

**ASUNCION LARENA DE VILLANUEVA, ASSISTED BY HER HUSBAND
HERMENEGILDO VILLANUEVA AND DEMETRIO LARENA,
PETITIONERS, VS. HONORABLE NICOLAS CAPISTRANO, JUDGE OF
THE TWENTY-FIRST JUDI...**

G. R. No. 25401. October 19, 1926

Ponente: OSTRAND, J.

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OSTRAND, J.:

This is a petition for a writ of mandamus to compel the respondent judge to approve and certify a record of appeal to this court from certain orders in a probate case.

It appears from the record that in the matter of the estate of the deceased Demetrio Larena, the Court of First Instance of Oriental Negros, Judge Fermin Mariano presiding, on June 26, 1922, issued an order directing the committee of appraisers of the estate to prepare and present to the court a scheme for the distribution and partition of the property of the estate among the heirs. The heirs were Josefina Rubio, the widow of the deceased; Asuncion Larena, an acknowledged natural child; and four legitimate children Demetrio, Enrique, Mariano and David Larena, the last three of whom were minors at the time. In the same order the court, for the guidance of the committee, laid down certain rules for the distribution of the estate.

On August 3, 1923, Buenaventura Lopez, one of the commissioners, presented a scheme of partition in conformity with said rules. This scheme of partition was accepted in writing by the heirs, the minors being represented by their guardian Juan 'Montenegro. On the same date Judge Fermin Mariano approved the scheme of partition in an order which in part reads as follows;

"Said scheme of partition is hereby approved and the court awards to Josefina Rubio Vda. de Larena each and all of the properties stated in her allotment and valued at P17,672.33; to Asuncion Larena each and all of the properties set forth in her allotment valued at P2,939; to Demetrio Larena each and all of the properties listed in his allotment and valued at P5,528 and to the minors Enrique, Mariano and David Larena there are hereby awarded pro indiviso each and all of the properties mentioned in the allotment pertaining to said minors, valued at P16,583.87 which belong to them in equal parts.

"The administrator is hereby ordered to deliver to Josefina Rubio, the widow of the deceased, the properties set out in her allotment, minus the cash item which is already in her possession; to Asuncion Larena the properties enumerated in her allotment, and to Juan Montenegro, guardian of the minors Enrique, Mariano and David Larena, the properties pertaining to said minors, and the administrator being one of the heirs of the said deceased, he must also file in this proceeding a statement to the effect of having received his share to his complete satisfaction. After compliance with this requisite, and a showing to the court of the receipt of the properties pertaining to all the heirs as mentioned in the said tentative partition, this administration shall be held terminated upon payment of the debts thereof, and it will be ordered that the bond given by the administrator be cancelled."

On August 9, 1923, the heirs Asuncion Larena and Demetrio Larena acknowledged in writing the receipt of their respective share of the inheritance in accordance with the order of the court and to their entire satisfaction. Nothing further seems to have been done until November 9, 1925, when the respondent judge, the successor in office of Judge Mariano, on his own motion ordered the intestate proceedings set down for hearing on November 24, 1925, all of the inherited parties except Asuncion Larena being notified of the order. The record of the hearing is not before us, but presumably as a result of said hearing, the court on December 21, 1925, issued an order directing that a new partition and distribution of the property of the deceased be had and appointing new commissioners for that purpose. The court also laid down new rules for the distribution, which rules differ somewhat from those stated by Judge Mariano in the order of June 26, 1922.

Upon being notified of the order of November 21, 1925, the herein petitioners Asuncion and Demetrio Larena on December 5, 1925, filed their exception to the same on the ground that the court had no jurisdiction to set aside the distribution already made and to order a new one. On the same date they filed a notice of appeal and asked that the amount of the appeal bond be fixed. On December 7, 1925, the appellants filed the bond which was approved by the court. Thereupon on December 8, 1925, the appellants presented the record of appeal for approval, but the court in an order dated January 9, 1926, refused to approve said record on the ground that the appeal was premature.

The appellants thereupon filed the present petition in this court setting forth the facts above stated and praying that a writ of mandamus issue ordering the respondent judge to approve and certify the aforesaid record of appeal.

In our opinion, the petition should be granted. It is true that where, there is no question as to the propriety of a partition or distribution of property, an appeal will not lie until the partition or distribution proceedings are terminated in the lower court, but it is otherwise when, as here, the appellant claims exclusive ownership of the whole or part of the property in question and maintains that a partition or distribution of the same is improper. In such cases an appeal may be taken directly from the order or judgment directing that a partition or distribution be made and it is not necessary to await the termination of the proceedings before perfecting the appeal. (*Africa vs. Africa*, 42 Phil., 902 and 934.)

The petition for a writ of mandamus is therefore granted, and it is ordered that the Judge of the Court of First Instance of the Twenty-first Judicial District approve the record of appeal presented by the herein petitioners in the matter of the estate of deceased Demetrio Larena on December 8, 1925, and certify it to this court, No costs will be allowed in the present case. So ordered.

Avañcena, C. J., Johnson, Street, Villamor, Johns, Romualdez, and Villa-Real, JJ., concur.

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