

MANDIAN (MANOBA), PLAINTIFF AND APPELLEE, VS. DIONISIO LEONG, DEFENDANT AND APPELLANT. CELESTINO LEONG, DEFENDANT-INTERVENOR AND APPELLEE.

G. R. No. L-10564. April 25, 1958

Ponente: REYES, J.B.L., J.

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REYES, J.B.L., J.:

Appellant Dionisio Leong was sued, in 1955, in the Court of First Instance of Davao by MANDIAN (Manoba), the widow and second consort of his late father Leon Lung (Civ. Case No. 1533 of that Court). She charged him with having usurped a parcel of land and coconut plantation in Trinidad, Davao, registered in her name under Transfer Certificate of Title No. 561 of Davao, and asked for an accounting of fruits, for damages and attorney's fees.

Answering the complaint, Dionisio denied any usurpation, and pleaded that he possessed and administered the disputed property as part of the estate of his late father Leon, by agreement with plaintiff.

Subsequently, defendant's brother Celestino Leong, upon his petition, was permitted by the court to intervene as defendant, and on June 6, 1955, filed an answer in intervention, pleading that the lot in question was acquired during his father's second marriage to plaintiff MANDIAN, but that the title was placed in her exclusive name because the husband was not a Filipino citizen. The answer also contained a cross-claim against the original defendant Dionisio Leong, averring his exclusive possession of the estate of the father and his failure to give his co-heirs any share in its fruits, and prayed for their accounting and distribution and for attorney's fees. Copy of this answer was served on counsel for cross-defendant Dionisio Leong on June 6, 1955. By order of June 27, 1955, the answer in intervention was admitted and plaintiff ordered to answer the cross-complaint.

On July 1, 1955, a motion was filed ex-parte by counsel for defendant-intervenor, alleging that no answer had been filed by Dionisio Leong to Celestino's cross-claim up to July 1, i.e., notwithstanding the lapse of 26 days; and prayed that Dionisio be declared in default. Conformably to this motion, the court, on July 2, 1955, declared Dionisio in default.

On July 11, Dionisio sought reconsideration of the order of default, on the ground that his period to answer Celestino's crossclaim should be counted not from the time he was served copy of the answer in intervention but from the time the court admitted it, i.e., from June 27. The court below, however, denied reconsideration and Dionisio Leong appealed to this Court.

The appeal must be dismissed.

The order declaring appellant in default is interlocutory and preliminary to the hearing of the case on the merits (Sitchon vs. Prov. Sheriff of Occidental Negros, 80 Phil., 397), and remains under the control of the court, and may be modified or rescinded by it on sufficient ground at any time before final judgment (I Francisco, Rules of Court, Part II, p. 642). Besides, the cross-plaintiff may, for aught we know, fail to establish his claims against appellant with requisite evidence, and the trial court may dismiss the cross-claim, notwithstanding the default. In

such event, the appellant would have no cause for complaint, and his appeal would be useless. Thus, the appeal at this stage is premature and improper.

This Court has ruled that it is a prerequisite to defendant's right to appeal that he file a motion Rule 38 asking that the order of default entered against him be set aside (*Lim Toco vs. Go Fay*, 80 Phil., 166; *Rodrigo vs. Cabrera*, 95 Phil., 790; *Tecson vs. Melendres*, 88 Phil., 703, and others). Once such motion is filed, the defendant, even if his motion is denied, becomes entitled to notice of all further proceedings including final judgment (*Reyes Calingo vs. Tan*, G. R. L-10336, May 31, 1957) and may duly appeal therefrom. Cross-defendant-appellant, Dionisio Leong, has not yet filed any such motion, since his petition for reconsideration of July 11, 1955, did not aver any surprise, fraud, mistake and excusable neglect. But even assuming that his petition to reconsider may be held to be one under Rule 38, still appellant should wait the judgment on the merits of the cross-claim, and if any such judgment is rendered against him, only then may he appeal, from the order of default as well as from the final judgment based upon such default order.

This appeal is, therefore, dismissed, and the trial court ordered to proceed with the hearing of the case, including the cross-claim against appellant Dionisio Leong. Costs against appellant. So ordered.

Paras, Bengzon, Montemayor, Reyes, Bautista Angelo, Labrador, Concepcion, Endencia and Felix, JJ., concur.

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