

**JAIME GAPOY, PETITIONER, VS. HON. MIDPANTAO L. ADIL,
PRESIDING JUDGE, BRANCH V, COURT OF FIRST INSTANCE OF
ILOILO, PURIFICACION GALVE AND ANTONIO GUARANA,
RESPONDENTS.**

G.R. No. L-46182. February 28, 1978

Ponente: GUERRERO, J.

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GUERRERO, J.:

Petition for certiorari from the order of the Court of First Instance of Iloilo dismissing petitioner's case, and the order of the same court denying the motion for reconsideration of the aforesaid order of dismissal.

In the Third Amended Complaint dated February 22, 1974 for "Reconveyance, Ownership, Possession and Damages," filed by petitioner Jaime Gapoy against spouses Purificacion Galve and Antonio Guarana, docketed as Civil Case No. 8371 in the Court of First Instance of Iloilo, petitioner claimed to be the lawful and absolute owner of a parcel of land measuring 24.3752 hectares, which he, together with his predecessor-in-interest had been in peaceful, continuous, public and adverse possession in the concept of owner since time immemorial, causing them to declare the property in their names for tax purposes.

The complaint alleged that sometime in 1973, petitioner learned that a portion of the land containing 29,735 square meters was wrongfully registered in the names of defendants, the private respondents herein, and an Original Certificate of Title was allegedly secured by them through fraud and deceit coupled with breach of trust; that by means of strategy and stealth, and taking advantage of the illiteracy of petitioner, respondents took possession of the portion covered by the title to the exclusion of petitioner; that later in the same year, petitioner again learned that respondents mortgaged the same portion to the Development Bank of the Philippines for the sum of P2,000.00; and that by means of the alleged illegal acts and respondents' refusal to vacate and reconvey the land after petitioner's demand, the latter was deprived of the right to enjoy and possess the property.

In their "Answer to Second Amended Complaint" dated December 7, 1973, respondents denied petitioner's claim of ownership and stated that petitioner never came into possession of the disputed property. Respondents asserted exclusive ownership and possession of the property which was originally registered and titled in their names in accordance with the Cadastral Act. As counterclaim, they prayed for multiple award for attorney's fee, moral damages and for actual litigation expenses.

Trial was commenced on July 14, 1976. Continuation was set on October 14, 1976, but on this designated date, petitioner who was due to testify on his own behalf, failed to appear because he became sick of diarrhea and severe abdominal pain as certified to by a Rural Health Midwife. Petitioner's counsel who was, however, present verbally moved for postponement of the trial, which motion was not objected to by respondents. Consequently, respondent Presiding Judge Midpantao L. Adil issued the following order:

"The plaintiff in this case being absent despite due notice, this case is hereby DISMISSED for failure to prosecute.

"This dismissal should be set aside if the plaintiff can show that his sickness is of such a nature, as evidenced by the proper medical certificate that it would have been really impossible physically for him to attend the trial today.

"SO ORDERED.

"Iloilo City, October 14, 1976."

A verified motion for reconsideration of the above order was filed by petitioner but the same was denied by respondent judge in the next quoted order:

"This is to consider the second Motion for Reconsideration, dated December 3, 1976, filed by the plaintiff and submitted for resolution today.

"A perusal of the motion shows that it is not accompanied by an affidavit of merit. An Affidavit of Merit is required in a motion for reconsideration because it is based on the same ground as those available for new trial. There is no distinction between the two. (Fortune Enterprises, Inc. vs. Gen. Finance Corp., L-13259, May 19, 1958, p. 164, Remedial Law Reviewer by Nuevas, 1968 Edition). Such being the case, it should follow the requirements for a motion for new trial. A motion for new trial is fatally defective if it is not supported by an affidavit of merit. (Castañeda vs. Ago, L-14066; Chengay vs. La Guardia, L-20739, cited p. 162, *ibid*).

"WHEREFORE, premises considered, the motion for reconsideration is hereby DENIED for lack of merit.

"SO ORDERED.

"ILOILO CITY, December 7, 1976."

Hence, petitioner comes to Us assailing the inconsiderate dismissal of his action and praying for reinstatement of the case for further proceedings.

For Our resolution is whether or not respondent judge had abused his discretion in dismissing the case below. Obviously, the order of dismissal is a judgment of nonsuit, or for failure to prosecute under section 3, Rule 17 of the Rules of Court, predicated mainly on petitioner's failure to appear at the trial. The rule provides:

"Sec. 3. Failure to prosecute. - If plaintiff fails to appear at the time of the trial, or to prosecute his action for an unreasonable length of time, or to comply with these rules or any order of the court, the action may be dismissed upon motion of the defendant or upon the court's own motion. This dismissal shall have the effect of

an adjudication upon the merits, unless otherwise provided by court."

It is a settled rule that the court can dismiss a case, even of its own accord, for failure of plaintiff to appear at the time of trial or to prosecute his action. Such dismissal depends upon the sound discretion of the judge, exercised with a view to the circumstances surrounding each particular case,[1] not reversible on appeal in the absence of abuse of discretion. The burden of showing abuse is upon the appellant since every presumption is in favor of the correctness of the court's action.[2]

Notwithstanding the accepted basic principle, it is imperative to note that dismissal of actions under section 3 of Rule 17 should be applied with extra care. The repressive or restraining effect of the Rule amounting to adjudication upon the merits may cut short a case even before it is fully litigated. Consequently, a judgment arrived thereat may forever bar a litigant from pursuing judicial relief under the same cause of action. Hence, it becomes necessary that the sound discretion of the court must extend to the vigilance of duly recognizing the circumstances surrounding the particular case to the end that technicality shall not lord over substantial justice. This is but to keep alive the dictum in *Dayo, et al. v. Dayo, et al.*[3] which enunciated that " x x x dismissals should be ordered not as penalty for neglect of the petitioners, but only in the extreme cases where the termination of the proceeding by dismissal is the only remedy consistent with equity and justice."

By no means is the Rule intended as instrument of haste as the brief order of dismissal swiftly attests. The Rule is not a mechanical axe that automatically falls by plaintiff's mere failure to appear. To constitute failure to prosecute, his non-appearance must be equated with unwillingness to proceed with the trial as when both plaintiff and counsel made no appearance at all, or with the assumption that plaintiff has already lost interest in prosecuting his action,[4] in the same way that should the ground for dismissal be delay, this delay or failure to proceed must be for an unreasonable length of time beyond the reasonable allowance which by judicial leniency a litigant is normally entitled.

The data in the records show that the complaint was originally filed as early as October 6, 1970 and defendants answered on November 11, 1970. As can be gleaned from the annexes to the petition, the complaint was amended no less than three times, the last of which is dated February 22, 1974. Pre-trial commenced on July 14, 1976 and on the same date plaintiff presented his first witness. In the following trial on October 14, 1976, petitioner through his wife, informed his counsel that he could not attend the trial due to illness, hence, counsel moved for the postponement of trial without objection from respondents.

It would, indeed, appear that from October 6, 1970 up to the issuance of the order of dismissal on October 14, 1976, is considerably so long a time in relation to the progress had in the proceedings. Yet, We cannot be certain who is responsible for the delay or whether there had been real intention to delay the case. Respondents did not even file their comments on the petition when required by Us. Nothing in the records shows that plaintiff had indulged in recurrent motions for postponement. That the substantial rights of respondents have been affected, is neither attested; for had there been any, they themselves could have filed a motion to dismiss due to delay without having to wait for the issuance of the October 14 order. On the other hand, had there been really a clear failure to prosecute, respondent judge could have dismissed the case outright or at least terminated the same without prejudice in accordance with the Rule. Strangely, the dismissal was only coupled with a condition that it shall be set aside if petitioner can show that his sickness is of such a nature that it would have been really impossible for him, physically, to attend the scheduled trial. We cannot say that this is an order without prejudice as nothing therein allows the filing of the case anew if the condition is not fulfilled. At most, the order is prejudicial with reservation, since it in effect expresses the desire of the respondent judge to continue hearing the case on the merits if the condition is fulfilled.

Counsel for petitioner's quick rapport in asking for a postponement of the trial is a prima facie contradiction of failing interest; at least on the part of the counsel. Of course, We do not overlook the procedural requirements of a motion to postpone trial for illness of a party under section 5 of Rule 22 which provides that the motion "may be granted if it appears upon affidavit that the presence of such party (or counsel) at the trial is indispensable and that the character of his illness is such as to render his non-attendance excusable." But in construing this rule, liberality has always been the guide when the request for postponement is reasonable rather than capricious. This liberality aims at giving a litigant the needed day in court as due process demands, a better practice, which, even for the "highly commendable desire for the dispatch of business," should not be easily sacrificed.[5] There being no sign that substantial rights have been eroded and an intention to delay not manifest, respondent judge should have followed the liberal practice of allowing postponement. We have seen, in this regard, that postponements and continuances of trial are parts and parcels of our procedural system of dispensing justice.[6]

In the subsequent order denying petitioner's motion for reconsideration, respondent judge implied that the motion is fatally defective for lack of an affidavit of merits. The order predicated the necessity of an affidavit of merits on the impression that the motion for reconsideration has the same ground as that of a motion for new trial, and that there is no distinction between the two. We do not necessarily share such a superficial view. There is, indeed, a distinction and a reason to differentiate the two. This, the Court cogently discussed in *Lucero v. Dacayo*,[7] thus:

"In the first place, there was no sense in requiring that the affidavit of merits should state the plaintiff's cause of action, because that was already pleaded in the complaint filed in the same court. Secondly, the provisions of Rule 37 on New Trial, do not govern all motions for reconsideration based on fraud, accident, excusable negligence or mistake; they are applicable only when a party, adversely affected by a judgment already rendered in a case, seeks to have it set aside and a new trial held, in the hope that the aforesaid judgment may be reversed or modified on account of the evidence that is to be produced. For, if a new trial is indeed granted, the original decision shall be vacated and the action is to stand for trial de novo. The procedure contemplated under this Rule, therefore, involves a reopening of the case for hearing, after it was already submitted for decision and a judgment thereon was actually reached. Since the reopening would necessarily affect the party in whose favor the disputed judgment was rendered, the Rule requires the movant to show the valid cause of action or defense which he intends to prove at the new trial, to prevent this remedy from being utilized merely to delay termination of the proceedings." (Emphasis supplied)

It ought to be noted that in the case at bar, the motion for reconsideration filed does not have the purpose of a new trial. The trial proper never reached a consummate stage, in fact, it had barely started. It is quite clear that the motion for reconsideration only sought for a continuation of the hearing to allow petitioner to testify on his own behalf by asking that the order of dismissal be set aside. The motion manifested that petitioner has a meritorious cause provable by documents still in his possession which he intended to offer in evidence had he been given the chance to testify. The motion having been verified by petitioner himself and accompanied by a certificate, issued by a public midwife in charge of the Rural Health Center where petitioner resides, confirming the latter's illness, We find substantial proof to indicate that the cause of his non-appearance is not far from truth. It is not practical to require petitioner to present a certification of a physician when he never consulted one, as none resided nor practiced in the place where he was treated. In a recent reiteration, We held:

"Time and time again WE have emphasized that the Rules of Court should not be interpreted to sacrifice substantial rights of a litigant at the altar of technicalities to the consequent impairment of the sacred principle of justice (*Alonzo vs. Villamor*, 16 Phil. 315); *Case & Nantz vs. Jugo*, 77 Phil. 517, 522). WE ruled that the Rules of Court frown upon hair-splitting technicalities that do not square with their liberal tendency and with

the ends of justice (Case & Nantz vs. Jugo, supra).[8]

For strictly adhering to legal technicalities and disregarding the standard of liberality set in our jurisprudence, We find that respondent judge abused his discretion in dismissing the action.

WHEREFORE, the orders appealed from are hereby set aside and the case remanded to the lower court for further proceedings. No costs.

SO ORDERED.

Teehankee, (Chairman), Makasiar, Muñoz Palma, and Fernandez, JJ., concur.

[1] Vernus-Sanciangco v. Sanciangco, G.R. No. L-16219, April 28, 1962, 4 SCRA p. 1207; also, Montejo v. Urotia, G.R. No. L-27187, July 22, 1971, 40 SCRA p. 41.

[2] Inter-Island Gas Service, Inc. v. Dela Cruz, G.R. No. L-17631, October 19, 1966, 18 SCRA p. 386.

[3] 95 Phil. p. 703 (1954).

[4] Del Prado v. Nespral, G.R. No. L-3933, May 28, 1952; Ventura v. Baysa, G.R. No. L-12960, January 31, 1962, 4 SCRA p. 167; Sia v. Buena, G.R. No. L-18863, August 31, 1962, 5 SCRA p. 1177.

[5] Cf. Luna v. Arcenas, 34 Phil. 80 (1916).

[6] Cf. Limon v. Candido, G.R. No. L-22418, April 28, 1969, 27 SCRA p. 1166; Rexwell Corporation v. Canlas, G.R. L-16746, December 30, 1961, 3 SCRA p. 875.

[7] G.R. No. L-23718, March 13, 1968, 22 SCRA p. 1004.

[8] Cabunilas v. Court of Appeals, G.R. No. L-46476, December 29, 1977.

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