

VICENTE D. SARMIENTO IN HIS CAPACITY AS THE JUDICIAL ADMINISTRATOR OF THE INTESTATE ESTATE OF LORENZO C. ATEGA, PETITIONER, VS. THE HON. MONTANO A. ORTIZ, ET AL., RESPONDENTS.

G. R. No. 18583. January 31, 1964

Ponente: MAKALINTAL, J.

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MAKALINTAL, J.:

Petition for certiorari to annul the order dated June 22, 1960 of respondent Judge of the Court of First Instance of Agusan, directing the cancellation of the notice of lis pendens, Entry No. 2902, on Original Certificate of Title No. RO-99 (N.A.).

The pertinent facts, insofar as they may be gathered from the pleadings, are:

On September 14, 1959 Lorenzo C. Atega filed in the aforementioned court against William Lasam, Marciana E. Lasam, the Philippine National Bank and the Register of Deeds of Butuan City, among others, a verified complaint (Civil Case No. 750), seeking annulment of Original Certificate of Title No. RO-99 (N.A.), the reconstituted title over Lot No. 436-A, Butuan Townsite TS-65. On September 8, 1959 a notice of lis pendens was annotated as Entry No. 2902 on said certificate of title.

On February 24, 1960 plaintiff's counsel notified the court that his client had died on January 25, 1960 and therefore asked for suspension of the proceedings until the deceased could be substituted by his legal heirs. The court, on March 5, 1960, issued an order requiring counsel to file an amended complaint with the corresponding substitution of parties plaintiff. Said counsel, however, denies that such order was ever received by him.

On June 20, 1960 defendants William Lasam and Marciana E. Lasam filed an "urgent ex-parte motion for cancellation of notice of lis pendens," which was granted by respondent judge in the order sought to be annulled.

Vicente D. Sarmiento, herein petitioner, who was, on October 20, 1960, allowed to substitute the deceased in his capacity as regular administrator of his estate, filed on November 14, 1960 a motion to set aside the order of cancellation. This, as well as a subsequent motion for reconsideration, was denied by respondent Judge.

The issue is whether respondent Judge committed grave abuse of discretion in ordering the cancellation of the notice of lis pendens.

Respondents, citing the cases of *Victoriano vs. Rovira* (55 Phil. 100) and *Municipal Council of Parafique vs. Court of First Instance of Rizal* (70 Phil. 363), justify the cancellation on the ground that there was unnecessary delay, attributable to petitioner and his counsel, in the resolution of the main case for annulment of the certificate of title, which delay was highly prejudicial to respondents William Lasam and Mariana E. Lasam because they could not dispose of their property in the manner they wished, i.e., by using it as security to guaranty a loan from respondent bank.

The cases mentioned exemplify the rule that a trial court has the discretionary power, in the exercise of which it cannot be charged with abuse, to order the cancellation of a notice of lis pendens under peculiar circumstances, as for instance, where the evidence so far presented by the party who applied therefor does not bear out the main allegations of his pleading and he has unnecessarily delayed the determination of the case to the prejudice of the owner affected.

Plaintiff Lorenzo C. Atega died on January 25, 1960. His counsel informed the court of the fact on February 24, 1960. He elaborated that he did not know whether a legal representative or administrator had been appointed or who the legal heirs were, but that he had inquired from the family of the deceased and that as soon as he received the necessary information he would transmit the same to the court. Thus, counsel substantially complied with his duty[1].

Under the circumstances, respondent Judge should have either waited for him to relay the necessary information or ordered him to name the members of the family of the deceased, who are presumably his heirs, in order that they might be substituted for the deceased. Or respondent Judge should have required said counsel to furnish the name and residence of the legal representative of the deceased, then ordered such legal representative to appear in lieu of the deceased within a specified time. If counsel failed to give the name of the legal representative, or the latter, after having been ordered, failed to appear, then respondent Judge should have ordered the other respondents to procure the appointment of a legal representative for the deceased within a given time, with a direction to such legal representative to appear in behalf of the deceased party[2].

It is contended, however, that the order of March 5, 1960 directed the counsel for the deceased who is now petitioner's counsel—to file an amended complaint, with due substitution of the plaintiff by his heirs. In the first place, counsel claims that he did not receive copy of this order and learned of it only upon receiving on August 14, 1961 respondents' answer herein. It is neither alleged in said answer nor otherwise proved that such copy had been received. And in the second place, even if counsel did receive copy, he could not have complied with the order since he did not, at that time, represent the heirs of the deceased.

Respondent Judge's order of March 5, 1960 was in-effectual. Failure of counsel to comply therewith, not only because he had no notice thereof, but because he could not legally do so, cannot be used as basis for the conclusion that it was petitioner or his counsel who had occasioned the delay.

And whether there was a delay or not in the main case, the cancellation of the notice of lie pendens upon ex parte motion of respondents was unduly precipitate. Evidently, as may be inferred from the order of March 5, 1960, respondent Judge still believed that counsel for the deceased plaintiff could continue to represent him or his heirs. Consequently, said counsel should have been notified of the motion for cancellation.

In view of the foregoing, we are of the opinion that respondent Judge acted with grave abuse of discretion in ordering the cancellation of the notice.

Regarding respondent bank's contention that the mortgage on the land executed in its favor by respondents Lasam is preferred to that of petitioner's lien, it is enough to state here that only transactions over the subject land, which are subsequent to the notice of lis pendens are affected by the pending litigation,[3] while rights previously acquired will remain unaffected.[4] In any event, that is a question that must be resolved in the main case.

Wherefore, the writ prayed for is hereby granted and respondent Judge's order directing cancellation of the notice of lis pendens is annulled, with costs against respondents.

Bengzon, C. J., Padilla, Bautista Angelo, Labrador, Concepcion, Reyes, J. B. L., Barrera, Paredes, Dizon and Regala, JJ., concur.

[1]Whenever a party to a pending case dies or becomes insane, it shall be the duty of his attorney to inform the court promptly of such death or insanity and to give the name and residence of the executor or administrator, guardian or other legal representative of the deceased or insane. (Sec. 16, Rule 3, Rules of Court)

[2] Barrameda vs. Barbara, 90 Phil., 718.

After a party dies and the claim is not thereby extinguished, the court shall order, upon proper notice, the legal representative of the deceased to appear and to be substituted for the deceased, within a period of thirty (30) days, or within such time as may be granted.

If the legal representative fails to appear within said time, the court may order the opposing party to procure the appointment of a legal representative of the deceased within a time to be specified by the court, and the representative shall immediately appear for and on behalf of the interest of the deceased. * * * The heirs of the deceased may be allowed to be substituted for the deceased, without requiring the appointment of an executor or administrator and the court may appoint guardian ad litem for the minor heirs. Section 17, Rule 3 Rules of Court.

[3] Atkin, Kroll and Co. vs. Domingo, 46 Phil. 302;

[4] De Roda vs. Lalk, 48 Phil. 104..

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