

JOSE ANTONIO GABUCAN, PETITIONER-APPELLANT, VS. HON. JUDGE LUIS D. MANTA, JOSEFA G. VDA. DE YSALINA AND NELDA G. ENCLONAR, RESPONDENTS-APPELLEES.

G.R. No. 51546. January 28, 1980

Ponente: AQUINO, J.

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AQUINO, J.:

This case is about the dismissal of a petition for the probate of a notarial will on the ground that it does not bear a thirty-centavo documentary stamp.

The Court of First Instance of Camiguin in its "decision" of December 28, 1977 in Special Proceeding No. 41 for the probate of the will of the late Rogaciano Gabucan, dismissed the proceeding (erroneously characterized as an "action").

The proceeding was dismissed because the requisite documentary stamp was not affixed to the notarial acknowledgment in the will and, hence, according to respondent Judge, it was not admissible in evidence, citing section 238 of the Tax Code, now section 250 of the 1977 Tax Code, which reads:

"SEC. 238. Effect of failure to stamp taxable document. - An instrument, document, or paper which is required by law to be stamped and which has been signed, issued, accepted, or transferred without being duly stamped, shall not be recorded, nor shall it or any copy thereof or any record of transfer of the same be admitted or used in evidence in any court until the requisite stamp or stamps shall have been affixed thereto and cancelled.

"No notary public or other officer authorized to administer oaths shall add his jurat or acknowledgment to any document subject to documentary stamp tax unless the proper documentary stamps are affixed thereto and cancelled."

The probate court assumed that the notarial acknowledgment of the said will is subject to the thirty-centavo documentary stamp tax fixed in section 225 of the Tax Code, now section 237 of the 1977 Tax Code.

Respondent Judge refused to reconsider the dismissal in spite of petitioner's manifestation that he had already attached the documentary stamp to the original of the will. (See *Mahilum vs. Court of Appeals*, 64 O.G. 4017, 17 SCRA 482, 486.)

The case was brought to this Court by means of a petition for mandamus to compel the lower court to allow petitioner's appeal from its decision. In this Court's resolution of January 21, 1980 the petition for mandamus was treated in the interest of substantial and speedy justice as an appeal under Republic Act No. 5440 as well as a special civil action of certiorari under Rule 65 of the Rules of Court.

We hold that the lower court manifestly erred in declaring that, because no documentary stamp was affixed to the will, there was "no will and testament to probate" and, consequently, the alleged "action must of necessity be dismissed".

What the probate court should have done was to require the petitioner or proponent to affix the requisite thirty-centavo documentary stamp to the notarial acknowledgment of the will which is the taxable portion of that document.

That procedure may be implied from the provision of section 238 that the non-admissibility of the document, which does not bear the requisite documentary stamp, subsists only "until the requisite stamp or stamps shall have been affixed thereto and cancelled".

Thus, it was held that the documentary stamp may be affixed at the time the taxable document is presented in evidence (*Del Castillo vs. Madrileña*, 49 Phil. 749). If the promissory note does not bear a documentary stamp, the court should have allowed plaintiff's tender of a stamp to supply the deficiency. (*Rodriguez vs. Martinez*, 5 Phil. 67, 71. Note the holding in *Azarraga vs. Rodriguez*, 9 Phil. 637, that the lack of the documentary stamp on a document does not invalidate such document. See *Cia. General de Tabacos vs. Jeanjaquet*, 12 Phil. 195, 201-2 and *Delgado and Figueroa vs. Amenabar*, 16 Phil. 403, 405-6.)

WHEREFORE, the lower court's dismissal of the petition for probate is reversed and set aside. It is directed to decide the case on the merits in the light of the parties' evidence. No costs.

SO ORDERED.

Barredo, (Chairman), Antonio, Concepcion, Jr., and Abad Santos, JJ., concur.

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