

## **PLACIDO ANTONIO, ET AL., PLAINTIFFS AND APPELLEES, PETRONILO JACINTO, DEFENDANT AND APPELLANT.**

*G.R. No. L-18569. June 22, 1965*

Ponente: REGALA, J.

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### **REGALA, J.:**

This is an appeal brought by the defendant from the order of the Court of First Instance of Isabela, denying his motion for relief from a default order and judgment of that court. The appeal was taken to the Court of Appeals but, considering that only questions of law are raised, the appeal was certified to this Court.

The facts that led to the issuance of (he disputed order are as follows: On March 28, 1958, the plaintiffs sued the defendant in the Court of First Instance of Isabela for the recovery of possession of a portion of land registered in the names of the deceased spouses Mariano Antonio and Micaela Cudiamat. Plaintiffs are the children and grandchildren of the registered owners. In their complaint, the plaintiffs alleged that the defendant had unlawfully taken possession of a portion of about 2-1/2 hectares of the land in question and prayed the court to re-ore them in possession and award them damages as a result thereof.

Accordingly, summons was issued to the defendant who received it, together with a copy of the complaint, on April 12, 1958.

On April 26, that is, the day before the last day for filing an answer, Attorney S. P. Tabangay filed a motion for extension of the time to answer on the pretext that he needed time to prepare the answer, his services having been engaged by the defendant only on that day. He therefore asked for 10 days from April 28 within which to answer the complaint. (Actually, the last day for the answer was April 27, not April 28).

The case was assigned to Branch II of the court whose seat was at Cauayan, Isabela. It happened, however, that the judge of Branch II had gone on leave and did not come back until the end of April, 1958. In his absence, Judge Manuel Arranz of Branch I, whose seat was at Ilagan, Tsabela, acted as vacation judge and took charge of interlocutory matters. For this reason, defendant's motion and the rest of the records of the case were mailed to him in Ilagan on April 30. Anticipating favorable action on the motion, the clerk of Branch II even prepared for the judge's signature a draft of an order giving defendant 10 days from April 27 within which to file his answer.

On account of a strike at the Rural Transit, which took charge of the transportation of mails, the records of this case did not reach Branch I until May 14. By then the regular judge of Branch II, Hon. Pedro C. Quinto, had returned to his post. For this reason, Judge Arranz took no action on the motion and instead returned it together with the other records of the case to Branch II on June 23.

Thereafter, on motion of the plaintiffs, the court declared the defendant in default. It subsequently denied his motion for reconsideration for lack of verification and affidavit of merit. Still later, on July 16, 1958, the court rendered judgment against defendant, ordering him to vacate the portion occupied by him and to pay damages.

On July 28, defendant filed a petition for relief from judgment. The petition was verified by the defendant a was

supported by the affidavits of merit which in substance recited that the portion occupied by the defendant bought by him from the deceased spouses Mariano Antonio and Micaela Cudiamat. Defendant also attached his answer. This petition was opposed by the plaintiffs.

On March 10, 1959, the court denied the defendant's petition for relief. Hence this appeal, the defendant contending (1) that it was error for the lower court to declare him in default without first resolving his motion for extension of time to answer (*Mapua vs. Mendoza*, 45 Phil. 424) ; (2) that his failure to answer the complaint was an honest mistake because he was "laboring on the honest and sincere belief" that his motion "would be resolved by the trial Court;" and (3) that he had a valid defense against the plaintiffs' complaint.

On the question as to whether or not a party in default may appeal the judgment on the merits against him, the rulings were to the effect that a defendant who is declared in default cannot appeal, unless he files a motion under Rule 38 to set aside the order of default upon the ground of fraud, accident, error or mistake or excusable neglect, and if his motion is denied, he may then appeal from the order denying such motion, and he may, in the meantime, apply for a writ of preliminary injunction to stay the execution of the judgment on the merits. And if the motion to stay is denied, the motion may be renewed on appeal.

The above procedure, however, was changed by the Revised Rules of Court. Under Rule 41, section 2, paragraph 3, a party who has been declared in default may likewise appeal from the judgment rendered against him as contrary to the evidence or to the law, even if no petition for relief to set aside the order of default has been presented by him in accordance with Rule 88. (*Moran*, Vol. 1, p. 453 [1963])

The Court agrees with the observation of the lower court that the least that the attorney for the defendant in this case should have done was to file his answer while the motion for extension was pending before the court.

As stated also by the lower court, the motion for reconsideration on the order of default did not comply with the Rules of Court as it lacked the necessary verification and affidavit of merit.

Considering that a motion for relief is addressed to the sound discretion of the court, We find that the lower court has not committed any abuse of discretion in denying the relief considering the nature and circumstances of the case.

WHEREFORE, the order appealed from is hereby affirmed Costs against the defendant-appellant.

Bengzon, C.J., Bautista Angelo, Concepcion, Reyes, J.B.L., Paredes, Dizon, Makalintal, Bengzon, J. P. and Zaldivar, JJ., concur.

Older affirmed.

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