

**CAYETANA GALLARDO AND CATALINO GARCIA,
PLAINTIFFS-APPELLANTS, VS. MARIANO B. BANZON AND EMILIO
ROQUE, PROVINCIAL SHERIFF OF BATAAN,
DEFENDANTS-APPELLEES.**

G.R. No. 48576. September 15, 1943

Ponente: OZAETA, J.

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OZAETA, J.:

In September, 1938, appellants commenced an action against the appellees in the Court of First Instance of Bataan (civil case No. 1641) to annul a sheriff's execution sale of a parcel of land belonging to said appellants, alleging that the sale was void because the judgment on which the writ of execution was issued had been fully paid, and because the notice of sale had not been published as required by law. When that case was called for trial on July 17, 1940, neither the plaintiffs nor their attorney appeared; hence it was dismissed then and there. Counsel for the plaintiffs moved to set aside the order of dismissal, alleging that his failure to appear at the trial was due not to abandonment but to a mistake or excusable negligence on his part, to wit: Before the notice of the trial was sent out, he moved his office to another building but forgot to notify the court of his change of address, and when said notice was received in his former office the person in charge there whom he had requested to deliver to him all correspondence "probably forgot the delivery of the notification of the trial of this case to the undersigned." The court, presided over by Judge Araneta Diaz, denied the motion but, according to counsel for the plaintiffs, verbally instructed him in open court to file a new action.

Following that suggestion counsel for the plaintiffs commenced the present action on September 24, 1940, by renewing his former complaint. Upon motion of the defendants, the court, then presided over by Judge Jose Bernabe, dismissed the new complaint on January 14, 1941, under section 3, Rule 30 of the new Rules of Court. The plaintiffs have appealed from that order of dismissal.

Section 3 of Rule 30, which is a modification of section 127 of Act No. 190, reads as follows:

"Sec. 3. Failure to prosecute.—When plaintiff fails to appear at the time of the trial, or to prosecute his action for an unreasonable length of time, or to comply with these rules or any order of the court, the action may be dismissed upon motion of the defendant or upon the court's own motion. This dismissal shall have the effect of an adjudication upon the merits, unless otherwise provided by court."

Rule 133 says:

"These rules shall take effect on July 1, 1940: They shall govern all cases brought after they take effect, and also all further proceedings in cases then pending, except to the extent that in the opinion of the court their application would not be feasible or would work injustice, in which event the former procedure shall apply."

Since the dismissal of the previous case was ordered on July 17, 1940, the effect of the new rule (section 3 of Rule 30) would attach to it unless in the opinion of the court its application to the then pending case "would work

injustice." Under Rule 38, appellants were entitled to be relieved of the order of dismissal of the previous case on the ground of accident, mistake, or excusable negligence. Judge Araneta Diaz, instead of granting such relief in order to afford the plaintiffs a day in court, suggested the filing of a new complaint, evidently under the impression that section 127 of Act No. 190 had not been modified by the new Rules of Court. So, instead of appealing from the order of dismissal, counsel for the plaintiffs filed a new complaint; but unfortunately for the plaintiffs another judge, who did not make the suggestion, later succeeded Judge Araneta Diaz, and he dismissed the new complaint also.

Counsel for the appellees denies that Judge Araneta Diaz verbally instructed counsel for the appellants to file a new complaint, saying that if he had done so, he would have incorporated the instruction, suggestion, or reservation in the order denying the motion to set aside the dismissal. Withal it is not improbable that the judge failed to mention it in his written order either thru oversight or because he did not deem it necessary. Giving counsel for the appellants the benefit of the doubt, we are inclined to believe his assertion made in the lower court as well as in this Court that Judge Araneta Diaz did verbally suggest the filing of a new complaint; for, otherwise, counsel for the plaintiffs would have appealed from the order denying his motion to set aside the dismissal, judging from the earnest and persistent attitude of the plaintiffs in prosecuting their case.

If the plaintiffs were induced not to appeal from the order of Judge Araneta Diaz denying their motion to set aside the order of dismissal because they were given to understand by said judge that he would entertain a new complaint, we think it would be unjust to dismiss also the new complaint and thereby definitely deprive the plaintiffs of their day in court. Under Rule 133, in relation to Rule 38, we feel justified in not applying section 3 of Rule 30 to the order of dismissal of the previous case because, in our opinion, to do so would work injustice.

Wherefore, the order of dismissal is hereby set aside. Let the case be remanded to the court of origin for trial and decision on the merits, with the costs of this instance against the appellees.

Yulo, C. J., Paras, and Bocobo, JJ., concur.

Moran, J., concurs in the result.

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