

**DOLORES, EUFEMIA, PEDRO FELICITAS, ELENA AND GAGA, ALL
SURNAMED CABALES AND ALEJANDRO TORRES, PETITIONERS, VS.
JOSETO TAN NERY AND THE HONORABLE COURT OF APPEALS,
RESPONDENTS.**

G.R. No. L-31987. November 21, 1979

Ponente: DE CASTRO, J.

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DE CASTRO, J.:

Petition for review on certiorari of the decision dated April 15, 1970 of the Court of Appeals in CA-G. R. No. 40760-R, affirming the order dated March 3, 1967 of the Court of First Instance of Misamis Oriental, Branch II, in Civil Case No. 1959 entitled "Joseto Tan Nery vs. Dolores Cabales, et al." denying the petition for relief of the defendants.

Plaintiff, now herein private respondent Joseto Tan Nery, filed a complaint dated July 18, 1961 in the Court of First Instance of Misamis Oriental, Branch II, docketed as Civil Case No. 1959 against defendants, now herein petitioners Dolores, Eufemia, Pedro, Felicitas, Elena and Gaga, all surnamed Cabales and Alejandro Torres, for recovery of portion of real property situated in barrio Agusan, Cagayan de Oro City, covered by Original Certificate of Title No. 30, now Transfer Certificate of Title No. T-3254. Defendants interposed the defense that they have long been in possession of the property in dispute, that plaintiff's property has been confined to the Western boundary of their land, and that plaintiff has no legal capacity to sue because he has already sold the questioned real property to the Development Bank of the Philippines.

On May 29, 1962, an amended complaint was filed by plaintiff impleading the Development Bank of the Philippines as party plaintiff for the reason that Joseto Tan Nery has transferred or assigned his property to the Development Bank of the Philippines on condition that he would repurchase the same, as in fact a portion of the repurchase price, has already been paid by him.

On June 16, 1962 the amended complaint was withdrawn, and plaintiff filed another amended complaint dated June 30, 1962 impleading the Development Bank of the Philippines as party defendant, it being an unwilling co-plaintiff.

In an answer dated May 13, 1963 the Development Bank of the Philippines alleged that the two parcels of land were purchased by it from the plaintiff in an auction sale conducted by the City Sheriff of Cagayan de Oro on July 28, 1960; that the same parcels of land were sold to the plain-tiff by the Development Bank of the Philippines under a Deed of Conditional Sale dated June 14, 1962; that it has requested the plaintiff to have the property in litigation surveyed by a duly licensed surveyor in order to determine whether the plaintiff has a right and a cause of action against the defendants, and that without the said survey made, the Development Bank of the Philippines will not be in a position to join the plaintiff as a party co-plaintiff or co-defendant in the case.

At the date set for hearing on September 23, 1966, for failure of the parties or their lawyers to appear

notwith-standing due notification, the case was dismissed without prejudice.

A motion for reconsideration dated September 26, 1966 was filed by plaintiff alleging that the nonappearance of plaintiff and counsel was due either to mistake or excusable negligence; that Civil Cases Nos. 2630-A and 2631, entitled "Joseto Tan Nery vs. Josefa Labnitin, et al." were also set for hearing on September 23, 1966 before Branch I of the Court of First Instance of Misamis Oriental; that plaintiff and counsel were present before Branch I wholly unaware that the present case was also scheduled for hearing on the same date before Branch II.

On October 1, 1966 the trial court issued an order setting aside the order dismissing this case. The case was set for hearing on October 16, 1966 but on said date, defendants and counsel, failed to appear despite notice. Plaintiff was authorized to present his evidence ex-parte before a commissioner.

On November 16, 1966 the court a quo rendered a decision in favor of plaintiff, the dispositive portion of which reads as follows:

"WHEREFORE, judgment is hereby rendered ordering the defendants to immediately vacate the land in question and restore possession thereof to the plaintiff, and to pay the latter the sum of THREE THOUSAND ONE HUNDRED SEVENTY FIVE PESOS (P3,175.00) as actual damages, FIVE HUNDRED PESOS (P500.00) as attorney's fees and the amount of ONE THOUSAND PESOS (P1,000.00) as moral damages, plus the costs." [1]

Atty. Augusto G. Maderazo, counsel for defendants, received a copy of the said decision on November 25, 1966, and on January 24, 1967 he filed a petition for relief on grounds of accident, mistake or excusable negligence. In the said petition, Atty. Maderazo alleged that in the morning of October 5, 1966 he was in Branch IV of the Court of First Instance of Misamis Oriental to appear at the hearing of Civil Case No. 19-C entitled "Tomas Jala vs. Miguel Raneses, et al." and before the start of the court session, a certain Efren Labial served him a copy of the notice of hearing in the present case; that immediately thereafter, his case was called, and he unconsciously inserted and mixed said notice of hearing with the papers of Civil Case No. 19-C and forgot all about it until he received a copy of the decision in the present case; that the notice of hearing having been mis-placed and inserted in the record of another case, counsel failed to appear at the hearing on October 14, 1966; and counsel prayed that the decision in question be set aside and defendants be allowed to present their evidence.

An opposition dated February 2, 1967 was filed by plaintiff alleging that there was no accident, mistake or excusable negligence to support the petition for relief. For lack of merit, the trial court denied the petition for relief on March 3, 1967.

From the order denying the petition for relief, defendants filed a notice of appeal to the Court of Appeals on March 21, 1967.

On April 15, 1970, the Court of Appeals rendered a decision affirming the order of the court a quo denying the petition for relief from judgment. Hence the present petition for review alleging the following: (1) The Court of Appeals committed grave abuse of discretion in not granting the petition for relief; (2) The Court of Appeals failed to take note of the affidavit of surveyor Francisco P. Lumasag stating that petitioners' land is outside the property of private respondent; (3) Copy of the lower court decision was received by petitioners' counsel on November 25, 1966, and the petition for relief from judgment was filed on January 24, 1967, and the action was, therefore, proper.

The main issue involved in the present petition is whether the respondent court erred in affirming the decision of the court a quo which denied herein petitioners' petition for relief from judgment. While it is true that the lower court is conferred the power to extend relief from judgment under Section 2 of Rule 38 of the Rules of Court, such

power is not absolute. It is confined only to cases "when a judgment or order is entered or any other proceeding is taken through fraud, accident, mistake or excusable negligence."

The ground given by counsel for petitioners to justify granting of the petition for relief is that he failed to attend the hearing because he inadvertently inserted the notice of hearing in the folder of another case, and that he was reminded of the case only when he received the decision in the present case on November 25, 1966.

It is apparent that the reason given by counsel for petitioners is not within the rule to justify the granting of the petition for relief. As observed by the respondent judge, with whom We, agree, the conduct of Atty. Augusto G. Maderazo" can hardly be characterized as a fraud, accident, mistake or excusable negligence that would justify the setting aside of the decision of the lower court of November 19, 1966. To rule otherwise would be to put a premium on counsel's forgetfulness and lack of diligence in the handling of his cases, as well as to allow the filing of petitions for relief under Rule 38 of the Rules of Court on the flimsiest and most fancied grounds." The dismal situation of petitioners becomes more apparent if We consider that on January 3, 1967 said counsel received herein private respondent's motion for execution of the decision of the court a quo. Nothing was done by petitioners until January 24, 1967 when they lodged a petition for relief from the decision. How can they reasonably claim accident, mistake or excusable negligence as ground to Support a petition for relief from judgment?

A prudent lawyer always keeps a separate record or diary of hearings of cases he handles and of his professional engagements.[2] Mere forgetfulness of a counsel to an action is not a sufficient ground to afford relief. The duty of an attorney does not end with making his appearances and filing of pleadings, but includes such precautionary measures as will assure the protection and safeguarding of the interest of his client.

Petitioners, likewise, are not at all free from blame. They should feel it their duty to make proper inquiries from their counsel as to when the suit was to be heard, and thereby serve a sort of a reminder to their counsel to inform himself of, and check on, the status of his case. For failing to act with prudence and diligence, their plea cannot elicit either approval or sympathy.

While the failure of petitioners to appear at the hearing is not so much due to their fault, but more to the lack of necessary diligence on the part of their counsel which resulted in their prejudice, the counsel's negligence is binding upon the clients. A client is bound by the action of his counsel in the conduct of a case and cannot be heard to complain that the result might have been different had counsel proceeded differently. His lawyer's mistake binds him. If the lawyer's mistake and negligence were to be admitted as reasons for reopening cases, there would never be an end to a suit so long as new counsel could be employed who could allege and show that prior counsel had not been sufficiently diligent or experienced or learned.[3] The matter of affording relief from failure of party or his counsel to appear at the trial is largely discretionary with the judge, and his action may not be interfered with unless abuse is patent on the record.[4] Petitioners failed to make out a case of excusable negligence for non-appearance of their counsel at the October 16, 1966 hearing.

As regards the second issue, petitioners argue that respondent court did not consider the affidavit of Francisco P. Lumasag stating that their landholding is outside the lot claimed by herein private respondent. The aforesaid affidavit which relates to their defense was not averred in the petition for relief in the court a quo. It was only on appeal in the Court of Appeals and before this Court that the said affidavit came out to light. The rule is well-settled that a special defense must be specifically pleaded in order to afford the trial court an opportunity to pass upon the issue raised, and the defense that was not properly pleaded before the trial court cannot be raised for the first time on appeal.[5]

WHEREFORE, the appealed decision should be, us it is hereby, affirmed, without special pronouncement as to

costs.

SO ORDERED.

Teehankee, (Chairman), Makasiar, Fernandez, Guerrero, and Melencio-Herrera, JJ., concur.

[1] pp. 13-14, Rollo.

[2] Bautista vs. Federico O. Borromeo, Inc., 30 SCRA 119.

[3] Vivero vs. Santos, 98 Phil. 500; United States vs. Umali, 15 Phil. 33; Isaac vs. Mendoza, 89 Phil. 279.

[4] Bala vs. Romillo, 3 PHILAJUR 450.

[5] Manila Port Service vs. Court of Appeals, 22 SCRA 1373.

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