

**FELICISIMA BALLECER AND JOSE S. AGAWIN, PETITIONERS, VS.
JOSE BERNARDO, THE HON. JESUS P. MORFE, PRESIDING JUDGE,
BRANCH XIII OF THE COURT OF FIRST INSTANCE OF MANILA, AND
THE S...**

G.R. No. L-21766. September 30, 1966

Ponente: CONCEPCION, J.

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CONCEPCION, J.:

This is an original action to set aside several orders of the Court of First Instance of Manila, in Civil Case No. 43073 thereof, as well as an alias writ of execution and a notice of sale issued in connection therewith. Upon the filing of the petition and the submission and approval of a bond in the sum of P1,000.00, on motion of petitioners herein, we issued a writ of preliminary injunction enjoining respondent Judge and the Sheriff of Manila from carrying out the aforementioned writ of execution.

Petitioners herein are the spouses Jose S. Agawin and Felicisima Ballecer. On May 4, 1960, they instituted said Civil Case No. 43073 against respondent Jose Bernardo, to recover damages allegedly caused by him in consequence of the destruction and demolition of a portion of a wall of the petitioners, along the common boundary line of their lot and that of Bernardo, at Felix Huertas Street, Manila, as well as to recover possession of a portion of petitioners' aforementioned lot, with an area of 0.80 square meters, which was allegedly encroached upon by the wall subsequently erected by Bernardo in place of the one he had destroyed.

In due course, Bernardo filed his answer denying petitioners' averments, and alleging, in turn, that the demolition and destruction made by him had taken place within the boundary of his own property. By way of counterclaim, Bernardo set up two (2) causes of action, namely: (1) that petitioners were the parties who had encroached upon and occupied a portion of Bernardo's property, with an area of about 3.70 square meters, without his consent and against his will, and (2) that petitioners' complaint is premature, uncalled for, capricious and without any justifiable cause, for which reason Bernardo prayed that they be sentenced to vacate his aforementioned portion of land allegedly encroached upon by them and to turn it over to him, and to pay damages aggregating P48,000.00.

On the last day of the reglementary period to answer the counterclaim, or on June 6, 1960, petitioners filed an ex parte urgent motion for extension of time therefor, but on June 11 the motion was denied and ordered stricken off the record. Then, on June 13, the court declared petitioners in default as to the counterclaim and ordered Bernardo to present his evidence thereon before the Deputy Clerk of Court on June 15, at 9:00 a.m., which Bernardo did. On June 20, the court rendered a decision the dispositive part of which reads:

"WHEREFORE, the Court hereby renders judgment on the counterclaim in favor of the defendant-counterclaimant and against the plaintiffs, as follows:

"1. Ordering the plaintiffs and/or their agents and representatives including all persons claiming under them to deliver and restore the possession thereof to the defendant, that portion of said defendant's property consisting of 3.7 square meters which is being encroached upon and occupied by or in possession of the plaintiffs;

"2. Ordering plaintiffs to pay, jointly and severally, the defendant the following sums, to wit:

"(a) P3,625.00 as compensatory damages which the defendant failed to realize in the form of rentals from that portion of his property subject matter of the counterclaim, corresponding to the period from May, 1948 to May, 1960, with interest thereon at the legal rate from the date of filing of the answer with counterclaim until fully paid; plus the sum of P25.00 for each month thereafter until the premises in question are actually delivered to the possession and occupation of the defendant;

"(b) P541.00 as actual damages incurred by the defendant;

"(c) P10,000.00 as moral damages;

"(d) P2,000.00 as exemplary damages; and

"(e) P1,000.00 as attorney's fees.

"With costs against the plaintiffs."

On June 28, petitioners moved for a reconsideration of the orders of June 11 and 13, but the motion was denied on July 1. Thereupon, petitioners filed a petition for relief from judgment, with a prayer for a writ of preliminary injunction, to restrain the Clerk of Court from issuing a writ of execution. After denying this petition, the Court, on petitioner's motion for reconsideration, granted it on January 18, 1961, only to deny it once more, on February 4, on motion for reconsideration filed by Bernardo. Forthwith, or on February 8, petitioners filed their notice of appeal. Soon thereafter, petitioners sought an extension of time to file their appeal bond and their record on appeal, but the motion was denied, on February 18, for lack of merit. On March 18, the Court ordered the issuance of a writ of execution, but, on April 11, the execution of the decision of June 20, 1960, was ordered stayed pending trial on the merits on petitioners' complaint.

On motion of Bernardo, dated December 19, 1962, said order was, on January 29, 1963, set aside and the issuance of a writ of execution "only as to paragraph No. 1 and paragraph No. 2-a of the dispositive part" of the aforementioned decision, was ordered. A reconsideration of this order having been denied, the Clerk of Court issued an alias writ of execution and, in pursuance thereof, the Sheriff of Manila caused to be published a notice of sale at public auction of a property of petitioners herein. Hence, the present case against Bernardo, the Judge of the lower court and the Sheriff of Manila.

The main question for determination in this case is whether the lower court has gravely abused its discretion in declaring the petitioners in default and in rendering judgment against them on Bernardo's counterclaim after an ex parte hearing. It is obvious that the answer must be in the affirmative.

To begin with, a motion for extension of time to file an answer to the counterclaim had been filed within the reglementary period and plausible reasons were given in support thereof: counsel for petitioners had been unable to contact them owing to a typhoon that had just hit Manila, and the flood and inclement weather that had followed.

The main reason for the lower court's adverse action thereon would seem to be petitioners' failure to set it for hearing as provided in the Rules of Court. But, there are motions that may be heard and granted ex parte, and petitioners' aforementioned motion belongs to such class. Thus in *Moya v. Barton* (76 Phil. 831, 833) it was held:

"With respect to the other ground, Section 2, of Rule 27 provides that 'every motion other than one which may be heard ex-parte x x x shall be filed with the court, and served upon the parties affected thereby.' Taking into consideration that the extension of time applied for may be shorter than the time required to have a motion set for hearing and acted on by the court, and that the court has, as above stated, discretion to grant the petition, the motion for extension filed in the present case may be considered as one which may be heard ex-parte. x x x."

What is more, Bernardo's counterclaim was predicated upon allegations of fact which are inconsistent with, and, hence, controverted by, the allegations in petitioners' complaint. In this connection, it should be noted that Bernardo had, according to the complaint, encroached upon petitioners' property, whereas Bernardo maintained the exact opposite in his counterclaim - not only that petitioners' allegation was not true, but, also, that they were the ones encroaching upon the property of Bernardo. Certainly, this contention, of Bernardo can not be decided without passing upon the truth of the allegations in the complaint, which petitioners are entitled to prove, whether they had answered Bernardo's counterclaim or not. In other words, the issues raised in the counterclaim were inseparable from those posed in the complaint, and so it was not absolutely necessary for the petitioners to file an answer to the counterclaim (*Arejola vs. Cayetano*, L-6673, Sept. 8, 1954; *Gomez vs. Martinez*, L-4473, Sept. 30, 1952). In the language of Mr. Justice Reyes (J.B.L.), speaking for the Court in *Navarro v. Bello* (54 O.G. 6588):

"There was no need for petitioners to answer respondents' counterclaim, considering that plaintiffs, in their complaint, claimed not only ownership of, but also the right to possess, the parcels in question, alleging that sometime in May, 1954, defendants, through force and intimidation, wrested possession thereof from their tenants, and that it was upon a writ of possession issued by the Court of First Instance of Pangasinan that they were placed back in possession by the provincial sheriff. These averments were denied by defendants in their answer, wherein they asserted ownership in themselves and illegal deprivation of their possession by plaintiffs, and as counterclaim, prayed for damages allegedly suffered because of plaintiffs' alleged usurpation of the premises.

"It thus appears that the issues of the counterclaim are the very issues raised in the complaint and in the answer, and said counterclaim is based on the very defenses pleaded in the answer. To answer such counterclaim would require plaintiffs to replead the same facts already alleged in their complaint.

"But in any event, whether or not plaintiffs have answered defendants' counterclaim, they have the right to prove the averments of their complaint, including their claim that it was by court order that they secured possession of the parcels in question from defendants. And if plaintiffs are able to prove such allegations, then the court must dismiss defendants' counterclaim for damages, since the illegal usurpation of defendants' possession allegedly committed by plaintiffs, which is the basis of the counterclaim, would not have been proved. In short, the issues of the counterclaim are so inseparable from those of the complaint and the answer that such counterclaim partakes of the nature of a special defense which, even if not specifically challenged by plaintiffs in a reply, is deemed controverted (Rule 11, Sec. 1, Rules of Court; *Rosario v. J. Martinez*, L-4473, September 30, 1962; *Lama v. Apacible*, 79 Phil. 68). There was, therefore, no occasion for plaintiffs' default on defendants' counterclaim, and the order of the court below declaring them in default, as well as the judgment by default, is improper and void."

The lower court committed, therefore, a grave abuse of discretion, amounting to excess of jurisdiction, in declaring the petitioners in default as regards the counterclaim, and in rendering a decision in default against them on said counterclaim, and, as a consequence, said decision is null and void, and so are the aforementioned writ of execution, alias writ of execution, and notice of sale issued by the Sheriff in pursuance thereof.

WHEREFORE, the orders complained of, as well as said writ of execution and alias writ of execution, and the notice of sale adverted to above, including the decision of June 20, 1960, are hereby annulled and set aside, and the writ of preliminary injunction heretofore issued by this Court is, accordingly, made permanent, with costs against herein respondent Jose Bernardo.

IT IS SO ORDERED.

Reyes, J.B.L., Dizon, Regala, Makalintal, Bengzon, J.P., Zaldivar, Sanchez, and Ruiz Castro, JJ., concur.
Barrera, J., on leave.

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