

IN THE MATTER OF THE PETITION TO APPROVE WILL OF SEGUNDA VDA. DE GAMIR. CONSUELO G. DIAZ, PETITIONER AND APPELLANT, VS. THELMA G. SAWAMOTO, IN HER CAPACITY AS ADMINISTRATRIX OF ...

G.R. No. L-22085. April 30, 1966

Ponente: BENGZON, J.P., J.

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BENGZON, J.P., J.:

Segunda Vda. de Gamir died on September 5, 1955, survived by two legitimate children, Consuelo Gamir Diaz and Jose Gamir. On April 16, 1956 her will, dated July 22, 1955, was submitted for probate in the Court of First Instance of Davao. Said probate court allowed the will on April 18, 1956.

As administrator of the deceased's estate, Jose Gamir petitioned on May 6, 1958 for approval of final accounts and of the project of partition. The next day—May 7, 1958—the final accounts and the project of partition were approved by the court. It was stated in paragraph 6 at page 6 of said project of partition:

"6. That although in the will of the late Segunda Vda. de Gamir, Lot No. 10-G (Annex "E") pertains to Jose Gamir and Lots No. 44-C and 44-A (Annex "D") to Consuelo Gamir Diaz, by virtue of a mutual agreement between the abovenamed heirs and on the basis of their mutual understanding, an interchange of ownership of the aforementioned Lots was effected;" (Exh. "H"; p. 22 Record on Appeal).

Jose Gamir thereafter died and Consuelo Gamir Diaz was made administratrix in his place.

Subsequently, on July 20, 1962, more than four years after the final accounts and the project of partition were approved, Consuelo Gamir Diaz moved to amend the project of partition to include in paragraph 6 at page 6 a stipulation as to a perpetual right of way allegedly verbally agreed upon in the exchange of the lots between the heirs; or, in lieu thereof, to delete said paragraph 6 altogether and allow the parties to execute a formal deed of exchange so that all terms agreed upon will be incorporated therein. Said motion was opposed on July 25, 1962 by the heirs of Jose Gamir. In addition, the administratrix of the estate of Jose Gamir (Thelma G. Sawamoto) moved on November 8, 1962 to close the estate of Segunda Vda. de Gamir.

The probate court, resolving the motion, stated in its order of November 28, 1962 that it had no jurisdiction to amend the project of partition in the manner prayed for by the movant Consuelo Gamir Diaz, because the order approving it had long become final. For purposes of appeal, however, evidence was allowed to be adduced on the matter. Thereafter, an amended motion for amendment of the project of partition was filed by the same movant and admitted into the records. Reiterating in another order, dated January 12, 1963, that the order approving the project of partition had long become final and adding that there was opposition to its amendment, the probate court again ruled that it has no jurisdiction to allow amendment and therefore denied the motion to amend. From said order Consuelo Gamir Diaz appealed to this Court to raise a question purely of law.

The single issue is whether the lower court erred in declaring itself without jurisdiction to amend the project of

partition as prayed for.

A right of way is an encumbrance upon real estate (Art. 613, New Civil Code). A probate court has no jurisdiction to make a pronouncement regarding the existence or non-existence of an encumbrance on real property (*Register of Deeds of Pampanga vs. Philippine National Bank*, 84 Phil., 600; 47 Off. Gaz., 1157). It is clear therefore that, as aptly observed by the court below, the existence or non-existence of the aforesaid encumbrance, consisting in a permanent right of way, being a controverted matter, the probate court has no jurisdiction to resolve and pass upon said dispute.

Accordingly, there is no further need to rule on whether the probate court's order approving the project of partition had become final, which point, at any rate, is apt to raise factual questions, not proper herein, as to whether the distribution and closure of the estate have actually been carried out.

Wherefore, the order appealed from is affirmed with costs against appellant. So ordered.

Bengzon, C.J., Bautista Angelo, Concepcion, Reyes, J.B.L., Barrera, Dizon, Regala, Makalintal, and Sanchez, JJ., concur.

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