

**VICTORIA REGNER, PETITIONER, VS. CYNTHIA R. LOGARTA,
TERESA R. TORMIS AND CEBU COUNTRY CLUB, INC., RESPONDENTS.***G.R. No. 168747. October 19, 2007*

Ponente: CHICO-NAZARIO, J.

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This Petition for Review on Certiorari seeks to reverse the Decision[1] dated 6 May 2005 of the Court of Appeals in CA-G.R. CV No. 71028 entitled, “Victoria Regner v. Cynthia Logarta, Teresa R. Tormis and Cebu Country Club, Inc.,” which affirmed the Order dated 9 November 2000 of the Regional Trial Court (RTC) of Cebu, granting herein respondents’ motion to dismiss Civil Case No. CEB 23927. The Order dated 9 November 2000 of the RTC dismissed herein petitioner’s complaint for declaration of nullity of a deed of donation, for failure to serve summons on Cynthia Logarta, an indispensable party therein.

Civil Case No. CEB. 23927 arose from the following factual antecedents:

Luis Regner (Luis) had three daughters with his first wife, Anicita C. Regner, namely, Cynthia Logarta (Cynthia) and Teresa Tormis (Teresa), the respondents herein, and Melinda Regner-Borja (Melinda).

Herein petitioner Victoria Regner (Victoria) is the second wife of Luis.

During the lifetime of Luis, he acquired several properties, among which is a share at Cebu Country Club Inc., evidenced by Proprietary Ownership Certificate No. 0272. On 15 May 1998, Luis executed a Deed[2] of Donation in favor of respondents Cynthia and Teresa covering Proprietary Ownership Certificate No. 0272 of the Cebu Country Club, Inc.

Luis passed away on 11 February 1999.

On 15 June 1999, Victoria filed a Complaint[3] for Declaration of Nullity of the Deed of Donation with Prayer for Issuance of a Writ of Preliminary Injunction and Temporary Restraining Order against Cynthia and Teresa with the RTC, docketed as Civil Case No. CEB. 23927. Victoria alleged in her complaint that: on 17 March 1997, Luis made a written declaration wherein he stated that due to his illness and forgetfulness, he would not sign any document without the knowledge of his lawyer, Atty. Francis Zosa; on 15 May 1998, when Luis was already very ill and no longer of sound and disposing mind, Cynthia and Teresa, conspiring and confederating with each other, fraudulently made or caused to be fraudulently made a Deed of Donation whereby they made it appear that Luis donated to them Proprietary Ownership Certificate No. 0272; since Luis no longer had the ability to write or affix his signature, Melinda, acting under the influence of her sisters, Cynthia and Teresa, fraudulently manipulated the hand of Luis so that he could affix his thumbmark on the assailed Deed of Donation; on 8 February 1998, or three days before the death of Luis, and when he was already in comatose condition at the Cebu Doctors’ Hospital, Melinda, Teresa, and Cynthia caused the preparation of an affidavit to the effect that Luis affirmed the Deed of Donation he allegedly executed earlier by lifting his hand to affix his thumbmark on the said affidavit.

Sheriff Melchor A. Solon served the summonses on Cynthia and Teresa at the Borja Family Clinic in Tagbilaran

City wherein Melinda worked as a doctor, but Melinda refused to receive the summonses for her sisters and informed the sheriff that their lawyer, Atty. Francis Zosa, would be the one to receive the same.

Upon her arrival in the Philippines, on 1 June 2000, Teresa was personally served the summons at Room 304, Regency Crest Condominium, Banilad, Cebu City. She filed her Answer[4] with counterclaim with the RTC on 6 June 2000.

Subsequently, on 12 September 2002, Teresa filed a motion to dismiss Civil Case No. CEB 23927 because of petitioner's failure to prosecute her action for an unreasonable length of time.

Petitioner opposed[5] the motion and filed her own motion to set the case for pre-trial, to which Teresa filed her rejoinder on the ground that their sister, Cynthia, an indispensable party, had not yet been served a summons. Thus, Teresa prayed for the dismissal of petitioner's complaint, as the case would not proceed without Cynthia's presence.

On 9 November 2000, the RTC issued an Order[6] granting respondent Teresa's motion to dismiss, pertinent portions of which read:

Considering that the donees in the Deed of Donation are Cynthia R. Logarta and Teresa R. Tormis, they are therefore an (sic) indispensable party (sic). In the case of *Quisumbing vs. Court of Appeals*, 189 SCRA 325, indispensable parties are those with such an interest in the controversy that a final decree would necessarily affect their rights so that the court could not proceed without their presence

Wherefore, in view of the foregoing, the instant case is hereby dismissed without prejudice.

A motion for reconsideration was filed by petitioner, but the same was denied in an Order dated 14 February 2001.

Aggrieved, petitioner appealed to the Court of Appeals. On 6 May 2005, the Court of Appeals rendered a Decision denying the appeal and affirming in toto the order of dismissal of the complaint by the RTC and the denial of the motion for reconsideration thereof. The Court of Appeals ratiocinated that petitioner's failure to move for an extraterritorial service of summons constitutes failure to prosecute for an unreasonable length of time, thus:

[T]he plaintiff-appellant [Victoria Regner] should have moved for the extraterritorial service of summons for both defendants-appellees Teresa R. Tormis and Cynthia R. Logarta as they were not residing and were not found in the Philippines when plaintiff-appellant [Victoria Regner] filed this case below. Although defendant-appellant Teresa Tormis was personally served with summons on June 1, 2000 when she came to the Philippines but the same was only effected after a long wait or after the lapse of almost one year from the date the complaint was filed on June 15, 1999. To allow this practice would be to make the continuation of like proceedings before the courts dependent on when the defendants would be personally served with summons by the time they would come to the Philippines, which would only unnecessarily delay the proceedings and clog the court dockets as well. The afore-cited rule was precisely crafted to meet situations similar to the present case to avoid unnecessary delays.

It has to be emphasized that it is incumbent upon the plaintiff [Victoria Regner] to move with leave of court for the extraterritorial service of summons. Taking into account the considerable time that had elapsed from the filing of the complaint on June 15, 1999 until defendant-appellee Teresa R. Tormis, through counsel, filed a motion to dismiss on September 12, 2000, or approximately fifteen (15) months, without any act on the part of plaintiff-appellant [Victoria Regner] to move for extraterritorial service of summons upon the person of defendant-appellee Cynthia Logarta renders plaintiff-appellant's [Victoria Regner] complaint dismissible for failure to prosecute her action for unreasonable length of time under Section 3, Rule 17, Revised Rules of

Court, x x x.[7]

Hence, this appeal via petition[8] for review on certiorari filed by petitioner raising the following assignment of errors:

THE COURT OF APPEALS ERRED IN HOLDING THAT THE DELAY IN SERVING SUMMONS ON ONE OF THE DEFENDANTS CONSTITUTES A FAILURE TO PROSECUTE NOTWITHSTANDING THAT THE REST OF THE CO-DEFENDANTS WERE DULY SERVED WITH SUMMONSES

THE COURT OF APPEALS ERRED IN NOT CONSIDERING THAT THE ANSWER FILED BY ONE INDIVIDUAL DEFENDANT REDOUNDS TO THE BENEFIT OF THE OTHER DEFENDANT WHO HAS NOT BEEN SERVED WITH SUMMONS, THE NATURE OF ACTION BEING ADMITTEDLY COMMON AMONG ALL DEFENDANTS.[9]

From the foregoing, this Court identifies the issues to be resolved in this petition as: (1) Whether a co-donee is an indispensable party in an action to declare the nullity of the deed of donation, and (2) whether delay in the service of summons upon one of the defendants constitutes failure to prosecute that would warrant dismissal of the complaint.

A Court must acquire jurisdiction over the persons of indispensable parties before it can validly pronounce judgments personal to the parties. Courts acquire jurisdiction over a party plaintiff upon the filing of the complaint. On the other hand, jurisdiction over the person of a party defendant is assured upon the service of summons in the manner required by law or otherwise by his voluntary appearance. As a rule, if a defendant has not been summoned, the court acquires no jurisdiction over his person, and a personal judgment rendered against such defendant is null and void.[10] A decision that is null and void for want of jurisdiction on the part of the trial court is not a decision in the contemplation of law and, hence, it can never become final and executory.[11]

Rule 3, Section 7 of the Rules of Court, defines indispensable parties as parties-in-interest without whom there can be no final determination of an action. As such, they must be joined either as plaintiffs or as defendants. The general rule with reference to the making of parties in a civil action requires, of course, the joinder of all necessary parties where possible, and the joinder of all indispensable parties under any and all conditions, their presence being a sine qua non for the exercise of judicial power.[12] It is precisely “when an indispensable party is not before the court [that] the action should be dismissed.”[13] The absence of an indispensable party renders all subsequent actions of the court null and void for want of authority to act, not only as to the absent parties but even as to those present.[14]

As we ruled in *Alberto v. Mananghala*[15]:

In an action for recovery of property against a person who purchased it from another who in turn acquired it from others by the same means or by donation or otherwise, the predecessors of defendants are indispensable parties if the transfers, if not voided, may bind plaintiff. (*Garcia vs. Reyes*, 17 Phil. 127.) In the latter case, this Court held:

In order to bring this suit duly to a close, it is imperative to determine the only question raised in connection with the pending appeal, to wit, whether all the persons who intervened in the matter of the transfers and donation herein referred to, are or are not necessary parties to this suit, since it is asked in the complaint that the said transfers and donation be declared null and void – an indispensable declaration for the purpose, in a proper case, of concluding the plaintiff to be the sole owner of the house in dispute.

If such a declaration of annulment can directly affect the persons who made and who were concerned in the said transfers, nothing could be more proper and just than to hear them in the litigation, as parties interested in maintaining the validity of those transactions, and therefore, whatever be the nature of the judgment rendered,

Francisco Reyes, Dolores Carvajal, Alfredo Chicote, Vicente Miranda, and Rafael Sierra, besides the said minors, must be included in the case as defendants.” (Garcia vs. Reyes, 17 Phil., 130-131.)

It takes no great degree of legal sophistication to realize that Cynthia and Teresa are indispensable parties to Civil Case No. CEB 23927. Cynthia and Teresa allegedly derived their rights to the subject property by way of donation from their father Luis. The central thrust of the petitioner’s complaint in Civil Case No. CEB 23927 was that Luis could not have donated Proprietary Ownership Certificate No. 0272 to his daughters Cynthia and Teresa, as Luis was already very ill and no longer of sound and disposing mind at the time of donation on 15 May 1997. Accordingly, the prayer in petitioner’s complaint was for the trial court to declare null and void the Deed of Donation and to restrain the Cebu Country Club, Inc. from transferring title and ownership of Proprietary Ownership Certificate No. 0272 to Cynthia and Teresa.

Thus, based on the Deed of Donation, Teresa and Cynthia are co-owners of Proprietary Membership Certificate No. 0272 of Cebu Country Club, Inc. The country club membership certificate is undivided and it is impossible to pinpoint which specific portion of the property belongs to either Teresa or Cynthia. Indeed, both Teresa and Cynthia are indispensable parties in Civil Case No. CEB 23927.

An indispensable party has been defined as follows:

An indispensable party is a party who has such an interest in the controversy or subject matter that a final adjudication cannot be made, in his absence, without injuring or affecting that interest, a party who has not only an interest in the subject matter of the controversy, but also has an interest of such nature that a final decree cannot be made without affecting his interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. It has also been considered that an indispensable party is a person in whose absence there cannot be a determination between the parties already before the court which is effective, complete, or equitable. Further, an indispensable party is one who must be included in an action before it may properly go forward.

A person is not an indispensable party, however, if his interest in the controversy or subject matter is separable from the interest of the other parties, so that it will not necessarily be directly or injuriously affected by a decree which does complete justice between them. Also, a person is not an indispensable party if his presence would merely permit complete relief between him and those already parties to the action, or if he has no interest in the subject matter of the action. It is not a sufficient reason to declare a person to be an indispensable party that his presence will avoid multiple litigation.[16]

In *Servicewide Specialists, Incorporated v. Court of Appeals*,^[17] this Court held that no final determination of a case could be made if an indispensable party is not legally present therein:

An indispensable party is one whose interest will be affected by the court’s action in the litigation, and without whom no final determination of the case can be had. The party’s interest in the subject matter of the suit and in the relief sought are so inextricably intertwined with the other parties that his legal presence as a party to the proceeding is an absolute necessity. In his absence there cannot be a resolution of the dispute of the parties before the court which is effective, complete, or equitable.

The rationale for treating all the co-owners of a property as indispensable parties in a suit involving the co-owned property is explained in *Arcelona v. Court of Appeals*^[18]:

As held by the Supreme Court, were the courts to permit an action in ejectment to be maintained by a person having merely an undivided interest in any given tract of land, a judgment in favor of the defendants would not be conclusive as against the other co-owners not parties to the suit, and thus the defendant in possession of the property might be harassed by as many succeeding actions of ejectment, as there might be co-owners of the title asserted against him. The purpose of this provision was to prevent multiplicity of suits by requiring the

person asserting a right against the defendant to include with him, either as co-plaintiffs or as co-defendants, all persons standing in the same position, so that the whole matter in dispute may be determined once and for all in one litigation.

Applying the foregoing definitions and principles to the present case, this Court finds that any decision in Civil Case No. CEB 23927 cannot bind Cynthia, and the Court cannot nullify the donation of the property she now co-owns with Teresa, even if limited only to the portion belonging to Teresa, to whom summons was properly served, since ownership of the property is still *pro indiviso*. Obviously, Cynthia is an indispensable party in Civil Case No. CEB 23927 without whom the lower court is barred from making a final adjudication as to the validity of the entire donation. Without the presence of indispensable parties to a suit or proceeding, a judgment therein cannot attain finality.[19]

Being an indispensable party in Civil Case No. CEB 23927, the trial court must also acquire jurisdiction over Cynthia's person through the proper service of summons.

Based on the foregoing disquisitions, the issue of whether the answer filed by Teresa should benefit Cynthia who was not served summons need not be discussed.

As to determine whether Cynthia was properly served a summons, it will be helpful to determine first the nature of the action filed against Cynthia and Teresa by petitioner Victoria, whether it is an action in personam, in rem or quasi in rem. This is because the rules on service of summons embodied in Rule 14 apply according to whether an action is one or the other of these actions.

In a personal action, the plaintiff seeks the recovery of personal property, the enforcement of a contract or the recovery of damages.[20] In contrast, in a real action, the plaintiff seeks the recovery of real property; or, as indicated in Section 2(a), Rule 4 of the then Rules of Court, a real action is an action affecting title to real property or for the recovery of possession, or for partition or condemnation of, or foreclosure of mortgage on, real property. An action in personam is an action against a person on the basis of his personal liability, while an action in rem is an action against the thing itself, instead of against the person.[21]

In an action in personam, personal service of summons or, if this is not possible and he cannot be personally served, substituted service, as provided in Section 7, Rule 14 of the Rules of Court,[22] is essential for the acquisition by the court of jurisdiction over the person of a defendant who does not voluntarily submit himself to the authority of the court.[23] If defendant cannot be served a summons because he is temporarily abroad, but is otherwise a Philippine resident, service of summons may, by leave of court, be made by publication.[24] Otherwise stated, a resident defendant in an action in personam, who cannot be personally served a summons, may be summoned either by means of substituted service in accordance with Section 7, Rule 14 of the Rules of Court, or by publication as provided in Sections 15 and 16 of the same Rule.

In all of these cases, it should be noted, defendant must be a resident of the Philippines; otherwise an action in personam cannot be brought because jurisdiction over his person is essential to make a binding decision.

On the other hand, if the action is in rem or quasi in rem, jurisdiction over the person of the defendant is not essential for giving the court jurisdiction so long as the court acquires jurisdiction over the res. If the defendant is a nonresident and he is not found in the country, summons may be served extraterritorially in accordance with Section 15, Rule 14 of the Rules of Court, which provides:

Section 15. Extraterritorial service. - When the defendant does not reside and is not found in the Philippines, and the action affects the personal status of the plaintiff or relates to, or the subject of which is, property within the Philippines, in which the defendant has or claims a lien or interest, actual or contingent, or in which the relief demanded consists, wholly or in part, in excluding the defendant from any interest therein, or the

property of the defendant has been attached within the Philippines, service may, by leave of court, be effected out of the Philippines by personal service as under Section 6; or by publication in a newspaper of general circulation in such places and for such time as the court may order, in which case a copy of the summons and order of the court shall be sent by registered mail to the last known address of the defendant, or in any other manner the court may deem sufficient. Any order granting such leave shall specify a reasonable time, which shall not be less than sixty (60) days after notice, within which the defendant must answer.

As stated above, there are only four instances wherein a defendant who is a non-resident and is not found in the country may be served a summons by extraterritorial service, to wit: (1) when the action affects the personal status of the plaintiff; (2) when the action relates to, or the subject of which is property within the Philippines, on which the defendant claims a lien or an interest, actual or contingent; (3) when the relief demanded in such action consists, wholly or in part, in excluding the defendant from any interest in property located in the Philippines; and (4) when the defendant non-resident's property has been attached within the Philippines. In these instances, service of summons may be effected by (a) personal service out of the country, with leave of court; (b) publication, also with leave of court; or (c) any other manner the court may deem sufficient.[25]

In such cases, what gives the court jurisdiction in an action in rem or quasi in rem is that it has jurisdiction over the res, i.e., the personal status of the plaintiff who is domiciled in the Philippines or the property litigated or attached. Service of summons in the manner provided in Section 15, Rule 14 of the Rules of Court is not for the purpose of vesting the court with jurisdiction, but for complying with the requirements of fair play or due process, so that the defendant will be informed of the pendency of the action against him; and the possibility that property in the Philippines belonging to him, or in which he has an interest, might be subjected to a judgment in favor of the plaintiff and he can thereby take steps to protect his interest if he is so minded.[26]

In petitioner's Complaint in Civil Case No. CEB No. 23427, she alleged that Cynthia is residing at 462 West Vine No. 201, Glendale, California, 912041, U.S.A.; while Teresa is residing at 2408 South Hacienda Boulevard, Hacienda Heights, California, but they usually visit here in the Philippines and can be served summonses and other processes at the Borja Family Clinic, Bohol. Pertinent portions of the Complaint read:

- Defendant Cynthia R. Logarta is a Filipino, of legal age, married to Ramon Logarta, resident (sic) 463 West Vine No.201, Glendale, California, 912041, USA. She however usually visits in the Philippines and can be served with summons and other processes of this Honorable Court at Borja Family Clinic, Tagbilaran, Bohol;
- Defendant Teresa R. Tormis is likewise a Filipino, of legal age, married to Antonio Tormis, and a resident of 2408 South Hacienda Heights, California, 19745, U.S.A. She however usually visits in the Philippines and can be served with summons and other processes of this Honorable Court at Borja Family Clinic, Tagbilaran, Bohol.[27]

Petitioner prayed for a declaration of nullity of the deed of donation, to restrain Cebu Country Club, Inc. from transferring title and ownership of Proprietary Ownership Certificate No. 0272 to Cynthia and Teresa, and for moral and exemplary damages. Civil Case No. CEB 23927 is evidently an action against Cynthia and Teresa on the basis of their personal liability for the alleged fraudulent transfer of the subject Country Club membership from Luis to their name. In this sense, petitioner questions the participation and shares of Cynthia and Teresa in the transferred Country Club membership. Moreover, the membership certificate from the Cebu Country Club, Inc. is a personal property. Thus, the action instituted by petitioner before the RTC is in personam.

Being an action in personam, the general rule requires the personal service of summons on Cynthia within the Philippines, but this is not possible in the present case because Cynthia is a non-resident and is not found within the Philippines.

As Cynthia is a nonresident who is not found in the Philippines, service of summons on her must be in accordance with Section 15, Rule 14 of the Rules of Court. Such service, to be effective outside the Philippines, must be made either (1) by personal service; (2) by publication in a newspaper of general circulation in such places and for such time as the court may order, in which case a copy of the summons and order of the court should be sent by registered mail to the last known address of the defendant; or (3) in any other manner which the court may deem sufficient. The third mode, like the first two, must be made outside the Philippines, such as through the Philippine Embassy in the foreign country where Cynthia resides.

Since in the case at bar, the service of summons upon Cynthia was not done by any of the authorized modes, the trial court was correct in dismissing petitioner's complaint.

Section 3, Rule 17 of the 1997 Rules of Civil Procedure, states –

SEC. 3. Dismissal due to fault of plaintiff. – If, for no justifiable cause, the plaintiff fails to appear on the date of the presentation of his evidence in chief on the complaint, or to prosecute his action for an unreasonable length of time, or to comply with these Rules or any order of the court, the complaint may be dismissed upon motion of the defendant or upon the court's own motion, without prejudice to the right of the defendant to prosecute his counterclaim in the same or in a separate action. This dismissal shall have the effect of an adjudication upon the merits, unless otherwise declared by the court.

As can be gleaned from the rule, there are three instances when the complaint may be dismissed due to the plaintiff's fault: (1) if he fails to appear during a scheduled trial, especially on the date for the presentation of his evidence in chief; (2) if he fails to prosecute his action for an unreasonable length of time; and (3) if he fails to comply with the rules or any order of the court.[28]

Considering the circumstances of the case, it can be concluded that the petitioner failed to prosecute the case for an unreasonable length of time. There is failure to prosecute when the plaintiff, being present, is not ready or is unwilling to proceed with the scheduled trial or when postponements in the past were due to the plaintiff's own making, intended to be dilatory or caused substantial prejudice on the part of the defendant.[29]

While a court can dismiss a case on the ground of failure to prosecute, the true test for the exercise of such power is whether, under the prevailing circumstances, the plaintiff is culpable for want of due diligence in failing to proceed with reasonable promptitude.[30] As to what constitutes an "unreasonable length of time," within the purview of the above-quoted provision, the Court has ruled that it "depends upon the circumstances of each particular case," and that "the sound discretion of the court" in the determination of said question "will not be disturbed, in the absence of patent abuse"; and that "the burden of showing abuse of judicial discretion is upon the appellant since every presumption is in favor of the correctness of the court's action." [31] Likewise, the concept of promptness is a relative term and must not unnecessarily be an inflexible one. It connotes an action without hesitation and loss of time. As to what constitutes the term is addressed to the consideration of the trial court, bearing in mind that while actions must be disposed of with dispatch, the essential ingredient is the administration of justice and not mere speed.[32]

It is well to quote the doctrine laid in *Padua v. Erieta*, [33] as accentuated in the subsequent case *Marahay v. Melicor* [34]:

Courts should not brook undue delays in the ventilation and determination of causes. It should be their constant effort to assure that litigations are prosecuted and resolved with dispatch. Postponements of trials and hearings should not be allowed except on meritorious grounds; and the grant or refusal thereof rests entirely in the sound discretion of the Judge. It goes without saying, however, that discretion must be reasonably and wisely exercised, in the light of the attendant circumstances. Some reasonable deferment of the proceedings may be

allowed or tolerated to the end that cases may be adjudged only after full and free presentation of evidence by all the parties, especially where the deferment would cause no substantial prejudice to any part. The desideratum of a speedy disposition of cases should not, if at all possible, result in the precipitate loss of a party's right to present evidence and either in plaintiff's being non-suited or the defendant's being pronounced liable under an ex parte judgment.

"[T]rial courts have x x x the duty to dispose of controversies after trial on the merits whenever possible. It is deemed an abuse of discretion for them, on their own motion, 'to enter a dismissal which is not warranted by the circumstances of the case' (Municipality of Dingras v. Bonoan, 85 Phil. 458-59 [1950]). While it is true that the dismissal of an action on grounds specified under Section 3, Rule 17 of the Revised Rules of Court is addressed to their discretion (Flores v. Phil. Alien Property Administrator, 107 Phil. 778 [1960]; Montelibano v. Benares, 103 Phil. 110 [1958]; Adorable v. Bonifacio, 105 Phil. 1269 [1959]; Inter-Island Gas Service, Inc. v. De la Gerna, L-17631, October 19, 1966, 18 SCRA 390), such discretion must be exercised soundly with a view to the circumstances surrounding each particular case (Vernus-Sanciangco v. Sanciangco, L-12619, April 28, 1962, 4 SCRA 1209). If facts obtain that serve as mitigating circumstances for the delay, the same should be considered and dismissal denied or set aside (Rudd v. Rogerson, 15 ALR 2d 672; Cervi v. Greenwood, 147 Colo. 190, 362 P.2d 1050 [1961]), especially where the suit appears to be meritorious and the plaintiff was not culpably negligent and no injury results to defendant (27 C.J.S. 235-36; 15 ALR 3rd 680)." (Abinales vs. Court of First Instance of Zamboanga City, Br. I, 70 SCRA 590, 595).

"It is true that the allowance or denial of petitions for postponement and the setting aside of orders previously issued, rest principally upon the sound discretion of the judge to whom they are addressed, but always predicated on the consideration that more than the mere convenience of the courts or of the parties of the case, the ends of justice and fairness would be served thereby (Camara Vda. de Zubiri v. Zubiri, et al., L-16745, December 17, 1966). When no substantial rights are affected and the intention to delay is not manifest, the corresponding motion to transfer the hearing having been filed accordingly, it is sound judicial discretion to allow them (Rexwell Corp. v. Canlas, L-16746, December 30, 1961)." x x x.

This Court recalls that the complaint herein was filed on 15 June 1999. The summonses for Cynthia and Teresa were served on their sister Melinda at the Borja Family Clinic in Tagbilaran City, but the latter refused to receive the same. It was only on 1 June 2000 that summons was served on Teresa at Room 304, Regency Crest Condominium, Banilad, Cebu City, when she was in the Philippines for a visit. However, the summons for Cynthia was never served upon her.

Although Section 1, Rule 14 of the Rules, imposes upon the clerk of court the duty to serve summons, this does not relieve the petitioner of her own duty as the plaintiff in a civil case to prosecute the case diligently. If the clerk had been negligent, it was petitioner's duty to call the court's attention to that fact. It must be noted that it was not even petitioner who called the court's attention that summons had not been served on Cynthia, but Teresa. This despite the fact that petitioner was aware, as early as 15 June 1999, when she filed her complaint, that the summonses could not be served on Teresa and Cynthia, as she admitted therein that Teresa and Cynthia were residing abroad. Petitioner as plaintiff should have asked that Cynthia and Teresa be summoned by publication at the earliest possible time. She cannot idly sit by and wait till this is done. She cannot afterwards wash her hands and say that the delay was not her fault. She cannot simply "fold [her] hands" and say that it is the duty of the clerk of court to have the summonses served on Cynthia and Teresa for the prompt disposition of her case. If there were no means of summoning any of the defendants, petitioner should have so informed the court within a reasonable period of time, so that the case could be disposed of one way or another and the administration of justice would not suffer delay. The non-performance of that duty by petitioner as plaintiff is an express ground for dismissing an action. For, indeed, this duty imposed upon her was precisely to spur on the slothful.

For failure to diligently pursue the complaint, petitioner trifled with the right of the respondents to speedy trial. It

also sorely tried the patience of the court and wasted its precious time and attention. To allow petitioner to wait until such time that summonses were served on respondents would frustrate the protection against unreasonable delay in the prosecution of cases and violate the constitutional mandate of speedy dispensation of justice which would in time erode the people's confidence in the judiciary. We take a dim view of petitioner's complacent attitude. *Ex nihilo nihil fit*.^[35]

Likewise, petitioner's counsel inexplicably failed to diligently pursue the service of summonses on respondents. These were acts of negligence, laxity and truancy which the court could have very easily avoided or timely remedied. Petitioner and her counsel could not avail themselves of this Court's sympathy, considering their apparent complacency, if not delinquency, in the conduct of their litigation.

Considering the foregoing, we sustain the dismissal by the trial court of the petitioner's complaint for failure to prosecute for a period of more than one year (from the time of filing thereof on 15 June 1997 until Teresa's filing of a motion to dismiss).

WHEREFORE, premises considered, the instant petition is DENIED for lack of merit and the assailed Decision dated 6 May 2005 of the Court of Appeals in CA-G.R. CV No. 71028 is hereby AFFIRMED. Costs against petitioner.

SO ORDERED.

Ynares-Santiago, (Chairperson), Austria-Martinez, Nachura, and Reyes, JJ., concur.

[1] Penned by Associate Justice Arsenio J. Magpale (Ret.) with Associate Justices Sesonando E. Villon and Enrico A. Lanzanas, concurring. Rollo, pp. 24-28.

[2] Rollo, pp. 33-34.

[3] *Id.* at 36-41.

[4] *Id.* at 43-46.

[5] *Id.* at 47-48.

[6] *Id.* at 25.

[7] *Id.* at 27-28.

[8] *Id.* at 11-23.

[9] *Id.* at 15.

[10] *Echevarria v. Parsons Hardware Co.*, 51 Phil. 980, 987 (1927).

[11] *Planas v. Collector of Internal Revenue*, 113 Phil. 377, 382 (1961).

[12] *Borlasa v. Polistico*, 47 Phil. 345, 347 (1925).

[13] *People v. Hon. Rodriguez*, 106 Phil 325, 327 (1959).

[14] *Lim Tanhu v. Ramolete*, G.R. No. L-40098, 29 August 1975, 66 SCRA 425, 448; *Director of Lands v. Court of Appeals*, 181 Phil. 432, 440 (1979); and *Alabang Development Corporation v. Valenzuela*, 201 Phil. 727, 742 (1982).

[15] 89 Phil. 188, 191-192 (1951).

[16] *Arcelona v. Court of Appeals*, 345 Phil. 250, 269-270 (1997).

[17] 321 Phil. 427, 434 (1995).

[18] *Supra* note 16 at 268-269, citing *Comments on the Rules of Court, Moran, Volume 1* (1970 ed.), pp. 182-83, citing *Palarca v. Baguisi*, 38 Phil. 177, 180-181 (1918). See also *Pobre v. Blanco*, 17 Phil. 156, 158-159 (1910); *Araneta v. Montelibano*, 14 Phil. 117, 123-124 (1909).

[19] *Lotte Phil. Co., Inc. v. Dela Cruz*, G.R. No. 166302, 28 July 2005, 464 SCRA 591, 596.

[20] *Hernandez v. Rural Bank of Lucena, Inc.*, 171 Phil. 70, 79-80 (1978).

[21] *Id.*

[22] SEC. 7. Substituted service.- If, for justifiable causes, the defendant cannot be served within a reasonable time as provided in the preceding section, service may be effected (a) by leaving copies of the summons at the defendant's residence with some person of suitable age and discretion then residing therein, or (b) by leaving the copies at defendant's office or regular place of business with some competent person in charge thereof.

[23] *Venturanza v. Court of Appeals*, G.R. No. L-77760, 11 December 1987, 156 SCRA 305, 312, citing *Pantaleon v. Asuncion*, 105 Phil. 761, 765 (1959).

[24] Rule 14, Sec. 16. Residents temporarily out of the Philippines.-When any action is commenced against a defendant who ordinarily resides within the Philippines, but who is temporarily out of it, service may, by leave of court, be also effected out of the Philippines, as under the preceding section.

[25] *Id.*

[26] *Perkin Elmer Singapore PTE LTD. v. Dakila Trading Corporation*, G.R. No. 172242, 14 August 2007.

[27] *Rollo*, p. 36.

[28] *Olave v. Mistas*, G.R. No. 155193, 26 November 2004, 444 SCRA 479, 493; *Bank of the Philippine Islands v. Court of Appeals*, 362 Phil. 362, 367-368 (1999).

[29] *Belonio v. Rodriguez*, G.R. No. 161379, 11 August 2005, 466 SCRA 557, 577-578.

[30] *Producers Bank of the Philippines v. Court of Appeals*, 396 Phil. 497, 507 (2000).

[31] *Goldloop Properties, Inc. v. Court of Appeals*, G.R. No. 99431, 11 August 1992, 212 SCRA 498, 508-509, citing *Montejo v. Urotia*, 148-B Phil. 43, 50 (1971).

[32] *Olave v. Mistas*, *supra* note 28.

[33] G.R. No. L-38570, 24 May 1988, 161 SCRA 458, 459-460.

[34] G.R. No. 44980, 6 February 1990, 181 SCRA 811, 816.

[35] From nothing nothing is produced.

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