43 Phil. 494

[G. R. No. 17857. June 12, 1922]

IN RE WILL OF JOSEFA ZALAMEA Y ABELLA, DECEASED. PEDRO UNSON, PETITIONER AND APPELLEE, VS. ANTONIO ABELLA ET AL., OPPONENTS AND APPELLANTS.

D E C I S I O N

VILLAMOR, J.:

On July 19, 1918, Doña Josefa Zalamea y Abella, single, 60 years old, who was residing in the municipality of Pagsanjan, Province of Laguna, executed her last will and testament with an attached inventory of her properties, Exhibits A and A-1, in the presence of three witnesses, who signed with her all the pages of said documents. The testatrix died on the 6th of January, 1921, and, as the record shows, the executor appointed in the will, Pedro Unson, filed in the Court of First Instance of Laguna on the 19th of January of the same year an application for the probate of the will and the issuance of the proper letters of administration in his favor.

To said application an opposition was presented by Antonio Abella, Ignacia Abella, Avicencia Abella, and Santiago Vito, alleging that the supposed will of the deceased Zalamea was not executed in conformity with the provisions of the law, inasmuch as it was not paged correlatively in letters, nor was there any attestation clause in it, nor was it signed by the testatrix and the witnesses in the presence of each other.

Trial having been held, the judge a quo overruled the opposition of the contestants, and ordered the probate of the will, Exhibit A, and the inventory, Exhibit A-1, holding that both documents contained the true and last will of the deceased Josef a Zalamea.

From the judgment of the court below, the contestants have appealed, and in their brief they assign three errors, which, in their opinion, justify the reversal of the judgment appealed from.

The first error assigned by the appellants as committed by the court below is its finding to the effect that Exhibit A, said to be the will of the deceased Josefa Zalamea, was executed with all the solemnities required by the law.

The arguments advanced by appellants' counsel in support of the first assignment of error tend to impeach the credibility of the witnesses for the proponent, specially that of Eugenio Zalamea. We have made a careful examination of the evidence, but have not found anything that would justify us in disturbing the finding of the court *a quo*. The attesting witnesses, Eugenio Zalamea and Gonzalo Abaya, clearly testify that together with the other witness to the will, Pedro de Jesus, they did sign each and every page of the will and of the inventory in the presence of each other and of the testatrix, as the latter did likewise sign all the pages of the will and of the inventory in their presence.

In their brief the appellants intimate that one of the pages of the will was not signed by the testatrix, nor by the witnesses on the day of the execution of the will, that is, on the 19th of July, 1918, basing their contention on the testimony of Aurelio Palileo, who says that on one occasion Gonzalo Abaya told him that one of the pages of the will had not been signed by the witnesses, nor by the testatrix on the day of its execution. Palileo's testimony is entirely contradicted by Gonzalo Abaya not only in the direct, but in the rebuttal, evidence as well. To our mind, Palileo's testimony cannot prevail over that of the attesting witnesses, Gonzalo Abaya and Eugenio Zalamea. The appellants impeach the credibility of Eugenio Zalamea, for having made a sworn declaration before the justice of the peace of Santa Cruz, Laguna, before the trial of this case, to the effect that he was really one of the witnesses to the will in question, which fact was corroborated by himself at the trial. The appellants take Zalamea's testimony in connection with the dismissal of a criminal case against a nephew of his, in whose success he was interested, and infer from this fact the partiality of his testimony. We deem this allegation of little importance to impeach the credibility of the witness Zalamea, especially because his testimony is corroborated by the other attesting witness, Gonzalo Abaya, and by attorney Luis Abaya, who had prepared the testament at the instance of the testatrix. The foregoing is sufficient for us to conclude that the first assignment of error made by the appellants is groundless.

The appellants contend that the court below erred in admitting the will to probate notwithstanding the omission of the proponent to produce one of the attesting witnesses.

At the trial of this case the attorneys for the proponent stated to the court that they had necessarily to omit the testimony of Pedro de Jesus, one of the persons who appear to have

witnessed the execution of the will, for there were reasonable grounds to believe that said witness was openly hostile to the proponent, inasmuch as since the announcement of the trial of the petition for the probate of the will, said witness has been in frequent communication with the contestants and their attorney, and has refused to hold any conference with the attorneys for the proponent. In reply to this, the attorney for the contestants, said to the court, "without discussing for the present whether or not in view of those facts (the facts mentioned by the attorneys for the petitioner), in the hypothesis that the same are proven, they are relieved from producing that witness, for while it is a matter not decided, it is a recognized rule that the fact that a witness is hostile does not justify a party to omit his testimony; without discussing this, I say, I move that said statement be stricken out, and if the proponent wants these facts to stand in the record, let him prove them." The court *a quo* ruled, saying, "there is no need."

To this ruling of the court, the attorney for the appellants did not take any exception.

In the case of Avera vs. Garcia and Rodriguez (42 Phil., 145), recently decided by this court, in deciding the question whether a will can be admitted to probate, where opposition is made, upon the proof of a single attesting witness, without producing or accounting for the absence of the other two, it was said; "while it is undoutedly true that an uncontested will may be proved by the testimony of only one of the three attesting witnesses, nevertheless in Cabang vs. Delfinado (34 Phil., 291), this court declared after an elaborate examination of the American and English authorities that when a contest is instituted, all of the attesting witnesses must be examined, if alive and within reach of the process of the court.

> "In the present case no explanation was made at the trial as to why all three of the attesting witnesses were not produced, but the probable reason is found in the fact that, although the petition for the probate of this will had been pending from December 21, 1917, until the date set for the hearing, which was April 5,1919, no formal contest was entered until the very day set for the hearing; and it is probable that the attorney for the proponent, believing in good faith that probate would not be contested, repaired to the court with only one of the three attesting witnesses at hand, and upon finding that the will was contested, incautiously permitted the case to go to proof without asking for a postponement of the trial in order that he might produce all the attesting witnesses.
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> "Although this circumstance may explain why the three witnesses were not

produced, it does not in itself supply any basis for changing the rule expounded in the case above referred to; and were it not for a fact now to be mentioned, this court would probably be compelled to reverse this case on the ground that the execution of the will had not been proved by a sufficient number of attesting witnesses.

"It appears, however, that this point was not raised by the appellant in the lower court either upon the submission of the cause for determination in that court or upon the occasion of the filing of the motion for a new trial. Accordingly it is insisted for the appellee that this question cannot now be raised for the first time in this court. We believe this point is well taken, and the first assignment of error must be declared not to be well taken. This exact question has been decided by the Supreme Court of California adversely to the contention of the appellant, and we see no reason why the same rule of practice should not be observed by us. (Estate of McCarty, 58 Cal., 335, 337.)

"There are at least two reasons why the appellate tribunals are disinclined to permit certain questions to be raised for the first time in the second instance. In the first place it eliminates the judicial criterion of the Court of First Instance upon the point there presented and makes the appellate court in effect a court of first instance with reference to that point, unless the case is remanded for a new trial. In the second place, it permits, if it does not encourage, attorneys to trifle with the administration of justice by concealing from the trial court and from their opponent the actual point upon which reliance is placed, while they are engaged in other discussions more simulated than real. These considerations are, we think, decisive.

"In ruling upon the point above presented we do not wish to be understood as laying down any hard and fast rule that would prove an embarrassment to this court in the administration of justice in the future. In one way or another we are constantly here considering aspects of cases and applying doctrines which have escaped the attention of all persons concerned in the litigation below; and this is necessary if this court is to contribute the part due from it in the correct decision of the cases brought before it. What we mean to declare is that when we believe that substantial justice has been done in the Court of First Instance, and the point relied on for reversal in this court appears to be one which ought properly to have been presented in that court, we will in the exercise of a sound discretion

> ignore such question upon appeal; and this is the more proper when the question relates to a defect which might have been cured in the Court of First Instance if attention had been called to it there. In the present case, if the appellant had raised this question in the lower court, either at the hearing or upon a motion for a new trial, that court would have had the power, and it would have been its duty, considering the tardy institution of the contest, to have granted a new trial in order that all the witnesses to the will might be brought into court. But instead of thus calling the error to the attention of the court and his adversary, the point is first raised by the appellant in this court. We hold that this is too late.
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> "Properly understood, the case of Cabang vs. Delfinado, *supra*, contains nothing inconsistent with the ruling we now make, for it appears from the opinion in that case that the proponent of the will had obtained an order for a republication and new trial for the avowed purpose of presenting the two additional attesting witnesses who had not been previously examined, but nevertheless subsequently failed without any apparent reason to take their testimony. Both parties in that case were therefore fully apprised that the question of the number of witnesses necessary to prove the will was in issue in the lower court."

In the case at bar, we do not think this question properly to have been raised at the trial, but in the memorandum submitted by the attorney for the appellants to the trial court, he contended that the will could not be admitted to probate because one of the witnesses to the will was not produced, and that the voluntary non-production of this witness raises a presumption against the pretension of the proponent. The trial court found that the evidence introduced by the proponent, consisting of the testimony of the two attesting witnesses and the other witness who was present at the execution, and had charge of the preparation of the will and the inventory, Exhibits A and A-1, was sufficient. As announced in Cabang vs. Delfinado, *supra*, the general rule is that, where opposition is made to the probate of a will, the attesting witnesses must be produced. But there are exceptions to this rule, for instance, when a witness is dead, or cannot be served with process of the court, or his reputation for truth has been questioned or he appears hostile to the cause of the proponent. In such cases, the will may be admitted to probate without the testimony of said witness, if, upon the other proofs adduced in the case, the court is satisfied that the will has been duly executed. Wherefore, we find that the non-production of the attesting witness, Pedro de Jesus, as accounted for by the attorney for the proponent at the trial, does not render void the decree of the court *a quo*, allowing the probate.

But supposing that said witness, when cited, had testified adversely to the application, this would not by itself have change the result reached by the court *a quo*, for section 632 of the Code of Civil Procedure provides that a will can be admitted to probate, notwithstanding that one or more witnesses do not remember having attested it, provided the court is satisfied upon the evidence adduced that the will has been executed and signed in the manner prescribed by the law.

The last error assigned by the appellants is made to consist in the probate of the inventory, Exhibit A-1, despite the fact that this exhibit has no attestation clause in it, and its paging is made in Arabic numerals and not in letters.

In the third paragraph of the will, reference is made to the inventory, Exhibit A-1, and at the bottom of said will, the testatrix Josef a Zalamea says:

> "In witness whereof, I sign this will composed of ten folios including the page containing the signatures and the attestation of the witnesses; I have likewise signed the inventory attached to this will composed of ten folios in the presence of Messrs. Gonzalo Abaya, Eugenio Zalamea, Pedro de Jesus, in this municipality of Pagsanjan, Laguna, Philippine Islands, this 19th of July, 1918."

And the attestation clause is as follows:

> "The foregoing will composed of ten folios including this one whereunto we have affixed our signatures, as well as the inventory of the properties of Doña Josefa Zalamea y Abella, was read to Doña Josef a Zalamea y Abella, and the latter affixed her name to the last, and each and every page of this will and inventory composed of ten folios in our presence; and she declared this to be her last will and testament and at her request we have affixed hereunto our respective signatures in her presence and in the presence of each other as witnesses to the will and the inventory this 19th of July, 1918, at Pagsanjan, Laguna, P. I.

(Sgd.) "GONZALO ABAYA,
"EUGENIO ZALAMEA,

In view of the fact that the inventory is referred to in the will as an integral part of it, we find that the foregoing attestation clause is in compliance with section 1 of Act No. 2645, which requires this solemnity for the validity of a will, and makes unnecessary any other attestation clause at the end of the inventory.

As to the paging of the will in Arabic numerals, instead of in letters, we adhere to the doctrine announced in the case of Aldaba vs. Roque (p. 378, *ante*), recently decided by this court. In that case the validity of the will was assailed on the ground that its folios were paged with the letters A, B, C, etc., instead of with the betters "one," "two," "three," etc. It was held that this way of numbering the pages of a will is in compliance with the spirit of the law, inasmuch as either one of these methods indicates the correlation of the pages and serves to prevent the abstraction of any of them. In the course of the decision, we said: "It might be said that the object of the law in requiring that the, paging be made in letters ,is to make falsification more difficult, but it should be noted that since all the pages of the testament are signed at the margin by the testatrix and the witnesses, the difficulty of forging the signatures in either case remains the same. In other words the more or less degree of facility to imitate the writing of the letters A, B, C, etc., does not make for the easiness to forge the signatures. And as in the present case there exists the guaranty of the authenticity of the testament, consisting in the signatures on the left margins of the testament and the paging thereof as declared in the attestation clause, the holding of this court in Abangan vs. Abangan (40 Phil., 476), might as well be repeated:

> " 'The object of the solemnities surrounding the execution of wills is to close the door against bad faith and fraud, to avoid substitution of wills and testaments and to guaranty their truth and authenticity. Therefore the laws on this subject should be interpreted in such a way as to attain these primordial ends. But, on the other hand, also one must not lose sight of the fact that it is not the object of the law to restrain and curtail the exercise of the right to make a will. So when an interpretation already given assures such ends, any other interpretation whatsoever, that adds nothing but demands more requisites entirely unnecessary, useless, and frustrative of the testator's last will, must be disregarded.'
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> "In that case the testament was written on one page, and the attestation clause on another. Neither one of these pages was numbered in any way, and it was

held: 'In a will consisting of two sheets the first of which contains all the testamentary dispositions and is signed at the bottom by the testator and three witnesses and the second contains only the attestation clause and is signed also at the bottom by the three witnesses, it is not necessary that both sheets be further signed on their margins by the testator and the witnesses, or be paged.'

"This means that, according to the particular case, the omission of paging does not necessarily render the testament invalid.

"The law provides that the numbering of the pages should be in letters placed on the upper part of the sheet, but if the paging should be placed in the lower part, would the testament be void for this sole reason? We believe not. The law also provides that the testator and the witnesses must sign the left margin of each of the sheets of the testament; but if they should sign on the right margin, would this fact also annul the testament? Evidently not. This court has already held in Avera vs. Garcia and Rodriguez (42 Phil., 145) :

" 'It is true that the statute says that the testator and the instrumental witnesses shall sign their names on the left margin of each and every page; and it is undeniable that the general doctrine is to the effect that all statutory requirements as to the execution of wills must be fully complied with. The same doctrine is also deducible from cases heretofore decided by this court.'

" 'Still some details at times creep into legislative enactments which are so trivial that it would be absurd to suppose that the Legislature could have attached any decisive importance to them. The provision to the effect that the signatures of the testator and witnesses shall be written on the left margin of each page-rather than on the right margin-seems to be of this character. So far as concerns the authentication of the will, and of every part thereof, it can make no possible difference whether the names appear on the left or on the right margin, provided they are on one or the other. In Caraig vs. Tatlonghari (R. G. No. 12558, decided March 23, 1918, not reported), this court declared a will void which was totally lacking in the signatures required to be written on its several pages; and in the case of *Re* Estate of Saguinsin (41 Phil., 875), a will was likewise declared void which contained the necessary signatures on the margin of each leaf (folio), but not in the margin of each page containing written matter.'

> "We do not desire to intimate that the numbering in letters is a requisite of no importance. But since its principal object is to give the correlation of the pages, we hold that this object may be attained by writing one, two, three, etc., as well as by writing A, B, C, etc."

We see no reason why the same rule should not be applied where the paging is in Arabic numerals, instead of in letters, as in the inventory in question. So that, adhering to the view taken by this court in the case of Abangan vs. Abangan, and followed in Aldaba vs. Roque, with regard to the appreciation of the solemnities of a will, we find that the judgment appealed from should be, as is hereby, affirmed with the costs against the appellants. So ordered.

Araullo, C. J., Malcolm, Avanceña, Ostrand, Johns, and *Romualdez, JJ,* concur.

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