

**MANUEL I. GONZALES, PETITIONER, VS. COURT OF APPEALS,
AMADEO GONZALES AND DELFINA CARIÑO, RESPONDENTS.***G. R. No. L-11282. November 29, 1958*

Ponente: LABRADOR, J.

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The record shows that petitioner herein Manuel I. Gonzales was, around the years 1938 to 1943, administrator of the estate of his deceased father Alejandro Gonzales y Tolentino. On November 5, 1943, the widow and the other heirs of the deceased fixed, by amicable settlement, the fees and commissions as administrator of Gonzales at P11,000. The amicable settlement was approved by the court on May 21, 1948, and on July 28, 1949 Gonzales secured a writ of execution against the other parties to said agreement for the satisfaction of the amount of his fees and commissions as above indicated. On September 23, 1949, he secured an alias writ of execution, by virtue of which the deputy provincial sheriff of Pangasinan levied upon a parcel of land containing an area of 1,374,148 square meters covered by Transfer Certificate No. 1234 of the Register of Deeds of Pangasinan. The participations therein of Pedro Gonzales, Amadeo Gonzales, Delfina Cariño, Loreto Esguerra, Rodolfo Penson and Alfonso Penson were levied upon and sold at public auction on June 17, 1950 for P2,307.46 to petitioner himself who was the highest bidder.

The present action was instituted on October 7, 1951 by Amadeo Gonzales, who claims that he did not participate in the compromise agreement fixing the fees and commissions of the administrator, and now asks that the sale be set aside as to his share. He alleges also that the levy on execution against his share was made fraudulently and through misrepresentation because petitioner did not notify the plaintiff Amadeo Gonzales of his motions leading finally to the issuance of the alias writ of execution; that the sale of plaintiff's share in the property is null and void because the order of execution was irregularly issued, the procedure of payment agreed upon in the amicable settlement and that prescribed by Rules 89 and 90 of the Rules of Court not having been followed. Upon the filing of the petition of Amadeo Gonzales, counsel for the petitioner Manuel I. Gonzales filed an objection thereto and a petition to confirm the sale of the property already above indicated.

A similar petition was filed by Delfina Carino on June 26, 1953. On June 30, 1953, the petitioner Manuel I. Gonzales filed a motion to strike out the petition of Delfina Cariño.

On the validity of the levy and sale on execution of the shares of Amadeo Gonzales and Delfina Carino in the land above described, the court a quo held that the amicable settlement fixing the fees of Manuel I. Gonzales at P11,000 and its approval by the court in its order of October 28, 1948 were in order, but that the levy, notice of sale and sale at public auction of the rights and interests of Amadeo Gonzales and Delfina Cariño were improperly made and, therefore, the sale to petitioner Manuel I. Gonzales of said shares of Amadeo Gonzales and Delfina Cariño over the property is null and void. Against this order this appeal was made to the Court of Appeals.

The first three assignments of error placed in the brief of petitioner in the Court of Appeals are as follows:

"The lower court erred in finding that petitioner-appellee Amadeo Gonzales had not actually received his share

in the parcel of land known as Hacienda Evangelista.

The lower court erred in finding that the delivery made by oppositor-appellant to the eight legatees, including appellee Amadeo Gonzales, thru their guardian Alejandro Gonzales, Jr., was defective insofar as appellee is concerned.

The lower court erred in declaring the levy, notice of sale and sale at public auction of the rights, interest or participations of appellee Amadeo Gonzales over the property have under dispute were improperly made." (p. 10, Brief for the oppositor-appellant in CA- G. R. No. 15433-R).

The Court of Appeals refused to consider these three assignments of error, holding that said assignments involve purely questions of fact, and as no transcript of the hearing and documents mentioned in appellant's brief are found among the records forwarded to said court in connection with the appeal, for which reason the assertions appearing in the brief cannot be verified in said court, the findings of fact made by the trial court in relation to the errors may be considered as the true facts of the case. It is claimed in the petition before us (filed by Manuel I. Gonzales), that this ruling of the Court of Appeals upon his three assignments of error, refusing to consider the questions of fact involved and taking the findings of fact made by the trial court to be correct, is erroneous, since the present Rules of Court, which became effective on July 1, 1940, provide that it is the duty of the clerk of court to transmit all the evidence taken upon the hearing in accordance with Section 10 of Rule 48. This contention appears to be in part meritorious. As stated by Mr. Chief Justice Moran in his comments on the Rules of Court, it is now the duty of the clerk of the trial court to forward not only the record on appeal (Sec. 3, Rule 48), but also the evidence, as a motion for new trial is no longer an antecedent to an appeal on question of fact and, furthermore, the appellate jurisdiction of the Court of Appeals is only on questions of fact (I Moran, Comments on the Rules of Court, 1950 ed. pp. 961-962). We have examined the records in the Court of Appeals and we found out that petitioner Gonzales did not ask for the transmission of the evidence taken in the hearing (ROA p. 53), although the court, in its order approving the record on appeal, directed the clerk to forward not only the record on appeal but also the oral and documentary evidence to the Court of Appeals (ROA p. 39). We also find that upon receipt by the clerk of the Court of Appeals of the printed record on appeal, he notified the petitioner that all the evidence, oral and documentary, presented in the case has already been attached to the record (Notice dated August 13, 1955), notwithstanding the fact that such evidence does not appear attached to the record.

While the petitioner had the right to expect that the evidence, oral and documentary, had already been transmitted to the Court of Appeals with the record on appeal as provided for by the Rules, the evidence does not appear in fact to have been transmitted at all to the Court of Appeals. On the other hand, it also appears that counsel for the appellant never demanded from the Court of Appeals for an order requiring the Clerk of the Court below to forward the evidence taken at the hearing. As we held in the case of Buenaventura vs. Chavez, 69 Phil., 86, even though it is the duty of the clerk of the trial court to forward the evidence together with the record on appeal, this does not discharge the appellant or his counsel from requiring the clerk of the court to comply with his duty. We do not now decide, however, the effect of the failure of the clerk of court to forward the evidence, or the neglect of the counsel for appellant to require the said clerk to forward the evidence. We prefer to base our decision on another point.

It appears from the record of the Court of Appeals that when counsel for the appellant received the decision of the Court of Appeals, the latter expressly refused to consider the first three assignments of error because of the absence of the transcript of the hearing and the documentary evidence submitted thereat. In spite of this ruling counsel for the appellant took no steps to remedy the absence of the evidence taken in the court below; he did not file a timely motion for reconsideration of the decision, and pray for an opportunity to have the missing evidence forwarded to it from the clerk of the trial court. It was incumbent upon appellant to call the attention of the Court

of Appeals that the evidence was missing because the clerk of the trial court had failed to comply with his obligation. Having failed to follow this remedy in the Court of Appeals and secure therefrom a relief from the failure of the clerk of court and of himself to have the evidence forwarded to the Court of Appeals, it is now too late for him to secure a reversal of the judgment of the Court of Appeals in this Court, on the above ground. Were we to grant him the relief prayed for, we would be violating the rule that no error is to be considered by us unless the same has previously been raised in the court below.

The second question involves the correctness of the ruling of the Court of Appeals that the levy and sale on execution of the interests in the property of the respondents Amadeo Gonzales and Delfina Cariño fail to comply with Section 6 of Rule 89 of the Rules of Court. It is argued on behalf of the petitioner that the shares of the property received by the heirs and legatees could be levied upon by a writ of execution, in accordance with the express order of the court on August 23, 1948 (pp: 29-30, ROA). Counsel further argues that the only vital issue is one of fact, i.e., whether Amadeo Gonzales, as a legatee, had actually or constructively received his share in Hacienda Evangelista. (p. 29, Brief for Appellant). We fully agree with the above contentions of the petitioner, namely, that there has been an order of the court authorizing the execution against property delivered to the heirs, and that the issue of fact determinative of the case is whether or not respondents Amadeo Gonzales and Delfina Cariño had actually received their shares in the property levied upon and sold at public auction by the sheriff. However, the trial court found, as a fact, that Amadeo Gonzales and Delfina Cariño never received their shares in that property. The trial court says in its decisions:

"* * *. But the levy, notice of sale, and sale at public auction made by the Sheriff affecting the rights, interest or participations of the legatees Amadeo Gonzales and Delfina Cariño over the property covered by Transfer Certificate of Title No. 1234 of the Register of Deeds of Pangasinan were not in order for such rights, interests or participations appear not to have been received by said legatees * * *."

The decision of the Court of Appeals approving the validity of the writ of execution is based on the findings of fact made by the trial court, that the legatees Amadeo Gonzales and Delfina Cariño have not actually received their shares, rights and interests in the property levied upon and sold at public auction (Dec. pp: 8-9 of Annex to Petitioner's Brief). Its citation of Section 6 of Rule 89 is only an additional reason or ground in sustaining the invalidity of the levy and sale. If any error has been committed in citing the above rule as an additional cause or reason, the same is only an error without prejudice.

The third assignment of error refers to the lack of jurisdiction of the trial court over the petitions of Amadeo Gonzales and Delfina Cariño, i.e., for annulment of the levy and sale on execution. It is true that the Court of Appeals had not passed upon this question of jurisdiction. The petitioner should have, therefore, called the attention of the Court of Appeals to the absence of a definite ruling on this assignment of error. As this is a matter of jurisdiction over the subject matter, which may be raised at any stage of proceedings, we are, therefore, forced to pass upon the same. The levy on execution was issued in pursuance of an order of the probate court dated August 23, 1948. While the action may be filed in any other court of competent jurisdiction, this does not mean that it may not be brought before the probate court itself that issued the order in compliance with which the writ was issued, especially since it directly involves the question of whether or not the sheriff had complied with its order (that of the probate court).

The judgment is hereby affirmed, with costs against petitioner.

Paras, C. J., Bengzon, Padilla, Montemayor, Bautista Angelo, Concepcion, Reyes, J. B. L., and Endencia, JJ., concur.

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