

ESTATE OF THE DECEASED SALOME AVILA. VICENTE ALDANESE, PETITIONER AND APPELLANT, VS. CANUTO SALUTILLO ET AL., OBJECTORS AND APPELLEES.

G.R. No. 23061. March 06, 1925

Ponente: OSTRAND, J.

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OSTRAND, J.:

This is an appeal from an order of the Court of First Instance of Cebu denying the probate of a document alleged to be the last will and testament of the deceased Salome Avila.

It appears from the record that the deceased, a widow and a resident of the municipality of Sibonga, Province of Cebu, died on May 4, 1924, in the municipality of San Juan del Monte, Province of Rizal. The will is dated May 3, 1924, appears to be executed in due form and is witnessed by R. M. de Moreta, Jose U. Borromeo and Estanislao Rafols, all residents of the City of Manila. The deceased left no ascendants or descendants and under the dispositions of the will the greater part of the estate will go to the petitioner Vicente Aldanese and his sister Enriqueta.

The petition for the probate of the will was presented to the Court of First Instance of Cebu on May 22, 1924, and was by order of the court set down for hearing on June 21, 1924. After due publication of the order Canuto, Teodora, Feliciano and Raymundo Salutillo and Valeria Llanos appeared as opponents on June 11, 1924, and asked that the hearing of the case be continued until July 14, 1924. In the meantime on June 13, 1924, the petitioner presented a motion asking the court to authorize the taking of the depositions of the witnesses to the will on the ground that being residents of the City of Manila said witnesses were unable to appear personally before the Court of First Instance of Cebu. In an order of the same date Auxiliary Judge Recto granted the motion and at the same time continued the hearing of the petition for the probate of the will until July 14, 1924. On the same day upon which the petitioner presented his motion for authorization to take the depositions aforementioned, the opponents filed the following amended opposition:

"Come now the opponents, Canuto Salutillo, Teodora Salutillo, Feliciano Salutillo, Raymundo Salutillo and Valeriana Llanos, by the undersigned attorneys and respectfully show to the Court the following:

"1. That Salome Avila died in the municipality of San Juan del Monte, Province of Rizal, in the Philippine Islands, on or about May 4, 1924.

"2. That the said Salome Avila left no ascendants or descendants.

"3. That the aforementioned opponents are the nearest surviving relatives of the said Salome Avila and are her heirs at law and are entitled to succeed to the estate left by her.

"4. That said opponents oppose the probate of the document purporting to be the last will and testament of the said Salome Avila on the following grounds:

"(a) That said will was not executed and attested as by law provided:

"(b) That the testatrix was mentally incapable of the execution of such an instrument at the time of its execution.

"(c) That it was procured by undue and improper pressure and influence, on the part of the beneficiaries, or some other person for their benefit.

"(d) That it was procured through fraud and deception.

"Wherefore, the opponents pray that said will be disallowed.

"Cebu, Cebu, June 14, 1924.

"JAKOSALEM, GULLAS, BRIONES &

CABAHUG, ROQUE DESQUITADO Y

JOSE DELGADO, AND MCVEAN & VICKERS

"By (Fdo.) J. C. VICKERS

"Attorneys for the opponents"

On June 19, 1924, the opponents presented a motion asking that the order authorizing the taking of the depositions be revoked. The court, Judge Wislizenus presiding, granted the motion and on July 11, 1924, revoked the order in question on the ground that it had not been sufficiently shown that it was impossible for the witnesses to appear personally before the court and that therefore their depositions would be inadmissible in evidence. The notification of this order was not received by the attorney for the petitioner until July 18, 1924.

By agreement between the parties the hearing of the petition for probate of the will was further continued until August 22, 1924. In the meantime on July 1, 1924, the attorney for the petitioner notified the attorneys for the opponents that the depositions of the witnesses would be taken on July 14, 1924, at nine o'clock before the notary public Jose Batungbacal at his office in room 215 of the Roxas Building, Manila. This notification was received by the attorneys for the opponents on the fifth day of the same month. The depositions of all three witnesses were taken at the time and place stated in the notification, the opponents failing to appear.

The petition for probate was finally heard on August 22, 1924. The depositions were duly presented but were ruled out by the court on the ground stated in its order of July 11th and there being no other sufficient evidence of the execution of the will, the petition was denied and this appeal brought.

In our opinion the court below erred in holding that the depositions in question were inadmissible in evidence in the probate proceedings. It is true that the rule prevailing in this jurisdiction is that when a will is contested the attesting witnesses must be called to prove the will or a showing must be made that they cannot be had, but that does not necessarily mean that they must be brought bodily before the court. It is their testimony which is needed and not their actual personal presence in the court room. As far as we can see, there is nothing in the leading case, *Cabang vs. Delfinado* (34 Phil., 291), cited by the appellees, to justify a different conclusion; in that case no effect was made to produce the testimony of the two subscribing witnesses though their abode was known to the proponent of the will.

The Code of Civil Procedure seems very clear upon the subject. Its section 274 provides that "the rules of evidence shall be the same in all courts of the Islands, and upon every trial, unless otherwise expressly provided by statute." Section 355 reads in part as follows:

"The testimony of a witness in the Philippine Islands may be taken by deposition, in an action, any time after the service of the summons or the appearance of the defendant, and, in a special proceeding, after the question

of fact has arisen therein, in the following cases:

* * * * *

"2. When the witness resides out of the province in which his testimony is to be used."

Section 361 reads:

"Either party may have the deposition taken of a witness in the Philippine Islands, in either of the cases mentioned in section three hundred and fifty-five, before any judge, justice of the peace, or notary public, on serving on the adverse party previous notice of the time and place of examination, together with a copy of an affidavit showing that the case is within section three hundred and fifty-five. Such notice must be served at least two days before the time is fixed for taking the deposition, and must in all cases give the party reasonable time after notice to be present at the taking thereof, and without a notice of such reasonable length of time the deposition shall not be admissible in evidence. The court shall determine, if the deposition is offered in evidence, whether a reasonable notice of taking has been given."

Section 406 of the same Code reads:

"A witness is not obliged to attend as a witness in a civil action before any court, judge, justice, or other officer out of the province in which he resides, unless the distance be less than thirty miles from his place of residence to the place of trial by the usual course of travel, but his testimony may be taken in such case in the form of a deposition."

In the present case, the will was presented for probate in Cebu; the attesting witnesses were living in Manila and were beyond the process of the court for compulsory attendance. They were called to testify and produced before an officer legally authorized to take their testimony in the form of depositions. The notice required by section 361, supra, was duly given and the opponents given the opportunity to be present and to cross-examine the witnesses. In the circumstances, this must certainly be considered a sufficient "calling" of the witnesses and satisfies the law.

The depositions in question appear to be in due form and would ordinarily be admissible, but the record indicates that the failure of the opponents to be represented at the examination of the witnesses was due to the fact that they were misled by the petitioner's action in seeking special authorization from the court for the taking of the depositions. In the interest of justice we therefore think that the depositions should be retaken and the opponents given another opportunity to examine the witnesses.

In the second assignment of error the appellant maintains that the court below erred in excluding the testimony of the photographer Luis G. Calderon in regard to the identity of a photographic copy of the will, which copy had been used in connection with the taking of the aforementioned depositions. It is well settled that when depositions of subscribing witnesses to a will are taken, a photographic copy of the will may be presented to the witnesses on their examination and that they may be asked the same questions with respect to it as if it were the original will. It follows that if the depositions are admitted the testimony as to the identity of the photographic copy shown to the witnesses is also admissible.

The order appealed from is reversed and the case remanded to the court below for further proceedings in accordance with the indications hereinbefore given. No costs will be allowed in this instance. So ordered.

Johnson, Malcolm, Villamor, Johns, and Romualdez, JJ., concur.

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