for Appellants" alleging, inter alia, that the aforementioned Notice was sent to his old address at Ormoc City; that he had assumed the duties of Presiding District Judge of the Court of First Instance of Bohol since September 12, 1967, and that he had transferred to a new residence at Tagbilaran City in Bohol. He, therefore, prayed that he be allowed to withdraw as counsel and that "defendants-appellants be given an extension (1st) of time to submit and file their brief x x x, of at least another period of forty-five (45) days to be counted from the date of their receipt of the resolution of this Honorable Court on instant petition in order to accord them sufficient material time to engage the services of another counsel x x x who may need sufficient time to go over and study the voluminous records of instant case." [2]

On July 8, 1968, petitioners retained the services of new counsels, Attys. Montalban-De Jesus and Associates, who immediately filed on the following day with respondent Court a Motion asking for a period of forty-five (45) days from the date of approval of said motion within which to file the appeal brief for petitioners. [3]

Before respondent Court acted on Judge Teleron's Petition and Atty. Montalban's Motion above referred to, sufficient copies of the "Brief for Defendants-Appellants" were filed by said new counsel on September 4, 1968. Private respondents' counsel, on the other hand, who was duly furnished with copies of the fore-going pleadings

and Brief, did not file any opposition, protest or objection.

On October 18, 1968, respondent Court promulgated a Resolution reading as follows:

"Acting upon the 'Petition for Leave to Withdraw as Counsel for Appellants' filed by Atty. Victorino C. Teleron, and the 'Motion for Grant of Period within which to File Appellants' Brief for Defendants-Appellants' filed by Atty. Froilan R. Montalban, for Montalban, De Jesus and Associates, the Court RESOLVED: (1) To DENY the petition of Atty. Teleron to withdraw as counsel for appellants. New Counsel Atty. Montalban may act as additional or collaborating counsel and (2) To DENY the motion for extension of time to file appellants' brief. The appeal is hereby DISMISSED."

Atty. Montalban, for the petitioners, filed a Motion for Reconsideration of the aforequoted Resolution, to which counsel for private respondents for the first time filed an Opposition. Respondent Court, by its Resolution of November 4, 1968, denied the Motion for Reconsideration.

Upon receipt of the November 4 Resolution, Judge Teleron sent by registered mail to respondent Court an "Urgent Second Motion for Reconsideration" wherein he alleged as follows:

"5. That in CA-G.R. No. 38553-R entitled: 'E. Maga, et al., plaintiffs-appellees, versus A. Marilao, defendant-appellant', upon petition of herein undersigned counsel to withdraw as counsel for the appellant therein for the reasons, therein stated, that he had then already assumed the duties of District Judge of the Court of First Instance of Bohol with a prayer therein, among others, that the appellant therein be granted an extension (1st) of time to file his brief and said extension to be counted from the date of the resolution of said petition, this Honorable Court of Appeals (FIFTH DIVISION) resolved on September 5, 1968 the under-signed's petition as follows:

'The withdrawal of appearance of Atty. Victorino C. Teleron as counsel for defendant-appellant is APPROVED.

'The Clerk of Court IS INSTRUCTED to issue a new notice to file brief to defendant-appellant Ambrosio Marilao, Palompon, Leyte.' x x x;

that the petition for withdrawal of the undersigned counsel upon similar grounds in other cases pending before this Honorable Court, like CA-G.R. No. 37313-R entitled: Feliciano Viovicente vs. Federico Demetrio, et al., and CA-G.R. No. 36789-R entitled: Sotero Pepito, et al. vs. Adriano Sobingsobing, et al. and others, were GRANTED by this Honorable Court;

"6. That the undersigned counsel reasonably expected, therefore, this Honorable Court to adopt in instant case a UNIFORM rule as in the aforecited case of CA-G.R. No. 38553-R entitled: 'E. Maga, et al. vs. A. Marilao';"[4]

and praying that the Appellants' Brief filed on September 4, 1968 be admitted and considered as having been filed on time and that the appeal of petitioners (appellants) be ordered reinstated. By Resolution dated December 14, 1968, respondent Court denied the aforecited Urgent Second Motion for Reconsideration.

On December 28, 1968, Atty. Montalban filed an "Ex-Parte Motion for Leave of Court to file Third Motion for Reconsideration"[5] together with a "Third Motion for Reconsideration,"[6] and on February 27, 1969, an "Ex-Parte Urgent Motion for Oral Argument."[7] This last Motion was denied by respondent Court in a Resolution promulgated on March 14, 1969.

As already stated above, private respondents in their Answer do not controvert the foregoing antecedent facts alleged by petitioners. It further appears that the "Third Motion for Reconsideration" had likewise been denied because counsel for petitioners filed in the Supreme Court an Urgent Motion stating, among others, that he received copy of a resolution of the Court of Appeals dated June 3, 1969 which reads thus:

"Acting upon the motion of counsel for plaintiffs-appellees praying that entry of judgment in this case be made and the records remanded for execution and considering that copy of the Resolution of March 6, 1969 denying defendants-appellants' motion for leave to argue the points in the third motion for reconsideration which had already been denied by resolution of Feb. 21, 1969 was received by appellants' counsel on March 26, 1969, the Court RESOLVED to GRANT said motion for immediate entry of judgment and remand of records." [8]

In said Urgent Motion, petitioners prayed that a res-training order be issued to direct said Court to hold in abeyance the enforcement of its foregoing resolution. We granted the Motion and issued a temporary restraining order. [9]

The sole issue is whether or not respondent appel-late Court acted with grave abuse of discretion in dismissing petitioners' appeal and in refusing to reconsider its resolution of dismissal.

In resolving the issue at bar, We find it pertinent to quote from the recently decided case of Heirs of the Late Florentina Nuguid Vda. de Haberer vs. Court of Appeals, et al. [10] thus:

"The dismissal of an appeal based on the appellant's failure to file brief is based on a power granted to respondent Court of Appeals and not on a specific and mandatory duty imposed upon it by the Rules. Since the power or authority is not mandatory but merely directory, the exercise thereof requires a great deal of circumspection, considering all the attendant circumstances. The failure of an appellant to file his brief within the time prescribed does not have the effect of dismissing the appeal automatically. Rather, the Court of Appeals has the discretion to dismiss or not to dismiss appellant's appeal, which discretion must be a sound one to be exercised in accordance with the tenets of justice and fair play having in mind the circumstances obtaining in each case." [11]

The particular circumstances of the present case, taken in the light of the foregoing authoritative pronouncements of this Court, impel Us to grant the instant Petition. Firstly, while petitioners admittedly were not able to submit their appeal brief within the period originally granted by respondent Court, their then counsel of record filed before the expiration of said period a petition to withdraw as counsel with a prayer that petitioners be given a first extension of time to file their brief so that they could engage the services of another lawyer and for the latter to have sufficient time to study the case. It should have been apparent to respondent Court that such a petition from petitioners' former counsel was not intended for dilatory purposes. The reason for the withdrawal was the legal incapacity of said former counsel to continue his representation of petitioners by reason of his having been appointed to the Judiciary. His further request for additional time to file brief was but reasonable under the circumstances, made in behalf of petitioners and for the protection of their interest in the appeal. The requisites of Rule 46, Section 15 of the Rules of Court have been met, namely, there was good and sufficient cause for the request for extension of time to file brief, and the motion for extension was made or filed before the expiration of the time sought to be extended.

The Resolution promulgated by respondent Court on October 18, 1968 dismissing the appeal is questionable as well as contradictory. It denied the petition of Judge Teleron to withdraw as counsel. In other words, the judge was supposed to continue representing petitioners despite his appointment to a public office. It likewise allowed the new counsel, Atty. Montalban, "to act as additional or corroborating counsel", yet in the same breath denied the motion for extension of time to file appellants' brief and dismissed the appeal. There would be no need for Atty. Montalban to act as "additional or collaborating counsel" since the appeal was ordered dismissed by respondent Court.

It is quite clear that, for no apparent and plausible reason at all, respondent Court of Appeals departed from the usual, accepted and orderly course of judicial proceedings. Nothing in the record reveals why at this particular instance, respondent Court chose to disregard the rule or policy which it has invariably adhered to, of granting

extensions of time to file brief.[12]

Upon the facts of this case and Our ruling there-from, it is opportune for Us to admonish all lawyers, who while engaged in law practice are appointed to public office including the Judiciary, to promptly inform their clients of their incapacity to continue their representation and the handling of cases, and, with the consent of said clients, to withdraw their appearance in the courts where they have pending cases. In the case at bar, had Judge Teleron petitioned respondent Court for his withdrawal as counsel in 1967 when he assumed the position of Presiding District Judge at Tagbilaran City, petitioners could have immediately secured a substitute lawyer who in turn could have, by 1968 when respondent Court required the filing of an appeal brief, had enough time to study the case and submit the necessary pleadings on time. In all probability, this whole exercise could have been avoided.

WHEREFORE, the Petition is hereby granted and the restraining order dated June 19, 1969 is hereby made permanent. Respondent Court of Appeals is directed to reinstate the appeal of herein petitioners in CA-G.R. No. 36416-R entitled "Teofilo Fabio, et al., plaintiffs-appellees, versus Felomena Fabio, et al., defendants-appellants," and to admit the Appellants' Brief filed by said petitioners on September 4, 1968, and consider the same as having been filed on time. No pronouncement as to costs.

### **SO ORDERED.**

Teehankee, (Chairman), Makasiar, Fernandez, and Melencio-Herrera, JJ., concur.

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[1] Rollo, pp. 35-36.

[2] Annex "B", Petition; Rollo, pp. 10-13.

[3] Annex "C", Petition; Rollo, pp. 14-15.

[4] Annex "F", Petition; Rollo, pp. 19-25.

[5] Annex "G", Petition; Rollo, pp. 26-27.

[6] Annex "H", Petition; Rollo, pp. 28-31.

[7] Annex "I", Petition; Rollo, p. 32.

[8] Rollo, p. 39.

[9] Rollo, p. 41, issued on June 19, 1969.

[10] L-42699 to L-42709, May 26, 1981.

[11] Citing Sec. 1, Rule 50, Rules of Court; PNB vs. DBP and Phil. Milling Co., Inc., et al., 26 SCRA 712; Maqui vs. Court of Appeals, 69 SCRA 368; Reyes vs. Court of Appeals, 80 SCRA 144; Ordoveza vs. Raymundo, 63 Phil. 275; Gregorio vs. Court of Appeals, 72 SCRA 120.

[12] See Allam, et al. vs. Acosta, et al., L-20242, January 31, 1964, 10 SCRA 230, 233; Razalan vs. Concepcion, et al., L-29374, February 18, 1970, 31 SCRA 611, 614; and Daisug vs. Court of Appeals, et al., L-31400, August 31, 1971, 40 SCRA 474, 480.

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