

## SECOND DIVISION

[ G.R. No. 157867, December 15, 2009 ]

**METROPOLITAN BANK & TRUST COMPANY, PETITIONER, VS.  
HON. SALVADOR ABAD SANTOS, PRESIDING JUDGE, RTC, BR. 65,  
MAKATI CITY AND MANFRED JACOB DE KONING, RESPONDENTS.**

### D E C I S I O N

**BRION, J.:**

This petition for review on *certiorari*,<sup>[1]</sup> seeks to reverse and set aside the decision dated November 21, 2002 and subsequent ruling on motion for reconsideration of the Court of Appeals (CA) in CA-G.R. SP No. 62325.<sup>[2]</sup> The CA decision affirmed the order of the Regional Trial Court (RTC) of Makati City, Branch 65,<sup>[3]</sup> dismissing the petition filed by Metropolitan Bank & Trust Company (*Metrobank*) for the issuance of a writ of possession of a condominium unit it had previously foreclosed. This dismissal was based on the finding that the petition contained a false certification against forum shopping.

### FACTUAL ANTECEDENTS

Respondent Manfred Jacob De Koning (*De Koning*) obtained a loan from Metrobank in the principal amount of Two Million, Nineteen Thousand Pesos (P2,019,000.00), evidenced by promissory note No. TLS/97-039/382599 dated July 24, 1997. To secure the payment of this loan, De Koning executed a real estate mortgage (*REM*) in favor of Metrobank dated July 22, 1996 over a condominium unit and all its improvements. The unit is located at Unit 1703 Cityland 10 Tower 1, H.V. Dela Costa Street, Makati City, and is covered by Condominium Certificate of Title No. 10681.

When De Koning failed to pay his loan despite demand, Metrobank instituted extrajudicial foreclosure proceedings against the REM. Metrobank was the highest bidder at the public auction of the condominium unit held on November 24, 1998 and a Certificate of Sale was issued in the bank's favor. Metrobank duly registered this Certificate of Sale with the Registry of Deeds for Makati City on January 18, 2000.

The redemption period lapsed without De Koning redeeming the property. Thus, Metrobank demanded that he turn over possession of the condominium unit. When De Koning refused, Metrobank filed on July 28, 2000 with the RTC Makati, Branch 65, an *ex parte* petition for a writ of possession over the foreclosed property, pursuant to Act No. 3135, as amended.

On August 1, 2000, the lower court issued an order setting the *ex parte* hearing of Metrobank's petition and directing that a copy of the order be given to De Koning to inform him of the existence of the proceedings.

During the scheduled *ex parte* hearing on August 18, 2000, De Koning's counsel appeared and manifested that he filed a motion to dismiss on the ground that Metrobank's petition violated Section 5, Rule 7 of the Rules of Court (*Rules*)<sup>[4]</sup> which requires the attachment of a certification against forum shopping to a complaint or other initiatory pleading. According to De Koning, Metrobank's petition for the issuance of a writ of possession involved the same parties, the same issues and the same subject matter as the case he had filed on October 30, 1998 with the RTC of Makati,<sup>[5]</sup> to question Metrobank's right to foreclose the mortgage. De Koning also had a pending petition for *certiorari* with the CA,<sup>[6]</sup> which arose from the RTC case he filed. When Metrobank failed to disclose the existence of these two pending cases in the certification attached to its petition, it failed to comply with the mandatory requirements of the Rules so that its petition should be dismissed.

The RTC agreed with De Koning and dismissed Metrobank's petition in its September 18, 2000 order on the ground De Koning cited, i.e., for having a false certification of non-forum shopping. The lower court denied Metrobank's motion for reconsideration. Metrobank thus elevated the matter to the CA on a petition for *certiorari* on January 5, 2001.

The CA affirmed the dismissal of Metrobank's petition. It explained that Section 5, Rule 7 of the Rules is not limited to actions, but covers any "*initiatary pleading*" that asserts a claim for relief. Since Metrobank's petition for writ of possession is an initiatory pleading, it must perforce be covered by this rule. Thus, Metrobank's failure to disclose in the verification and certification the existence of the two cases filed by De Koning, involving the issue of Metrobank's right to foreclose on the property, rendered the petition dismissible.

The CA denied Metrobank's subsequent motion for reconsideration. Hence, this petition for review on *certiorari*, raising the following issues:

## **ISSUES**

### **I.**

THE COURT OF APPEALS AND THE LOWER COURT, CONTRARY TO THE APPLICABLE DECISIONS OF THIS HONORABLE COURT, RULED THAT THE EX PARTE PETITION FOR THE ISSUANCE OF A WRIT OF POSSESSION IS AN INITIATORY PLEADING ASSERTING A CLAIM.

### **II.**

THE COURT OF APPEALS, IN UPHOLDING THE RULING OF THE LOWER COURT, DELIBERATELY IGNORED THE FACT THAT THE PETITION FOR THE ISSUANCE OF A WRIT OF POSSESSION IS EX PARTE IN NATURE.

### **III.**

THE COURT OF APPEALS COMMITTED A MISAPPREHENSION OF FACTS.

Metrobank claims that an *ex parte* petition for the issuance of a writ of possession is not an initiatory pleading asserting a claim. Rather, it is a mere incident in the transfer of title over the real property which was acquired by Metrobank through an extrajudicial foreclosure sale, in accordance with Section 7 of Act No. 3135, as

amended. Thus, the petition is not covered by Section 5, Rule 7 of the Rules and a certification against forum shopping is not required.

Metrobank further argues that considering the *ex parte* nature of the proceedings, De Koning was not even entitled to be notified of the resulting proceedings, and the lower court and the CA should have disregarded De Koning's motion to dismiss.

Lastly, Metrobank posits that the CA misapprehended the facts of the case when it affirmed the lower court's finding that Metrobank's petition and the two cases filed by De Koning involved the same parties. There could be no identity of parties in these cases for the simple reason that, unlike the two cases filed by De Koning, Metrobank's petition is a proceeding *ex parte* which did not involve De Koning as a party. Nor could there be an identity in issues or subject matter since the only issue involved in Metrobank's petition is its entitlement to possess the property foreclosed, whereas De Koning's civil case involved the validity of the terms and conditions of the loan documents. Furthermore, the extra-judicial foreclosure of the mortgaged property and De Koning's petition for *certiorari* with the CA involved the issue of whether the presiding judge in the civil case acted with grave abuse of discretion when he denied De Koning's motion to set for hearing the application for preliminary injunction.

De Koning, in opposition, maintains that Metrobank's petition was fatally defective for violating the strict requirements of Section 5, Rule 7 of the Rules. As noted by both the lower court and the CA's ruling that Metrobank failed to disclose the two pending cases he previously filed before the RTC and the CA, which both involved the bank's right to foreclose and, ultimately, the bank's right to a writ of possession by virtue of foreclosure.

De Koning also asserts that Metrobank should have appealed the lower court's decision and not filed a special civil action for *certiorari* since the order being questioned is one of dismissal and not an interlocutory order. According to De Koning, since the filing of a petition for *certiorari* cannot be a substitute for a lost appeal and does not stop the running of the period of appeal, the questioned RTC order has now become final and executory and the present petition is moot and academic.

## **THE COURT'S RULING**

**We find Metrobank's petition meritorious.**

### ***Procedural Issue***

Section 1, Rule 65 of the Rules, clearly provides that a petition for *certiorari* is available only when "*there is no appeal, or any plain, speedy and adequate remedy in the ordinary course of law.*" A petition for *certiorari* cannot coexist with an appeal or any other adequate remedy. The existence and the availability of the right to appeal are antithetical to the avilment of the special civil action for *certiorari*. As we have long held, these two remedies are "*mutually exclusive.*"<sup>[7]</sup>

Admittedly, Metrobank's petition for *certiorari* before the CA assails the dismissal order of the RTC and, under normal circumstances, Metrobank should have filed an appeal.

However, where the exigencies of the case are such that the ordinary methods of appeal may not prove adequate -- either in point of promptness or completeness, so that a partial if not a total failure of justice could result - a writ of *certiorari* may still be issued.<sup>[8]</sup> Other exceptions, Justice Florenz D. Regalado listed are as follows:

(1) **where the appeal does not constitute a speedy and adequate remedy** (*Salvadares vs. Pajarillo, et al.*, 78 Phil. 77), as where 33 appeals were involved from orders issued in a single proceeding which will inevitably result in a proliferation of more appeals (*PCIB vs. Escolin, et al.*, L-27860 and 27896, Mar. 29, 1974); (2) **where the orders were also issued either in excess of or without jurisdiction** (*Aguilar vs. Tan*, L-23600, Jun 30, 1970, Cf. *Bautista, et al. vs. Sarmiento, et al.*, L-45137, Sept. 23 1985); (3) for certain special consideration, as public welfare or public policy (See *Jose vs. Zulueta, et al.* -16598, May 31, 1961 and the cases cited therein); (4) where in criminal actions, the court rejects rebuttal evidence for the prosecution as, in case of acquittal, there could be no remedy (*People vs. Abalos*, L029039, Nov. 28, 1968); (5) **where the order is a patent nullity** (*Marcelo vs. De Guzman, et al.*, L-29077, June 29, 1982); and (6) where the decision in the *certiorari* case will avoid future litigations (*St. Peter Memorial Park, Inc. vs. Campos, et al.*, L-38280, Mar. 21, 1975).<sup>[9]</sup> [Emphasis supplied.]

Grave abuse of discretion may arise when a lower court or tribunal violates or contravenes the Constitution, the law or existing jurisprudence.<sup>[10]</sup> As will be discussed in greater detail below, the RTC decision dismissing Metrobank's petition was patently erroneous and clearly contravened existing jurisprudence. For this reason, we cannot fault Metrobank for resorting to the filing of a petition for *certiorari* with the CA to remedy a patent legal error in the hope of obtaining a speedy and adequate remedy.

### ***Nature of a petition for a writ of possession***

A writ of possession is defined as "*a writ of execution employed to enforce a judgment to recover the possession of land. It commands the sheriff to enter the land and give its possession to the person entitled under the judgment.*"<sup>[11]</sup>

There are three instances when a writ of possession may be issued: (a) in land registration proceedings under Section 17 of Act No. 496; (b) in judicial foreclosure, provided the debtor is in possession of the mortgaged realty and no third person, not a party to the foreclosure suit, had intervened; and (c) in extrajudicial foreclosure of a real estate mortgage under Section 7 of Act No. 3135, as amended by Act No. 4118.<sup>[12]</sup> The present case falls under the third instance.

The procedure for obtaining a writ of possession in extrajudicial foreclosure cases is found in Section 7 of Act No. 3135, as amended by Act No. 4118, which states:

Section 7. In any sale made under the provisions of this Act, the purchaser may petition the Court of First Instance of the province or