

FORTUNATO TUASON, PETITIONER-APPELLANT, VS. COURT OF APPEALS, JUDGE FERNANDO A. CRUZ, LEONOR LIMOS AND REGISTER OF DEEDS OF RIZAL (NOW CALOOCAN CITY), RESPONDENTS-APPELLEES.

G.R. No. L-32682. February 29, 1972

Ponente: VILLAMOR, J.

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VILLAMOR, J.:

This is an appeal from the judgment of the Court of Appeals in CA-G.R. No. 44523-R denying the petition for certiorari filed by Fortunato Tuason.

This case may be traced back to May 27, 1958, when Fortunato Tuason filed LRC No. 11267 with the Court of First Instance of Rizal, Pasig Branch, against the spouses Florencio Macaraeg and Leonor Limos. The case was dismissed on September 8, 1958. In the meantime, Macaraeg died. After the dismissal of the case, the widow, Leonor Limos, asked Tuason to vacate the parcel of land (consisting of around 160 square meters) subject matter of the case, since he was occupying the same without paying any rental.

On May 4, 1960, Tuason filed Civil Case No. 6104 with the same court (Caloocan City Branch) against Limos. After almost ten years, or on July 19, 1969, a decision was promulgated by the trial court dismissing Tuason's complaint, and ordering him to vacate the premises and to surrender their possession to Limos.

Tuason received notice of the decision on August 7, 1969, and therefore had up to September 6, 1969, within which to perfect an appeal. On August 18, Tuason filed a notice of appeal and an appeal bond. On August 29, he filed a first motion for extension of twenty days within which to file a record on appeal. The motion was granted. On September 26, a second, motion for extension of ten days was filed. On October 3, believing that Tuason had filed his second motion for extension one day late, Limos filed a motion to dismiss Tuason's appeal. On October 4, the trial court granted the second motion for extension of time, to expire on October 6. On October 7, Tuason filed a third motion for extension of ten days. On October 10, Limos filed a supplemental motion to dismiss the appeal on the ground that when Tuason filed his third motion for extension on October 7, the decision had already become final; hence, the period for filing a record on appeal was no longer extendible. In the meantime, the court granted the third motion for extension in an order dated October 8. On October 15, Tuason filed a record on appeal. On the same date, Limos filed a motion to reconsider the order of October 8 granting Tuason's third motion for extension.

On November 19, 1969, the court issued an order dismissing Tuason's appeal on the ground that "[i]t appears from an examination of the record that when the plaintiff filed his 'Urgent Motion for Last Extension to File Record on Appeal' on October 7, 1969, the period within which he should have filed the same, to wit, on October 6, 1969, has already elapsed and, therefore, there was nothing more to extend." Tuason moved to reconsider, but

on December 17, 1969, the court issued an order denying his motion and ordering the issuance of a writ of execution.

Tuason went to the Court of Appeals on certiorari. As already stated, that court denied the petition. Hence this appeal.

Petitioner-appellant's arguments in the present appeal boil down to the following: (1) On October 6, 1969, the last day for the filing of a record on appeal, he arrived at the court a few minutes after 4:00 P.M. to file his third motion for extension. The cause of his delay was the unusually heavy traffic from San Juan, Rizal, to Caloocan City. A clerk in the court advised him to return the next day. Accordingly, on October 7, 1969, at 9:10 A.M., he filed the motion. He therefore incurred a delay of only nine hours and ten minutes, and considering that the delay was caused by misfortune, accident, mistake or excusable negligence, the trial court should not have denied his third motion. (2) The trial court having granted petitioner-appellant's motion for extension in its order of October 8, 1969, and petitioner-appellant having, pursuant to said order, already filed a record on appeal on October 15, 1969, the court could no longer recall or reconsider its October 8 order on November 19, 1969, or after the lapse of one month and eleven days. (3) The record on appeal was filed within the reglementary period, because the three motions of respondent-appellee Limos (motion to dismiss the appeal filed on October 3, 1969, supplemental motion filed on October 10, and motion for reconsideration filed on October 15) were resolved only on November 19, 1969; hence, the period for filing the record on appeal was suspended from October 3 to November 19, 1969, and because of this the filing thereof on October 15, 1969, was seasonable.

The appeal is without merit.

Petitioner-appellant's filing on October 7, 1969, of his third motion for extension of time to file a record on appeal, was one day late, because the original period, as twice extended, expired the day before. An application for extension of time must be filed prior to the expiration of the period sought to be extended (*Galima, et al. vs. Court of Appeals, et al.*, L-21046, January 31, 1966, 16 SCRA 140, 143; *Vivo, etc. vs. Arca, etc., et al.*, L-21589, April 30, 1965, 13 SCRA 771, 774). Thus on October 7, 1969, the trial court no longer had the power to grant petitioner-appellant an extension of time, for, the period within which to perfect an appeal having already elapsed, the court lost all jurisdiction over the case, and had no alternative but to order the execution of the final judgment (*Galima, et al. vs. Court of Appeals, et al.*, supra).

Accident is invoked as an excuse. Assuming, for the sake of argument, that petitioner-appellant's delay on October 6, 1969, in arriving in court to file his motion was due to accident, still, considering his own admission that he arrived only "a few minutes after 4:00 P.M.," he could have filed said motion that very day by sending the same in Caloocan City itself (where he was then) by registered mail.

Since the trial court had lost jurisdiction over the case, its order of October 8, 1969, granting petitioner-appellant's third motion for extension, was null and void and of no legal effect. No abuse of discretion could therefore be attributed to said court when, after its attention had been called to its mistake, it issued an order in effect reconsidering and setting aside its erroneous order. On the contrary, it was the proper course of action to take. In *Vivo, etc. vs. Arca, etc., et al.*, supra, we sustained the order of the respondent judge who reconsidered and set aside a previous order to transmit the record of the case to this Court, after it was pointed out to him that the notice of appeal was filed one day late, and that, consequently, the judgment had already become final and executory.

Petitioner-appellant's contention that the filing by respondent-appellee Limos of her three motions on October 3, 10 and 15, 1969, interrupted the running of the period to file a record on appeal for forty-seven days, i.e., from October 3, 1969 to November 19, 1969, when the trial court finally resolved the motions, deserves scant

consideration. The October 3 motion was one to dismiss the appeal on the ground that petitioner-appellant's second motion for extension was filed one day late. That second motion for extension was, however, granted in the court's order of October 4, 1969. Consequently, respondent-appellee Limos' October 3 motion must be deemed to have been disposed of by that order, and any reference thereto in the order of November 19, 1969, was unnecessary and superfluous. The October 10 motion was one to dismiss petitioner-appellant's appeal on the ground that the filing of a third motion for extension on October 7, 1969, was one day late. Since, as already stated above, the third motion was indeed filed late, and the trial court's judgment had already become final, respondent-appellee Limos' motion could not have had the effect of suspending the period for perfecting petitioner-appellant's appeal; what had already run out could no longer be suspended. The same thing is true with the October 15 motion of respondent-appellee Limos, which was for the reconsideration of the court's order of October 8 granting petitioner-appellant's third motion for extension. That order, as we have said above, is null and void, having been issued after the court had lost jurisdiction.

In addition to the foregoing considerations, it must be mentioned here — as was stated by the Court of Appeals in its appealed decision — that the issues of late filing of petitioner-appellant's third motion for extension due to accident, and of interruption of the running of the period to file a record on appeal, were not raised by petitioner-appellant in the trial court. There, petitioner-appellant insisted that his third motion was filed on October 6, 1969, and that the record on appeal was filed within the extended period. Petitioner-appellant's failure to lay the said issues before the trial court made his recourse to the Court of Appeals on certiorari doubly indefensible, for questions which courts of first instance are required by law to decide should not be summarily taken from them and presented to a higher court without first giving them an opportunity of deliberately passing on such questions themselves (*Herrera, etc. vs. Barretto, etc., et al.*, 25 Phil., 245 272).

PREMISES CONSIDERED, the judgment appealed, from is affirmed, with costs against petitioner-appellant.

Concepcion, C.J., Makalintal, Zaldivar, Castro, Fernando, Teehankee, Barredo, and Makasiar, JJ., concur.

CONCURRING OPINION

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

I concur fully with the majority opinion but would like to add, as further ground for our decision, that traffic jams in Greater Manila at or about the hours of entering or leaving office has been endemic for so many years past that failure to take them now into account can be in no way considered accident or excusable negligence.

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