

JUAN CLARIDAD, PLAINTIFF-APPELLANT, VS. ISABEL NOVELLA, DEFENDANT-APPELLEE.*G.R. No. L-4207. October 24, 1952*

Ponente: LABRADOR, J.

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This is an appeal from an order of the Court of First Instance of Negros Occidental dismissing plaintiff's complaint on the ground that plaintiff's action is barred by a prior judgment. The complaint was filed on June 3, 1950, and alleges that plaintiff's father was the registered owner of Lot No. 1019 of the Bago eadastre and had sold said lot to defendant with pacto de retro for P800; that his father is now dead, and plaintiff has bought the rights and interests of his co-heirs therein; that defendant refused to show the deed to plaintiff, and afterwards caused the cancellation of the title in the name of plaintiff's father and the issuance of another title in his own name; that the deed of sale with pacto de retro was intended by the parties thereto as a contract of mortgage; that plaintiff's father continued in possession of the property, and that the same is still now in plaintiff's possession; that plaintiff offered to repurchase it and deposited the sum of P800 therefor with the clerk of court, but that defendant refused the offer. The complaint prays that the contract be declared as one of mortgage and defendant be compelled to reconvey it to plaintiff, with damages. On June 26 defendant filed a motion to dismiss the action on the ground that the same action was filed on March 30, 1944, by plaintiff under Civil Case No. 54 of the Court of First Instance of Negros Occidental and judgment was tendered therein on May 5, 1944. Copy of said judgment was attached to the motion as Annex A. The plaintiff replied to the motion alleging that Case No. 54 had been decided in the Court of First Instance of Negros Occidental, but that the ease was appealed to the Court of Appeals in Cebu, and the records of said case in that court were destroyed and the period for reconstitution of judicial records had expired (June 30, 1947). On August 11, 1950, the court granted the motion to dismiss, holding that there was a prior judgment, and that under Section 30 of Act No. 3110, as it was possible to have reconstituted the judicial record and as plaintiff did not choose to do so, he should suffer from his neglect and may not be permitted to file the action anew. Against the above order the plaintiff has prosecuted this appeal.

There is no doubt that Civil Case No. 54 of the Japanese military occupation and the present one are identical. In one as well as in the other plaintiff seeks to compel defendant to allow the redemption of Lot No. 1019 of the Bago cadastre. There is, therefore, identity of parties, identity of subject matter, and identity of cause of action. But the rule of estoppel by judgment (Section 44(b), Rule 39) can not apply because the judgment rendered in the previous case had not become final, because it was appealed to the Court of Appeals in Cebu. (I Moran 367, 1952 ed.) The motion to dismiss should have been predicated on the pendency of another action, still unreconstituted. But this was not raised as a ground for dismissal. The trial court, therefore, erred in holding that the action was barred by a prior judgment.

The other point to be determined is the effect of the failure of both of the parties to reconstitute the records of the previous civil case, No. 54. It is to be noted that when the complaint was filed on June 3, 1950, the period originally fixed by this Court for the reconstitution of judicial records, June 30, 1947, had already expired, and

Republic Act No. 441, providing for a new period of one year from June 7, 1950, the date of its approval, was not yet in force. But the motion to dismiss was presented on June 26, 1950, and mention is made therein of the existence of the record of Civil Case No. 54 and of the judgment therein dated May 5, 1944 (Annex A), and these facts were raised as a ground for the claim that the action was barred by prior judgment. It was in the answer to his motion that plaintiff called attention to the fact that the defense of prior judgment cannot be sustained for the reason that the judgment in question had been appealed and the records forwarded to the Court of Appeals in Cebu, where the same were destroyed. Plaintiff further stated that the period originally fixed for reconstitution by the Supreme Court had expired. The defendant filed a reply to the answer to the motion to dismiss, alleging that reconstitution was possible by a printed copy of the record on appeal, or by the preparation of a new record on appeal, but that plaintiff has allowed the period to lapse. The plaintiff thereafter also filed an answer to the reply, and subsequently, or on August 11, 1950, the court issued the order of dismissal.

It seems that neither the court nor the parties had become aware of the passage of Republic Act No. 441. All thought that the period for reconstitution had lapsed. The period fixed therein, however, has now expired and may not be availed of. Should plaintiff alone be blamed for this failure to reconstitute the record?

This Court has held that the duty to ask for reconstitution lies upon both parties. (*Macario Gunabe, et al., v. The Director of Prisons*, G. R. No. L-1231, promulgated January 30, 1947, 44 O. G. (No. 4) 1244, 1246.) Plaintiff did not ask for reconstitution in the belief that it was not possible to do so because of the destruction of the records. It was to the advantage of defendant in this case to have asked for re-constitution, because the former judgment was favorable to her. It is, therefore, clear that she has, by her voluntary omission, impliedly waived such right. Under these circumstances, Section 29 of Act No. 3110 is applicable. It provides:

Sec. 29. In case the parties interested in a destroyed record fail to petition for the reconstitution thereof within the six months next following the date on which they were given notice in accordance with section two hereof, they shall be understood to have waived the reconstitution and may file their respective actions anew without being entitled to claim the benefits of section thirty-one hereof.

And considering that the period for reconstitution has definitely lapsed, the above provision must be enforced, and the action allowed to continue.

WHEREFORE, the order appealed from is hereby reversed, and the case is remanded to the court below for further proceedings. Without costs.

Paras, Pablo, Bengzon, Padilla, Montemayor, Jugo, and Bautista Angelo, JJ., concur.

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