

**GUALBERTO V. MAGNO, PETITIONER, VS. HON. MONTANO A. ORTIZ,
IN HIS CAPACITY AS JUDGE OF THE COURT OF FIRST INSTANCE OF
AGUSAN, THE CLERK OF COURT, COURT OF FIRST INSTANCE OF
AGUS...**

G.R. No. L-22670. January 31, 1969

Ponente: MAKALINTAL, J.

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MAKALINTAL, J.:

On October 31, 1963 judgment was rendered in favor of the plaintiff in Civil Case No. 410 of the Court of First Instance of Agusan, entitled "Rogaciano Suazo, plaintiff versus Director of Lands and Ines Buquingo Vda. de Bacarro, defendant's, Gualberto V. Magno, Intervenor". In said judgment plaintiff was declared owner of Lot No. 2987 of the cadastral survey of Barrio Libertad, PLS-22, Butuan City, by virtue of a decision of the Cadastral Court of Agusan way back on November 17, 1941. On December 12, 1963 intervenor Gualberto V. Magno, who was claiming the same land as purchaser from the defendant, received a copy of the judgment. On January 11 of the following year, or on the thirtieth day from receipt of the copy, the intervenor filed by registered mail with the court a quo a motion for reconsideration. The said motion did not contain a notice of hearing.

On January 27, 1964 respondent Judge motu proprio caused to be served upon all parties concerned a notice setting the motion for reconsideration for hearing on February 8, 1964. On the same day, January 27, respondent Rogaciano Suazo moved for the issuance of a writ of execution of the decision on the ground that it has already become final and executory since neither the defendants nor the intervenor perfected an appeal within the reglementary period. The motion for execution and the motion for reconsideration were heard on February 1 and 8, 1964, respectively.

On March 3, 1964 respondent Rogaciano Suazo filed an answer to petitioner's motion for reconsideration. On March 9 following respondent Judge issued an order, a copy of which was received by petitioner on March 17, denying the motion for reconsideration and allowing the issuance of a writ of execution. Upon receipt of said order the intervenor (petitioner herein) filed a notice of appeal, a cash appeal bond and a record on appeal.

On March 18, 1964 petitioner moved to reconsider that portion of the order dated March 17 which allowed the issuance of a writ of execution. The motion was denied in an order dated March 31, 1964.

Petitioner filed the instant petition for certiorari, alleging that respondent Judge acted in excess of jurisdiction and with grave abuse of discretion in declaring the decision in Civil Case No. 410 final and unappealable, in disregarding petitioner's motion for reconsideration, in ordering the issuance of a writ of execution and in denying petitioner's urgent motion for reconsideration of the order granting the motion for execution; and praying that a writ of preliminary injunction be issued restraining the respondents Clerk of Court and Provincial Sheriff of Agusan from proceeding with the execution of the judgment in Civil Case No. 410, that the orders of respondent Judge dated March 9 and March 31, 1964 be annulled and that respondent Judge be ordered by mandamus to consider and approve petitioner's record on appeal.

On April 18, 1964 We issued the writ of preliminary injunction prayed for, upon petitioner's postings surety bond in the amount of P1,000.00.

The issue decisive of this petition is whether or not petitioner's motion for reconsideration filed in the court a quo without a notice of hearing, but concerning which a notice was subsequently caused by the court itself to be served upon all parties concerned, suspended the period for appeal.

Petitioner contends that respondent Judge gravely abused his discretion in considering the subject motion for reconsideration a mere scrap of paper, and that "what the law prohibits is not absence of previous notice but the absolute absence thereof and lack of opportunity to be heard," citing *Borja vs. Tan*, G.R. No. L-6108, May 25, 1953; *Duran Embate vs. Penolio*, G.R. No. L-4942, September 23, 1953 and *Sun Un Giok vs. Matusa, et al.*, G.R. No. L-10304, May 31, 1957.

The cases relied upon by petitioner are not in point. In *Borja vs. Tan*, the lower court appointed a co-administrator for the estate without previous notice of hearing, thereby depriving the other interested parties of the opportunity to express their objection. This Court there held that the procedural defect was cured when the interested parties pre-sented their motion to reconsider the appointment. Indeed, the question involved was one of due process, not the efficiency of a motion for reconsideration without a notice of hearing. In *Duran Embate vs. Penolio*, plaintiff's counsel petitioned the clerk of court to set his motion for contempt for hearing on a certain date, giving notice thereof by re-gistered mail to defendant's counsel. On the date set for the hearing of the motion neither defendant nor his counsel appeared, and the court issued an order adverse to defendant. A motion to set aside the order was seasonably filed by defendant on several grounds, one of which was that the notice given to him was not sufficient and that a court order setting the case for hearing should have been previously issued. It was held that it was not necessary that the court itself order the motion to be set for hearing, as a prerequisite therefor, because the notice given by the moving party was sufficient. And in *Sun Un Giok vs. Matusa, et al.*, the question revolved on whether the notice of hearing, incorporated in a motion to dismiss and addressed to the clerk of court, requesting that said motion be submitted for the "consideration of the Honorable Court and as soon as there-after as counsel can be heard", and at the same time certifying that a copy of the motion had been sent to counsel for the adverse party, was sufficient compliance with sections 4 and 5 of Rule 26, (now Rule 15) of the Rules of Court. This Court there held that such notice was a substantial compliance with the requirement of the Rules, for in virtue of said notice the hearing was actually set by the clerk of court, of which counsel for the other party was notified. In the said case there was a notice of hearing incorporated in the motion, whereas in the case at bar there was absolutely no notice at all.

Petitioner also cites *Inesin, et al. vs. Canonoy, et al.*, G. R. No. L-13231, February 29, 1960. The pertinent facts therein are as follows: Counsel for the defendants received copy of the order of dismissal on October 7, 1955, and on October 31 they moved to reconsider the said order. The motion for reconsideration did not contain a notice of hearing, but on December 6, 1956 a motion was presented asking the clerk of court to set the motion for reconsideration for hearing on December 22. The motion was opposed on the ground that it contained no notice of hearing and therefore should be considered as a mere scrap of paper, which did not toll the running of the period for the judgment to become final. Nevertheless, the court reconsidered and set aside its order of dismissal. This Court, in affirming the order of the lower court, stated:

"It is to be noted that the court of first instance holds its sessions in Pagadian, Zamboanga del Sur, only once a year on the dates to be fixed by the district judge (sec. 151, Rev. Adm. Code, superseded by Sec. 54 of Rep. Act No. 296). As the sessions in Pagadian are not continuous throughout the year, and since it is not shown that, at the time the respondents herein presented the motion to reconsider the order of dismissal, the Judge of the Court of First Instance had already set the date for the next term, the attorney for the movant, respondent

herein, could not set the motion for hearing, not knowing on what date or in what month the next yearly session in Pagadian was to take place. It is true that the attorney for the respondent could have set the motion for hearing, on the first day of the term, asking the clerk of court to set it for hearing on that date, but the failure to adopt such a step could not have meant negligence or neglect on the part of the attorney for the movants for said attorney had the alternative to set the motion for hearing as soon as the judge has fixed the following term of the court in that municipality. Under the rules, which we have enjoined to be interpreted liberally, and under the circumstances, we are not prepared to declare that the said motion, which was accepted by the clerk of court was a mere scrap of paper. x x x"

As may be observed, these were special circumstances obtaining in the case just cited which constituted the basis of the ruling therein, but which are not present in the case at bar.

As correctly stated by the trial Court, the subject motion for reconsideration was in fact a motion for new trial. The reasons relied upon are equivalent to an assertion that the decision was contrary to law, which is a ground for new trial (Rule 37, Section 1[c]). The applicable rule on the matter, therefore, is Section 2 of Rule 37, construed in relation to sections 4, 5 and 6 of Rule 15, which provide that a written notice of a motion for new trial shall be served by the movant on the adverse party, stating the time and place of the hearing thereof, and that without proof of service of the notice the motion shall not be acted upon by the court. These provisions have been applied in the case of Manila Surety & Fidelity Co., Inc. vs. Batu Construction Co., et al., G.R. No. L-16636, June 24, 1965 and reiterated in Fulton Insurance Co. vs. Manila Railroad Co., et al., G.R. No. L-24263, November 18, 1967.

As regards the notice of hearing caused to be issued by respondent Judge, it is contended that it cured the defect of lack of notice. Under the facts of this case, the contention is incorrect. In the first place, the duty to give such notice devolves upon the movant, not upon the court. In *Fulton Insurance Co. vs. Manila Railroad Co., et al.*, supra, it was pointed out categorically that section 2 of Rule 37 repealed the provision of section 146 of the old Code of Civil Procedure and the rulings founded thereon, to the effect that the notice must be served by the court on the adverse party. Secondly, even granting that the court a quo had authority to issue motu proprio the notice of hearing, such notice nevertheless did not cure the defect of the motion for reconsideration. For while the motion was filed on the thirtieth day from notice of the decision the notice of hearing was only issued six-teen (16) days thereafter. Considering that a defective motion for reconsideration does not toll the running of the period for appeal, the decision in Civil Case No. 410 had already become final when the notice of hearing was issued by respondent Judge.

In view of the foregoing considerations, we deem it unnecessary to consider the other issues raised in the petition. The writ prayed for is hereby denied and the preliminary injunction issued in this case is lifted, with costs against petitioner.

Concepcion, C.J., Reyes, J.B.L., Dizon, Zaldivar, Sanchez, Castro, Fernando, Capistrano, Teehankee, and Barredo, JJ., concur.

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