

LILIA YUSAY GONZALES, PETITIONER, VS. HON. WENCESLAO L. FERNAN, AS JUDGE OF THE COURT OF FIRST INSTANCE OF ILOILO AND FLORENCIA P. VDA. DE YUSAY, RESPONDENTS.*G.R. No. L-20352. November 29, 1968*

Ponente: FERNANDO, J.

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A petition for mandamus was filed in this Court on October 8, 1962, wherein it is alleged: "That petitioner is of legal age, married and resident of Molo, Iloilo City; That respondent Judge is a public official with office in the Provincial Building, Iloilo City, while respondent Florencia P. Vda. de Yusay is of legal age, widow, and resident of Aurora Subdivision, Iloilo City in which office and residence, the said respondents may be served with summons; That on May 30, 1956, a reamended project of partition was filed by the Commissioner appointed by the Court of First Instance of Iloilo in Special Proceedings No. 459 entitled 'Intestate Estate of the late Matias Yusay', which project of partition was approved by the said court on June 7, 1956, and affirmed by the Supreme Court in G. R. No. L-11378 on August 21, 1959, which intestate proceedings however, are still pending up to the present, the debts thereof not being totally paid, and there is as yet no delivery of the estate to the heirs; That in the said project of partition, petitioner, as a natural child of Matias Yusay, was awarded one-third (1/3) of the whole estate while the two-thirds (2/3) was awarded to his only legitimate son, Jose S. Yusay; That among the one-third (1/3) share assigned to the petitioner is a parcel of land with area of 10.8405 hectares and covered by OCT No. 42956 of the Register of Deeds of Iloilo supposedly Lot No. 5904 of the Cadastral Survey of Pototan, Iloilo, which however, upon verification was in reality Lot No. 5927 of Pototan Cadastre; That since the basis of the partition was the area and the assessed value of the properties in question, there was an obvious mistake in the placing of the said lot number, for which reason, petitioner filed a motion to correct the reamended project of partition dated August 17, 1962 with reference to the said lot attaching therein the certification of the Iloilo Register of Deeds to the effect that it is Lot No. 5927 and not Lot No. 5904 which has an area of 10.8405 hectares, and praying that Lot No. 5904 of Pototan Cadastre appearing in Group II, Part V of the project of partition dated May 13, 1956 be read as Lot No. 5927 of Pototan Cadastre, a copy of said motion is attached hereto and made integral part hereof as Annex 'A'; That on August 31, 1961, respondent Florencia P. Vda. de Yusay, widow of Jose Yusay and one of his heirs (Jose S. Yusay died on November 30, 1956) without disputing the accuracy of the above certification of the Register of Deeds, filed an opposition to the said motion alleging substantially that since the said project of partition has already been affirmed by the appellate court and is now final and executory, the probate court can no longer amend the same, * * *; That on September 22, 1962, respondent Court denied said motion sustaining the view of respondent Florencia P. Vda. de Yusay that he has no more juris-diction to amend or correct the said project of partition, * * *; That on September 24, 1962, the petitioner filed a motion for re-consideration of the said order * * *; That in refusing to assume jurisdiction, respondent Court is unlawfully neglecting the performance of an act which the law specifically enjoins as a duty resulting from an office and that from such neglect, petitioner has no other plain, speedy and adequate remedy in the ordinary course of the law except the present petition." [1]

In the aforesaid petition, the question raised, according to petitioner, is the availability of mandamus as the proper remedy to compel the lower court to assume jurisdiction under the above circumstances. It is its view that it could not do so as the final project of partition had been previously affirmed by us.

Petitioner, on the other hand, would rely on a doctrine that an order of affirmance by appellate court would not prevent the trial court "from opening the judgment for the hearing of a new party and the determination of a new claim",^[2] from which petitioner would draw the conclusion that since the mistake as to what is the lot that possesses an area of 10.8405 hectares was not passed upon in the project of partition, respondent Judge, the Hon. Wenceslao L. Fernan, now retired, could and should validly assume jurisdiction.

The prayer of the petition was as follows: "That the petition be given due course for being sufficient in form and substance; That after hearing, judgment be rendered ordering respondent Judge to assume jurisdiction in hearing the motion to correct re-amended project of partition dated August 17, 1962 referred to hereinabove; Petitioner prays for any remedy just and equitable in the premises."^[3]

The petition was given due course on October 10, 1962 in our Resolution, with respondents being ordered to file within ten (10) days from notice, an answer to the petition. No such answer was filed until now.

Then on October 4, 1968, petitioner filed a motion for an early decision. Such a motion is however superseded by a subsequent motion seeking withdrawal filed by petitioner on November 12, 1968, and worded thus: "COMES NOW petitioner, thru her undersigned counsel, and to this Honorable Court most respectfully moves to withdraw her petition in the above-entitled case on the ground that she is seeking another remedy, for the same cause, in the Court of First Instance of Iloilo, sitting as cadastral court, under Section 112 of Act 496."^[4]

WHEREFORE, the above motion is granted and the present petition considered withdrawn, without pronouncement as to costs.

Concepcion, C.J., Reyes, J.B.L., Dizon, Makalintal, Zaldivar, Sanchez, Castro and Capistrano, JJ., concur.

[1] Petition, pp. 1-3.

[2] Petition, p. 5.

[3] Ibid.

[4] Motion to Withdraw Petition.

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