

## THIRD DIVISION

[ G.R. No. 109493, July 02, 1999 ]

**SPOUSES SERAFIN AQUINO AND RUMELIA AQUINO,  
PETITIONERS, VS. COURT OF APPEALS, GOVERNMENT SERVICE  
INSURANCE SYSTEM, ET. AL., RESPONDENTS.**

### R E S O L U T I O N

**GONZAGA-REYES, J.:**

This is a Petition for Review on *Certiorari* under Rule 45 of the Rules of Court from the Resolution<sup>[1]</sup> of the Court of Appeals dated July 25, 1991, which dismissed the appeal of herein petitioners.

It appears that Civil Case No. 38-M-89 filed by herein petitioners against the Government Service Insurance System (GSIS) for specific performance, damages and annulment with prayer for preliminary injunction with the Regional Trial Court of Malolos, Bulacan, Branch 12 was dismissed on March 27, 1989 on the ground that the complaint failed to state a cause of action against the GSIS.<sup>[2]</sup>

The petitioners filed a notice of appeal<sup>[3]</sup> with the RTC. Their appeal was dismissed on July 25, 1991 for failure to file an appellants' brief within the reglementary period which expired on May 29, 1991 pursuant to Section 1 (f), Rule 50 of the Rules of Court.<sup>[4]</sup>

On September 1, 1992, the Court of Appeals<sup>[5]</sup> denied the motion of herein petitioners to "recall Entry of Judgment and to reinstate appeal etc., there being no showing therein of any reason to justify the failure of appellant's counsel to file appellant's brief within the reglementary period and considering that the resolution dated July 25, 1991 dismissing the appeal became final xxx"<sup>[6]</sup>.

On March 15, 1993, the Court of Appeals<sup>[7]</sup> denied the petitioner's motion for reconsideration of its September 1, 1992 Resolution on the ground that it was beyond the power of the Court to modify the dismissal since the order dismissing the appeal had become final and executory on August 19, 1991 and Entry of Judgment was issued on November 4, 1991.<sup>[8]</sup>

Hence, this petition where the petitioners assign the following errors:

**"I. IT WAS ERROR FOR THE COURT OF APPEALS NOT TO HAVE  
SERVED A COPY OF ITS RESOLUTION OF DISMISSAL UPON THE  
APPELLANT DESPITE KNOWLEDGE THAT THEIR FORMER COUNSEL  
OF RECORD HAD DIED.**

**II. IT WAS ERROR FOR THE COURT OF APPEALS TO SERVE COPIES**

**OF RESOLUTIONS UPON THE APPELLANT'S FORMER COUNSEL DE PARTE.**

**III. IT WAS ERROR FOR THE COURT OF APPEALS TO DENY APPELLANT'S MOTION FOR RECONSIDERATION ON THESE GROUNDS.**

**IV. IT WAS ERROR FOR THE COURT OF APPEALS TO DENY ADMISSION OF THE BRIEF FOR THE APPELLANT WHICH WAS ALREADY APPENDED TO THEIR MOTION FOR RECONSIDERATION.**

**V. THERE ARE COMPELLING REASONS AS ENUMERATED IN THE APPELLANTS' BRIEF FOR THE COURT OF APPEALS TO RESOLVE THE ISSUES ON THE MERITS."**<sup>[9]</sup>

The petitioners argue that they were never notified by their counsel of record, Atty. Mala, of the notice to file an appellant's brief. Atty. Mala was incapacitated to notify the petitioners of their obligation as he was in a coma when said notice was served upon him. They argue that when the Court of Appeals was notified of the death of Atty. Mala when it received the return of the assailed Resolution of July 25, 1991<sup>[10]</sup> bearing the notation "RETURN TO SENDER, REASON: Deceased 8-1-81", it should have sent resolutions, notices and other processes to the petitioners themselves for the reason that when the case was brought to the Court of Appeals, they had no counsel of record and were filing and signing the pleadings themselves. They add that although Atty. Rosalino Barican continued to be served with copies of resolutions, etc., Atty. Barican withdrew as their counsel of record while the case was still pending before the RTC of Malolos, Bulacan. The petitioners also argue that substantial justice demands that they be allowed to continue their appeal for the reason that as soon as they learned of the dismissal of their appeal, they immediately procured the services of new counsel who filed an appeal brief together with a motion for reconsideration. As the procedural lapses were attributable to the Court of Appeals and their former counsel, they should still be accorded their right to appeal. Finally, they claim that on the merits, there are compelling grounds to allow the appeal.<sup>[11]</sup>

The respondents, on the other hand, argue that Atty. Barican did not make a formal withdrawal as counsel of record of the petitioners. It is true that Atty. Mala assisted the petitioners in filing their notice of appeal but said notice was signed by Serafin Aquino himself. Moreover, Atty. Mala never entered his appearance as their counsel. In addition, the Motion for the Issuance of a Writ of Preliminary Injunction<sup>[12]</sup> filed by the petitioners was signed by the petitioner spouses and only notarized by Atty. Mala. If it was intended that he should be their counsel of record, he should have signed the motion. The respondents also claim that this petition is already *res judicata* as their appeal was dismissed and the decision became final and executory; an entry of judgment was issued and the case was remanded to the lower court for execution. Finally, the respondents maintain that the petitioners are guilty of forum shopping and contemptuous behavior as shown by the different cases filed by the petitioner against them.

In reply<sup>[13]</sup>, the petitioners reiterate that there was a failure of service of a copy of the resolution of the Court of Appeals in CA G.R. CV No. 21553 dated July 25, 1991

dismissing their appeal since it never reached their lawyer, Atty. Mala, who died on June 3, 1991; and that Atty. Barican was no longer their counsel of record<sup>[14]</sup>. They also claim that CA-G.R. No. 21533 is not *res judicata* to G.R. No. 109493 since:

1. There was no judgment on the merits in CA-G.R. No. 21533 since it was dismissed on a mere technicality.
2. There is no identity of subject matter since CA-G.R. No. 21533 sought a review of the decision of the RTC-Malolos while G.R. No. 109493 seeks a review of the dismissal of their appeal by the Court of Appeals.

Petitioners also claim that they are not guilty of forum shopping since there was no pending action when the second and subsequent cases were filed; and that it was the GSIS who initiated one of the cases, Civil Case No. 301 for unlawful detainer; and that the cases they filed involve different subject matters, which negates a finding of forum shopping.<sup>[15]</sup>

In their rejoinder<sup>[16]</sup>, respondents assert that Atty. Barican's withdrawal was never approved by the Court despite his certification that he withdrew as counsel for petitioners.

We rule that there was a proper service of the Resolution of the Court of Appeals in CA G.R. CV No. 21553 dated July 25, 1991 on the petitioners.

Section 26, Rule 138 of the Rules of Court states the proper procedure for the withdrawal of a lawyer as counsel in a case. It provides:

"Section 26 - **Change of Attorneys** - An attorney may retire at anytime from an action or special proceeding, by the written consent of his client filed in court. He may also retire at anytime from an action or special proceeding, without the consent of his client, should the court, on notice to the client and attorney, and on hearing, determine that he ought to be allowed to retire. In case of substitution, the name of the attorney newly employed shall be entered on the docket of the court in place of the former one, and the written notice of the change shall be given to the adverse party xxx."

Unless the procedure prescribed in the above mentioned section is complied with, the attorney of record is regarded as the counsel who should be served with copies of the judgments, orders and pleadings and who should be held responsible for the case.<sup>[17]</sup> Cortez vs. Court of Appeals, 83 SCRA 31 at p. 35 <sup>[1978]</sup>.<sup>17</sup> In cases of substitution of attorneys the following requisites must be complied with:

1. Written application for substitution;
2. written consent of the client; and
3. a written consent of the attorney to be substituted.

In case the consent of the attorney to be substituted cannot be obtained, there must at least be proof that notice of the motion for substitution has been served