

LORENZO B. FAJARDO, PETITIONER, VS. HONORABLE FROILAN BAYONA, JUDGE OF THE COURT OF FIRST INSTANCE OF MANILA, AND ESTER TOLOSA DE FAJARDO, RESPONDENT.*G.R. No. L-8314. March 23, 1956*

Ponente: LABRADOR, J.

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This is a petition for certiorari and mandamus to compel the Judge Froilan Bayona of the Court of First Instance of Manila to give course to an appeal presented by petitioner against the court's order denying petitioner's application for relief under Rule 38 of the Rules of Court. The record discloses that the following proceedings have taken place before the respondent judge:

In civil case No. 12435 of the respondent court entitled "Lorenzo B. Fajardo vs. Ester Tolosa de Fajardo", decision was rendered on November 4, 1953 in favor of defendant dismissing plaintiff's complaint. Plaintiff Fajardo tried to perfect an appeal from said judgment but failed to present the record on appeal within the period fixed by the trial court, for which reason the appeal was declared abandoned and the appeal dismissed. This order is dated January 9, 1954. Three days before the dismissal of this appeal, that is on January 6, 1954, Fajardo filed a petition for relief under Rule 38 of the Rules, alleging that he did not have sufficient time to present the amended record on appeal within the time fixed by the court, because he left Manila for Jolo on December 31, 1953 and did not come back until January 6, 1954, after the period for the presentation of the amended record on appeal had expired. It is also alleged in the petition that counsel could not have prepared the amended record on appeal in time as it was voluminous, consisting of 117 pages, and the period granted for the presentation of the amended record on appeal was only five (5) days, too short a period for him for its preparation. Opposition to this petition (for relief) was presented on three grounds, namely, plaintiff's negligence was inexcusable; plaintiff's counsel is guilty of laches; and plaintiff is barred from filing the petition for relief because he had presented a petition with the Supreme Court to compel the judge to give course to the appeal he had tried to perfect but which petition was denied, and that he is therefore, prohibited from seeking relief under Rule 88 of the Rules. The trial judge sustained this last objection on the strength of our ruling in the case of Palomares vs. Jimenez *, G. R. No. Lr-4513, promulgated January 31, 1952. In connection with the previous attempt of petitioner to appeal from the judgment, it is worthy to note that the petition for mandamus was filed with us, but we dismissed the petition on January 12, 1954 "without prejudice to the filing of the proper action in the Court of Appeals, the remedy being in aid of its appellate jurisdiction." On presenting the petition for mandamus in the Court of Appeals, this court also denied the petition on February 9, 1954. (Reply Memorandum, pp. 2-3.)

The question now before us is, was petitioner barred by his previous attempt to appeal through a petition for certiorari and mandamus instituted in the Court of Appeals, which attempt, however, was unsuccessful, or may petitioner obtain the same end by first presenting a petition for relief under Rule 38 of the Rules and then appealing from the order denying said petition? One of the most important principles underlying our rules of procedure is that denying multiplicity of suits or remedies. When a litigant comes before a court of justice all

causes of action or matters of defense arising out of or related to the controversy must be joined by him in the action or defense and he may not again bring up the said matters in a subsequent action or proceeding, whether or not! said matters were set forth and litigated in the previous suit. The purpose and aim of the principle is to have controversies and the matters directly related thereto settled once and for all once they are brought to the courts for determination. Litigation is costly both to litigants and to the State, and the objective of procedure is limit its number or extent. In consonance with the above principle, we have the rules against multiplicity of suits, the rule of estoppel by judgment (section 44, Rule 39), and the rule of res judicata (section 45, Rule 39). We have also provided in the Rules that the special civil actions of certiorari, prohibition and mandamus can only be availed of if there is no other plain, speedy and adequate remedy in the ordinary course of law (Sees. 1, 2 and 3, Rule 67). So also with respect to motions. Provision is made that a motion attacking a pleading or proceeding shall include all objections then available and that all objections not so included are waived (section 8, Rule 26). And in connection with pleadings, defenses and objections not raised are deemed waived (section . 10, Rule 9). With these principles and provisions in mind one can not fail to understand that in the case at bar the presentation of the petition for relief under Rule 38, for the purpose of securing an appeal from the judgment, should not be allowed petitioner again because he already had the opportunity to prosecute or compel the allowance of his appeal from the judgment, when he instituted the action of certiorari and mandamus against the judge who had refused to approve his record on appeal. Such was the import of our ruling in *Palomares vs. Jimenez*, *Supra*. This ruling is supported by competent authority.

"Except where such remedies are cumulative under the governing statutes, a motion to vacate or set aside a Judgment will not be entertained when the proper remedy of the party aggrieved is by appeal, error, or certiorari, * * *" (49 C. J. S. p. 511.)

The remedy first pursued by petitioner when he tried to have his appeal admitted was. a remedy at law. , That which he subsequently pursued when he sought relief was a remedy in equity. It has been held a vicious practice indeed for a party first to pursue a legal remedy and later abandon it and prosecute that in equity. (*Mellerio vs. Freeman*, 211 Pa. 202, 60 Atl. 735). There will be no end to litigation were parties allowed to avail of all remedies one after another. As we said the remedy under Rule 38 is to be availed of only in exceptional cases, and where there is other remedy at law, it should not be allowed to be used (*Palomares vs. Jimenez*, *supra*).

But there is another potent reason why the appeal must be denied and the order appealed from affirmed. Appellant Fajardo would not profit by the allowance of his appeal, even if his appeal against the order, were allowed. His motion for relief is accompanied by an affidavit which counsel gave the title of "affidavit of merit." Upon examining this affidavit, one will find that it is not the affidavit of merits that Rule 38 requires. It is an affidavit supporting counsel's excusable negligence, not an affidavit that petitioner Fajardo has a meritorious cause of action. As a matter of fact, neither his petition in the court below nor his petition in this Court contains any allegation or claim that he has a good or meritorious cause of action against the respondent. Neither is his complaint attached to his petition in the court below or in this Court. In *Paher, vs. Yatco, et al.*, 48 Off. Gaz., 59, we held through Mr. Justice Montemayor:

"* * *, but when it is very evident as shown by the facts of the case that the granting of the writ would not profit the petitioner to obtain said remedy, for like a mirage it would merely raise false hopes and in the end avail the petitioner nothing, said petition for mandamus will be dismissed." (Syllabus.)

The petition is hereby denied with costs against the petitioner. So ordered.

Parás, C. J., Bengzon, Padilla, Montemayor, Reyes, A., Bautista Angelo, Concepcion, Reyes, J. B. L., and Endencia, JJ., concur.

* 90 Phil., 778.

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