

IN RE WILL OF THE DECEASED LEONCIA TOLENTINO. VICTORIO PAYAD, PETITIONER AND APPELLANT, VS. AQUILINA TOLENTINO, OPPOSITOR AND APPELLANT.

G. R. No. 42258. September 05, 1936

Ponente: DIAZ, J.

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DIAZ, J.:

There are two motions filed by the oppositor Aquilina Tolentino pending resolution: That of January 29, 1935, praying for the reconsideration of the decision of the court and that of the same date, praying for a new trial.

The oppositor bases her motion for reconsideration upon the following facts relied upon in her pleading:

- That the testatrix did not personally place her thumb-mark on her alleged will;
- That the testatrix did not request Attorney Almario to write her name and surname on the spaces of the will where she should place her thumb-marks;
- That the will in question was not signed by the testatrix on the date indicated therein;
- That the testatrix never made the will in question; and
- That on the date the will in question was executed, the testatrix was no longer in a physical or mental condition to make it.

We have again reviewed the evidence to determine once more whether the errors assigned by the oppositor in her brief have not been duly considered, whether some fact or detail which might have led us to another conclusion has been overlooked, or whether the conclusions arrived at in our decision are not supported by the evidence. We have found that the testatrix Leoncia Tolentino, notwithstanding her advanced age of 92 years, was in good health until September 1, 1933. She had a slight cold on said date for which reason she was visited by her physician, Dr. Florencio Manuel. Said physician again visited her three or four days later and found her still suffering from said illness but there was no indication that she had but a few days to live. She ate comparatively well and conserved her mind and memory at least long after noon of September 7, 1933. She took her last nourishment of milk in the morning of the following day, September 8, 1933, and death did not come to her until 11 o'clock sharp that morning.

The will in question was prepared by Attorney Marciano Almario between 11 and 12 o'clock noon on September 7, 1933, in the house of the testatrix Leoncia Tolentino, after she had expressed to said attorney her desire to make a will and bequeath her property to the petitioner Victorio Payad in compensation according to her, for his diligent and faithful services rendered to her. Victorio Payad had grown up under the care of the testatrix who had been in her home from childhood. The will was written by Attorney Almario in his own handwriting, and was written in Spanish because he had been instructed to do so by the testatrix. It was later read to her in the presence of Pedro L. Cruz, Jose Ferrer Cruz, Perfecto L. Ona and other persons who were then present. The testatrix approved all the

contents of the document and requested Attorney Almario to write her name where she had to sign by means of her thumb-mark in view of the fact that her fingers no longer had the necessary strength to hold a pen. She did this after having taken the pen and tried to sign without anybody's help. Attorney Almario proceeded to write the name of the testatrix on the three pages composing the will and the testatrix placed her thumb-mark on said writing with the help of said attorney, said help consisting in guiding her thumb in order to place the mark between her name and surname, after she herself had moistened the tip of her thumb with which she made such mark, on the ink pad which was brought to her for said purpose. Said attorney later signed the three pages of the will in the presence of the testatrix and also of Pedro L. Cruz, Jose Ferrer Cruz and Perfecto L. Ona, who, in turn, forthwith signed it successively and exactly under the same circumstances above stated.

In support of her claim that the testatrix did not place her thumb-mark on the will on September 7, 1933, and that she never made said will because she was no longer physically or mentally in a condition to do so, the oppositor cites the testimony of Julian Rodriguez, Gliceria Quisonia, Paz de Leon and her own.

Julian Rodriguez and Gliceria Quisonia testified that they had not seen Attorney Almario in the morning of September 7, 1933, in the house of the deceased where they were then living, and that the first time that they saw him there was at about 12 o'clock noon on September 8th of said year, when Leoncia Tolentino was already dead, Gliceria Quisonia stating that on that occasion Almario arrived there accompanied only by a woman named Pacing. They did not state that Almario was accompanied by Pedro L. Cruz, Jose Ferrer Cruz and Perfecto L. Ona, the instrumental witnesses of the will. Said two witnesses, however, could not but admit that their room was situated at the other end of the rooms occupied by the deceased herself and by the petitioner Victorio Payad, and that their said room and that of Victorio Payad are separated by the stairs of the house; that Gliceria Quisonia saw the deceased only once on the 7th and twice on the 8th, and that Julian Rodriguez stayed in his room, without leaving it, from 9 to 12 o'clock a. m. on the 7th of said month. Gliceria Quisonia further stated that in the morning of September 7th, she prepared the noonday meal in the kitchen which was situated under the house. Under such circumstances, it is not strange that the two did not see the testatrix when, according to the evidence for the petitioner, she made her will and signed it by means of her thumbmark. In order to be able to see her and also Almario and the instrumental witnesses of the will, on that occasion, it was necessary for them to enter the room where the deceased was, or at least the adjoining room where the will was prepared by Attorney Almario, but they did not do so.

Gliceria Quisonia and Julian Rodriguez also testified that on the 7th the testatrix was already so weak that she could not move and that she could hardly be understood because she could no longer enunciate, making it understood thereby, that in such condition it was absolutely impossible for her to make any will. The attorney for the oppositor insists likewise and more so because, according to him and his witness Paz de Leon, two days before the death of the testatrix, or on September 6, 1933, she could not even open her eyes or make herself understood.

The testimony of said four witnesses is not sufficient to overthrow, or discredit the testimony of the petitioner-appellant or that of Attorney Almario and the three instrumental witnesses of the will because, to corroborate them, we have of record the testimony of the physician of the deceased and of the accountant Ventura Loreto who are two disinterested witnesses, inasmuch as the outcome of these proceedings does not affect them in the least. The two testified that two, three or four days before the death of the testatrix, they visited her in her home, the former professionally, and the latter as an acquaintance, and they then found her not so ill as to be unable to move or hold a conversation. They stated that she spoke to them intelligently; that she answered all the questions which they had put to her, and that she could still-move in spite of her weakness.

In view of the foregoing facts and considerations, we deem it clear that the oppositor's motion for reconsideration

is unfounded.

The oppositor's motion for a new trial is based upon the following facts: (1) That upon her death, the deceased left a letter signed by herself, placed in a stamped envelope and addressed to Teodoro R. Yangco, with instructions not to open it until after her death; (2) that there are witnesses competent to testify on the letter in question, in addition to other evidence discovered later, which could not be presented at the trial; (3) that in the letter left by the deceased, she transfers all her property to Teodoro R. Yangco stating therein that, upon her death, all the property in question should become Yangco's. From this alleged fact, the oppositor infers that the deceased never had and could not have had the intention to make the will in question, and (4) that said oppositor knew of the existence of said letter only after her former attorney, Alejandro Panis, had been informed thereof in May, 1935, by one of Teodoro R. Yangco's attorneys named Jose Cortes.

Subsequent to the presentation of the motion for a new trial, the oppositor filed another supplementary motion alleging that she had discovered some additional new evidence consisting in the affidavit of Attorney Gabino Fernando Viola wherein the latter affirms that Victorio Payad had called him on September 5, 1933, to prepare the will of the deceased but he did not do so because after seeing her he had been convinced that she could not make a will because she had lost her speech and her eyes were already closed.

The affidavits of Attorneys Jose Cortes and Gabino Fernando Viola, substantially affirming the facts alleged by the oppositor, are attached to both motions for a new trial.

The affidavits of Attorneys Jose Cortes and Gabino Fernando Viola are not and cannot be newly discovered evidence, and are not admissible to warrant the holding of a new trial, because the oppositor had been informed of the facts affirmed by Attorney Jose Cortes in his affidavit long before this case was decided by this court. It is stated in said affidavit that in May, 1935, Attorney Jose Cortes revealed to the attorney for the oppositor the fact that the deceased had left a letter whereby she transferred all her property to Teodoro R. Yangco, and the judgment was rendered only on January 15, 1936, or eight months later.

The oppositor contends that she had no reason to inform the court of said newly discovered evidence inasmuch as the judgment of the lower court was favorable to her. She, however, overlooks the fact that she also appealed from the decision of the lower court and it was her duty, under the circumstances, to inform this court of the discovery of said allegedly newly discovered evidence and to take advantage of the effects thereof because, by so doing, she could better support her claim that the testatrix made no will, much less the will in question. Said evidence, is not new and is not of the nature of that which gives rise to a new trial because, under the law, in order that evidence may be considered newly discovered evidence and may serve as a ground for a new trial, it is necessary (a) that it could not have been discovered in time, even by the exercise of due diligence; (b) that it be material, and (c) that it also be of such a character as probably to change the result if admitted (section 497, Act No. 190; *Banal vs. Safont*, 8 Phil., 276).

The affidavit of Attorney Cortes is neither material nor important in the sense that, even considering it newly discovered evidence, it will be sufficient to support the decision of the lower court and modify that of this court. It is simply hearsay or, at most, corroborative evidence. The letter of the deceased Leoncia Tolentino to Teodoro R. Yangco would, in the eyes of the law, be considered important or material evidence but this court has not the letter in question before it, and no attempt was ever made to present a copy thereof.

The affidavit of Attorney Gabino Fernando Viola or the testimony he may give pursuant thereto is not more competent than that of Attorney Jose Cortes because, granting that when he was called by Victorio Payad to help the deceased Leoncia Tolentino to make her will and he went to her house on September 5, 1933, the deceased was almost unconscious, was unintelligible and could not speak, it does not necessarily mean that on the day she

made her will, September 7, 1933, she had not recovered consciousness and all her mental faculties to capacitate her to dispose of all her property. What Attorney Gabina Fernando Viola may testify pursuant to his affidavit in question is not and can not be newly discovered evidence of the character provided for by law, not only because it does not exclude the possibility that the testatrix had somewhat improved in health, which possibility became a reality at the time she made her will because she was then in the full enjoyment of her mental faculties, according to the testimony of Pedro L. Cruz, Jose Ferrer Cruz, Perfecto L. Ona, Victorio Payad and Mareiano Almario, but also because during the hearing of these proceedings in the Court of First Instance, Attorney Viola was present, and the oppositor then could have very well called him to the witness stand, inasmuch as her attorney already knew what Attorney Viola was to testify about, yet she did not call him. The last fact is shown by the following excerpt from pages 148 to 150 of the transcript:

"Mr. Panis (attorney for the oppositor, addressing the court): Your Honor, I should like to present as the last witness Attorney Fernando Viola who was called by the petitioner Victorio Payad to prepare the will of the deceased in his favor on September 5, 1933.

"Court: But, Mr. Panis, are you going to testify for Attorney Fernando Viola?—Mr. Panis: No, Your Honor.

"Court:

Well, where is that attorney? Where is that witness whom you wish to call to the witness stand?—Mr. Panis : Your Honor, he is busy in the branch presided over by Judge Sison.

"Court :

And when can he come ?—Mr. Panis : I am now going to find out, Your Honor. If the other party, Your Honor, is willing to admit what said witness is going to testify in the sense that said Attorney Fernando Viola went to the house of the deceased on September 5, 1933, for the purpose of talking to the deceased to draft the will upon petition of Mr. Victorio Payad; if the other party admits that, then I am going to waive the presentation of the witness Mr. Fernando Viola.

"Mr. Almario (attorney for the petitioner):

We cannot admit that.

"Court :

The court had already assumed beforehand that the other party would not admit that proposition.

"Mr. Panis :

I request Your Honor to reserve us the right to call the witness, Mr. Viola, without prejudice to the other party's calling the witness it may wish to call.

"Court:

The court reserves to the oppositor its right to call Attorney Viola to the witness stand."

If, after all, the oppositor did not decide to call Attorney Viola to testify as a witness in her favor, it might have been because she considered his testimony unimportant and unnecessary, and at the present stage of the proceedings, it is already too late to claim that what said attorney may now testify is a newly discovered evidence.

For the foregoing considerations, those stated by this court in the original decision, and the additional reason that, as held in the case of *Chung Kiat vs. Lim Kio* (8 Phil., 297), the right to a new trial on the ground of newly discovered evidence is limited to ordinary cases pending in this, court on bills of exceptions, the motions for reconsideration and a new trial filed by the oppositor are hereby denied, ordering that the record be remanded

immediately to the lower court. So ordered.

Avanceña, C. J., Villa-Real, Abad Santos, Imperial, and Laurel, JJ., concur.

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