

ROSE BUSH MALIG AND JOE, THOMAS, AND JOHN ALL SURNAMED BUSH, REPRESENTED IN THIS SUIT BY THEIR ATTORNEY-IN-FACT, ROSE BUSH MALIG, PLAINTIFFS-APPELLANTS, VS. MARIA SANTOS BUSH, D...*G.R. No. L-22761. May 31, 1969*

Ponente: MAKALINTAL, J.

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This is an appeal by the plaintiffs from two orders of the Court of First Instance of Manila in Civil Case No. 51639, the first dismissing the complaint and the second denying the motion to reconsider the order of dismissal.

On September 19, 1962 the plaintiffs filed the complaint, alleging that they were the acknowledged natural children and the only heirs in the direct line of the deceased John T. Bush, having been born of the common-law relationship of their father with Apolonia Perez from 1923 up to August, 1941; that said John T. Bush and Apolonia Perez, during the conception of the plaintiffs, were not suffering from any disability to marry each other; that they lived with their alleged father during his lifetime and were considered and treated by him as his acknowledged natural children; that said John T. Bush, at the time of his death, left several real and personal properties; that the defendant, by falsely alleging that she was the legal wife of the deceased, was able to secure her appointment as administratrix of the estate of the deceased in Testate Proceedings No. 29932 of the Court of First Instance of Manila; that she submitted to the court for approval a project of partition, purporting to show that the deceased left a will whereby he bequeathed his estate to three persons, namely: Maria Santos Bush, Anita S. Bush and Anna Berger; that the defendant then knew that the plaintiffs were the acknowledged natural children of the deceased; and that they discovered the fraud and misrepresentation perpetrated by the defendant only in July, 1962. They prayed that the project of partition be annulled; that the defendant be ordered to submit a complete inventory and accounting of all the properties left by the deceased and another project of partition adjudicating to the plaintiffs their legal participation in the said estate and/or in the event that the defendant had disposed of all or part of the estate, that she be ordered to pay them the market value thereof; and that the defendant be ordered to pay for the value of the fruits received, damages and attorney's fees.

The defendant moved to dismiss, alleging lack of cause of action, res judicata and statute of limitations. The plaintiffs opposed and the defendant filed a reply to the opposition. On January 10, 1963 the lower court denied the motion, "it appearing that the grounds upon which said motion is based are not indubitable." In time, the defendant filed her answer specifically denying all the material averments of the complaint and invoking laches, res judicata and statute of limitations as affirmative defenses.

After the issues were joined the case was set for hearing, but on the date thereof the hearing was postponed upon the defendant's manifestation that she would file a written motion to dismiss. The motion, when filed, challenged the jurisdiction of the court, stating that since the action was one to annul a project of partition duly approved by the probate court it was the court alone which could take cognizance of the case, citing Rule 75, Section 1, of the

Rules of Court. On October 31, 1963 the lower court granted the motion and dismissed the complaint, not on the ground relied upon by the defendant but because the action had prescribed. The plaintiffs moved to reconsider but were turned down; hence, this appeal.

The procedural question posed by appellants is: May the lower court dismiss an action on a ground not alleged in the motion to dismiss?

It must be remembered that the first motion to dismiss, alleging lack of cause of action, res judicata and statute of limitations, was denied because those grounds did not appear to the court to be indubitable. The second motion reiterated none of those grounds and raised only the question of jurisdiction. In dismissing the complaint upon a ground not relied upon, the lower court in effect did so *motu proprio*, without offering the plaintiffs a chance to argue the point. In fact the court did not even state in its order why in its opinion the action had prescribed, and why in effect, without any evidence or new arguments on the question, it reversed its previous ruling that the ground of prescription was not indubitable.

In *Manila Herald Publishing Co., Inc. vs. Ramos et al.*, 88 Phil. 94, it was held:

"Section 1 of Rule 8 enumerates the grounds upon which an action may be dismissed, and it specifically ordains that a motion to this end be filed. In the light of this express requirement we do not believe that the court had power to dismiss the case without the requisite motion duly presented. The fact that the parties filed memoranda upon the court's indication or order in which they discussed the proposition that the action was unnecessary and was improperly brought outside and independently of the case for libel did not supply the deficiency. Rule 30 of the Rules of Court provides for the cases in which an action may be dismissed, and the inclusion of those therein provided excludes any other, under the familiar maxim, *inclusio unius est exclusio alterius*. The only instance in which, according to said Rules, the court may dismiss upon the court's own motion an action is, when the plaintiff fails to appear at the time of the trial or to prosecute his action for an unreasonable length of time or to comply with the Rules or any order of the court."

The foregoing ruling is applicable in this case, because although a motion to dismiss had been presented by the defendant the resolution of the court granting the same was based upon a ground not alleged in said motion. But assuming that the lower court could properly consider the question of prescription anew, the same still did not appear to be indubitable on the face of the allegations in the complaint. The defendant cites Article 137 of the Civil Code, which provides that an action for acknowledgment of natural children may be commenced only during the lifetime of the putative parents, except in two instances not obtaining in this case, and that the present action was commenced after the death of the putative father of the plaintiffs. The said provision is not of indubitable application, since the plaintiffs do not seek acknowledgment but allege as a matter of fact that they "are the acknowledged natural children and the only heirs in the direct line of the late John T. Bush." Whether or not this allegation is true will, of course, depend upon the evidence to be presented at the trial.

The defendant insists in this instance on the jurisdictional ground posed in her motion to dismiss, citing Rule 75, Section . 1, of the Rules of Court formerly in force (now Rule 73, Section 1), which says:

"SECTION 1. Where estate of deceased persons settled.— If the decedent is an inhabitant of the Philippines at the time of his death, whether a citizen or an alien, his will shall be proved, or letters of administration granted, and his estate settled, in the Court of First Instance in the province in which he resides at the time of his death, and if he is an inhabitant of a foreign country, the Court of First Instance of any province in which he had estate. The court first taking cognizance of the settlement of the estate of a decedent, shall exercise jurisdiction

to the exclusion of all other courts. The jurisdiction assumed by a court, so far as it depends on the place of residence of the decedent, or of the location of his estate, shall not be contested in a suit or proceeding, except in an appeal from that court, in the original case, or when the want of jurisdiction appears on the record."

It will be noted that the foregoing rule fixes jurisdiction for purposes of the special proceeding for the settlement of the estate of a deceased person, "so far as it depends on the place of residence of the decedent, or of the location of his estate." The matter really concerns venue, as the caption of Rule cited indicates, and in order to preclude different courts which may properly assume jurisdiction from doing so, the Rule specifies that "the court first taking cognizance of the settlement of the estate of a decedent, shall exercise jurisdiction to the exclusion of all other courts."

In the final analysis this action is not necessarily one to annul the partition already made and approved by the probate court, and to reopen the estate proceeding so that a new partition may be made, but for recovery by the plaintiffs of the portion of their alleged inheritance of which, through fraud, they have been deprived.

Without prejudice to whatever defenses may be available to the defendant, this Court believes that the plaintiffs' cause should not be foreclosed without a hearing on the merits.

WHEREFORE, the orders appealed from are set aside and the case remanded for further proceedings. Costs against the defendant-appellee in this instance.

Reyes, J.B.L., Dizon, Zaldivar, Sanchez, Fernando and Capistrano, JJ., concur.

Teehankee and Barredo, JJ., took no part.

Concepcion, C.J., and Ruiz Castro, J., are on leave.

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