

AGAPITA N. CRUZ, PETITIONER, VS. HON. JUDGE GUIL-LERMO P. VILLASOR, PRESIDING JUDGE OF BRANCH I, COURT OF FIRST INSTANCE OF CEBU, AND MANUEL B. LUGAY, RESPONDENTS.*G.R. No. L-32213. November 26, 1973*

Ponente: ESGUERRA, J.

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Petition to review on certiorari the judgment of the Court of First Instance of Cebu allowing the probate of the last will and testament of the late Valente Z. Cruz. Petitioner-appellant Agapita N. Cruz, the surviving spouse of the said deceased, opposed the allowance of the will (Exhibit "E"), alleging that the will was executed through fraud, deceit, misrepresentation and undue influence; that the said instrument was executed without the testator having been fully informed of the contents thereof, particularly as to what properties he was disposing; and that the supposed last will and testament was not executed in accordance with law. Notwithstanding her objection, the Court allowed the probate of the said last will and testament. Hence this appeal by certiorari which was given due course.

The only question presented for determination, on which the decision of the case hinges, is whether the supposed last will and testament of Valente Z. Cruz (Exhibit "E") was executed in accordance with law, particularly Articles 805 and 806 of the new Civil Code, the first requiring at least three credible witnesses to attest and subscribe to the will, and the second requiring the testator and the witnesses to acknowledge the will before a notary public.

Of the three instrumental witnesses thereto, namely, Deogracias T. Jamaoas, Jr., Dr. Francisco Pañares, and Atty. Angel H. Teves, Jr., one of them, the last named, is at the same time the Notary Public before whom the will was supposed to have been acknowledged. Reduced to simpler terms, the question to resolve is whether the last will and testament in question was attested and subscribed by at least three credible witnesses in the presence of the testator and of each other, considering that the three attesting witnesses must appear before the notary public to acknowledge the same. As the third witness is the notary public himself, petitioner argues that the result is that only two witnesses appeared before the notary public to acknowledge the will. On the other hand, private respondent-appellee, Manuel B. Lugay, who is the supposed executor of the will, following the reasoning of the trial court, maintains that there is substantial compliance with the legal requirement of having at least three attesting witnesses even if the notary public acted as one of them, bolstering up his stand with 57 American Jurisprudence, p. 227 which, insofar as pertinent, reads as follows:

"It is said that there are practical reasons for upholding a will as against the purely technical reason that one of the witnesses required by law signed as certifying to an acknowledgment of the testator's signature under oath rather than as attesting the execution of the instrument."

After weighing the merits of the conflicting claims of the parties, We are inclined to sustain that of the appellant that the last will and testament in question was not executed in accordance with law. The notary public before

whom the will was acknowledged cannot be considered as the third instrumental witness since he cannot acknowledge before himself his having signed the will. To acknowledge before means to avow (*Javellana v. Ledesma*, 97 Phil. 258, 262; *Castro v. Castro*, 100 Phil. 239, 247); to own as genuine, to assent, to admit; and "before" means in front or preceding in space or ahead of. (*The New Webster Encyclopedic Dictionary of the English Language*, p. 72; *Funk & Wagnalls New Standard Dictionary of the English Language*, p. 252; *Webster's New International Dictionary* 2d. p. 245.) Consequently, if the third witness were the notary public himself, he would have to avow, assent, or admit his having signed the will in front of himself. This cannot be done because he cannot split his personality into two so that one will appear before the other to acknowledge his participation in the making of the will. To permit such a situation to obtain would be sanctioning a sheer absurdity.

Furthermore, the function of a notary public is, among others, to guard against any illegal or immoral arrangements. (*Balinon v. De Leon*, 50 O. G. 583.) That function would be defeated if the notary public were one of the attesting or instrumental witnesses. For then he would be interested in sustaining the validity of the will as it directly involves himself and the validity of his own act. It would place him in an inconsistent position and the very purpose of the acknowledgment, which is to minimize fraud (*Report of the Code Commission* p. 106-107), would be thwarted.

Admittedly, there are American precedents holding that a notary public may, in addition, act as a witness to the execution of the document he has notarized. (*Mahilum v. Court of Appeals*, 64 O. G. 4017; 17 SCRA 482; *Sawyer v. Cox*, 43 Ill. 130). There are others holding that his signing merely as a notary in a will nonetheless makes him a witness thereunder (*Ferguson v. Ferguson*, 47 S. E. 2d. 346; *In Re Douglas' Will*, 83 N. Y. S. 2d. 641; *Ragsdal v. Hill*, 269 S. W. 2d. 911; *Tyson v. Utterback*, 122 So. 496; *In Re Baybee's Estate* 160 N. W. 900; *Merrill v. Boal*, 132 A. 721; See also *Trenwith v. Smallwood*, 15 So. 1030). But these authorities do not serve the purpose of the law in this jurisdiction or are not decisive of the issue herein, because the notaries public and witnesses referred to in the aforementioned cases merely acted as instrumental, subscribing or attesting witnesses, and not as acknowledging witnesses. Here the notary public acted not only as attesting witness but also as acknowledging witness, a situation not envisaged by Article 806 of the Civil Code which reads:

"ART. 806. Every will must be acknowledged before a notary public by the testator and the witnesses. The notary public shall not be required to retain a copy of the will or file another with the office of the Clerk of Court." [Underscoring supplied]

To allow the notary public to act as third witness, or one of the attesting and acknowledging witnesses, would have the effect of having only two attesting witnesses to the will which would be in contravention of the provisions of Article 805 requiring at least three credible witnesses to act as such and of Article 806 which requires that the testator and the required number of witnesses must appear before the notary public to acknowledge the will. The result would be, as has been said, that only two witnesses appeared before the notary public for that purpose. In the circumstances, the law would not be duly observed.

FOR ALL THE FOREGOING, the judgment appealed from is hereby reversed and the probate of the last will and testament of Valente Z. Cruz (Exhibit "E") is declared not valid and hereby set aside.

Costs against the appellee.

Makalintal, C.J., Ruiz Castro, Teehankee, Makasiar, and Muñoz Palma, JJ., concur.

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