

MARCIANA VDA. DE HOYO-A, CLARITA, GODOFREDO, ENRIQUETA, LUZVIMINDA, HERNANE, EDGARDO AND MARIVEL, ALL SURNAMED HOYO-A, AND MANUELA HOYO-A DE LA CRUZ, PETITIONERS, VS. DOMINADOR ...

G.R. No. 71171. July 23, 1985

Ponente: AQUINO, J.

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AQUINO, J.:

This case is about the appealability of an ORDER denying a motion to set aside an order of default as distinguished from the denial of a motion to set aside a judgment by default.

The petitioners, Marciana Hoyo-a and her eight children, filed in 1978 against Dominador Virata with the Court of First Instance of Negros Occidental, San Carlos City branch, two injunction cases to restrain him from occupying portions of two homesteads, with areas of sixteen and eight hectares, applied for by Heracleo Hoyo-a, Marciana's deceased husband, and by Marciana herself. The homesteads are portions of Lot No. 2527 located at Sitio Labilabi, Barrio Mabini, Escalante, Negros Occidental.

In its order dated April 19, 1978, the trial court dismissed the two cases for being premature. The petitioners filed a motion for reconsideration of that order. It was reconsidered by Judge Corpuz-Macandog in her order of December 18, 1981 (p. 101, Record).

In another order dated February 20, 1984, Virata was declared in default by Judge Severino C. Aguilar upon the motion of the petitioners. Virata's motion to set aside the order of default was denied in the order of June 19, 1984. His motion for reconsideration of the denial order was also denied.

Judge Aguilar did not give due course to Virata's appeal from the denial order. The case was set for reception of petitioners' evidence. Mrs. Hoyo-a testified at the hearing on March 6, 1985.

In the meantime, Virata was able to secure from the Appellate Court (Justices PV Sison, Bidin and Veloso) a resolution dated April 10, 1985 requiring the trial court to elevate the records of the two cases. They were elevated to the Appellate Court. That resolution is assailed by the petitioners in this prohibition case.

We hold that the order denying the motion to set aside the order of default is not appealable. It is interlocutory because the trial court has still to render a judgment by default (*Abesames vs. Garcia*, 98 Phil. 769; 2 Moran, Comments on the Rules of Court, 289. See section 2, Rule 41 of the Rules of Court).

To do justice in these 1978 cases, whose disposition has been scandalously delayed, Virata is hereby given an unextendible period of ten (10) days from notice of the finality of this judgment to answer the complaints in the two cases. After the petitioners have answered the counterclaim, if any, in Virata's answer, the case should be set for pre-trial and then tried. Virata's counsel can cross-examine Mrs. Hoyo-a.

If Virata does not file any answer, then the order of default should stand and Mrs. Hoyo-a can continue the

presentation of her evidence.

WHEREFORE, the petition is granted. The records of the two cases are remanded to the lower court for further proceedings. No costs.

SO ORDERED.

Makasiar, (Chairman), Concepcion, Jr., Abad Santos, Escolin, and Cuevas, JJ., concur.

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