SIXTEENTH DIVISION

[CA-G.R. CV NO. 98291, November 17, 2014]

DANILO A. AQUINO, LOURDES A. AGUSTIN, ANSELMO A. AQUINO, PLACIDO A. AQUINO, ROSALINA A. GALOPE, ALFREDO L. AQUINO III, VIRGINIA A. DE LOS REYES, TEODULO A. AQUINO AND NORMA A. COMIA, PLAINTIFF-APPELLEES, VS. ESTELITA D. AQUINO, ALVIN D. AQUINO, JOSEPH MELVIN D. AQUINO, JACQUELINE AQUINO, MARIANNE A. MANUEL AND LILIA ARABIA, DEFENDANTS-APPELLANTS.

DECISION

ZALAMEDA, R.V., J.:

This is an Appeal from the Decision[1] dated 17 November 2011 issued by Branch 42, Regional Trial Court of Manila[2] in a case for Judicial Partition, docketed as Civil Case No. 09-120977, entitled "Danilo Aquino, et al., Plaintiffs, versus Estelita D. Aquino, et al., Defendants."

The facts are as follows —

On 02 March 2009, plaintiffs-appellees Danilo A. Aquino, Lourdes A. Agustin, Anselmo A. Aquino, Placido A. Aquino, Rosalina A. Galope, Alfredo L. Aquino III, Virginia A. de Los Reyes, Teodulo A. Aquino and Norma A. Comia[3] filed Complaint[4] for Judicial Partition against defendants-appellants Estelita D. Aquino, Alvin D. Aquino, Joseph Melvin D. Aquino, Jacqueline Aquino, Marianne A. Manuel and Lilia Arabia[5] involving a parcel of land with improvements, consisting of one hundred eleven and twenty hundredths square meters (111.20 sq. m.) located in Malate, Manila and registered in the name of their parents, Alfredo V. Aquino married to Marcelina Amor-Aquino, as per Transfer Certificate of Title No. 77405.[6]

The parties are co-owners of the above-described property, being the known heirs of their deceased parents. Sometime in August 2007, appellees notified appellants of their desire to have an extra-judicial partition of the property. Allegedly, a series of discussions among the parties ensued and all initially agreed to have the entire property sold to one person. As the time progressed, however, appellant Estelita D. Aquino and her children[7] made an about turn and instead requested to be given the area they presently occupied, which is virtually the entire property. Despite earnest efforts from the appellees to settle the problem amicably among themselves, negotiations fell through as the Aquinos turned down the various proposals of their co-owners. As such, appellees were forced to engage the services of counsel who sent a letter[8] dated 19 May 2008 to the Aquinos requesting for a meeting to discuss the intended extra-judicial partition of the property. When such request left unheeded, appellees filed the Complaint for judicial partition.

Appellants, filed their Answer,[9] denying appellees' claim as to any meeting or series of discussions between the parties in 2007. Appellants, however, admitted that all the co-owners initially agreed to sell the property but later balked since it appeared that the shares of the appellees from the proceeds of the sale were unconscionably higher and grossly prejudicial to them.

Appellants likewise admitted being in possession of the property for a long time after the parties' predecessors-in-interest allowed them to use the same. Appellants claimed being cooperative with the appellees, albeit adamant with their demand that the property be sold at a higher price than what the buyer was offering them. They likewise demanded for the proper accounting of the proceeds of the sale, as well as the expenses and taxes which are chargeable to the estate.

Lastly, appellants refuted that the parties tried to amicably settle the dispute before the filing of the Complaint. On the contrary, appellees supposedly demolished part of the house erected on the property so as to oust appellants therefrom, to coerce them to agree to the former's proposal. In light of this, by way of counter-claim, appellants sought actual and exemplary damages incurred as a result of the demolition of their house. Appellants also prayed that appellees be required to reimburse them of their expenses in the payment of real estate taxes, as well those they have incurred in the preservation of the property.

During the trial on the merits, appellees presented appellee Danilo A. Aquino,[10] while appellants presented appellants Mary Antonette A. Manuel[11] and Estelita D. Aquino[12] as their respective witnesses.

On the witness stand, Danilo mentioned appellees to be his siblings, while appellant Estelita, along with her children, in-laws with their deceased brother, Virgilio Aquino.[13] Appellant Lilia Arabia, on the other hand, is appellees' half-sister with their father.

According to Danilo, the property in dispute previously belonged to their parents, Spouses Alfredo V. Aquino and Marcelina A. Aquino.[14] Upon the death of spouses Aquino, their title passed to appellees and appellants by intestate succession, which was the only property left by the decedents to the heirs.[15] All in all, there were eleven (11) heirs who have a stake in the property, with their deceased brother now represented by the Aquinos.[16]

Also, the appellees did not offer the property to appellants[17] as the parties merely discussed the partition of the property and eventually, all agreed to sell the property.[18] As such, his sister, appellee Lourdes A. Agustin, negotiated the sale of the property to a certain Wally dela Cruz for two million five hundred thousand (P2,500,000.00) pesos and a deed of sale allegedly executed in his favor.[19] Estelita, however, suddenly had a change of mind as she and her children did not sign the deed of sale. Apparently, appellants found the purchase price unconscionably low and have no other place to transfer once the property was sold.[20] The co-owners, therefore, were forced to have further meetings on how to go about the problem but the appellants no longer cooperated.[21]

On the part of appellants, Mary Antonette claimed having rejected the sale of the property to Wally dela Cruz as they wanted the property to be sold at a higher price.[22] She admitted that appellants were aware of the negotiations between the appellees and Wally dela Cruz but they voiced out their objection thereto.[23] Mary Antonette further asserted that they were actually willing to buy the property at two million five hundred thousand (P2,500,000.00) pesos, if only it was offered to them.

Estelita, the last witness, testified that she heard about the intended sale but she thought that it was just all exploratory. As such, appellants were shocked that the transaction between appellees and Wally dela Cruz pushed through[24] for two million five hundred thousand (P2,500,000.00) pesos, when a neighbor was able to get seven million (P7,000,000.00) pesos for a piece of land smaller in size.[25]

Estelita also claimed that contrary to appellees' assertion, the only instances when the parties met were at the time Wally dela Cruz issued a check for the purchase price and likewise, during the hearing at the mediation center.[26]

After the case was submitted for decision, the court *a quo* issued the now assailed Decision, the dispositive portion of which reads —

> "X x x
>
> WHEREFORE, the Court hereby orders the partition of the subject property.
>
> SO ORDERED.
>
> X x x"[27]

Appellants filed a Motion for Reconsideration[28] but the same was denied. Subsequently, they filed a Notice of Appeal[29] which was given due course by the court *a quo* through its Order[30] dated 22 February 2012.

Appellants are now before Us submitting the following assignment of errors for Our consideration, *viz.* —

1. The court *a quo* committed serious and reversible error in holding for the partition of the subject property despite the absence of indispensable and interested parties,

2. The court *a quo* committed serious and reversible error in the issuance of the assailed decision for being contrary to law, and

3. The court *a quo* committed serious and reversible error in not awarding restitution in favor of the appellants in the form of damages and attorney's fees.[31]

The records disclose that the assailed Decision zeroed in on the basic issue of whether or not partition is proper in this case. Significantly, the court *a quo* even emphasized in court that this was the only issue to be resolved in the end. The determination of such issue in an action for judicial partition is unquestionably very much elementary. This is at the core of every partition case.

It should not be forgotten, however, that an action for partition involves two (2) phases. During the first phase, the trial court determines whether a co-ownership in fact exists while in the second phase the propriety of partition is resolved. Thus, until and unless the issue of co-ownership is definitely resolved, it is premature to effect a partition of the subject property.[32]

In the instant case, there is no dispute that the parties recognize each other as having a right to the piece of the pie, so to speak. In fact, both sides agree that the property is to be divided among eleven (11) co-owners. The problem, however, is that since the property is indivisible — there being a house of strong material constructed thereon — it is evidently physically impossible to have it partitioned or subdivided for the co-owners to enjoy their respective shares. If We also trace back the events prior to the filing of the suit, the parties were at odds as to how to effect the partition of the property.

As can be seen from the dispositive portion of the assailed Decision, the court *a quo* ruled that the parties are co-owners and partition is thus proper. Appellants think otherwise, though. They claim that the appellees have divested themselves of the right to ask for partition after selling their shares to a certain Wally dela Cruz. Corollarily, appellants argue that Wally dela Cruz, being an indispensable party, ought to be impleaded if this case is to proceed to its lawful conclusion.

Taking into consideration the facts of this case and pertinent rules and laws, We rule against appellants' argument.

For one, We agree with the appellees that appellants are proscribed from raising this issue after failing to plead the same in their Answer, as required by the omnibus motion rule and further, considering that the same was not among the issues included in the Pre-Trial Order.[33]

Indeed, Section 1, Rule 9 of the Rules of Court is categorical that defenses and objections not pleaded either in a motion to dismiss or in the answer are deemed waived. "X x x [t]he only grounds the court could take cognizance of, even if not pleaded in the motion to dismiss or answer, are: (a) lack of jurisdiction over the subject matter; (b) existence of another action pending between the same parties for the same cause; and (c) bar by prior judgment or by statute of limitations."[34] None of these exceptions exist or were proven in this case.

In addition, Section 7, Rule 18 of the *Rules of Court* explicitly provides that issues to be tried between the parties in a case shall be limited to those defined in the pre-trial order —

"X x x

Section 7. *Record of pre-trial.* — The proceedings in the pre-trial shall be recorded. Upon the termination thereof, the court shall issue an order which shall recite in detail the matters taken up in the conference, the action taken thereon, the amendments allowed to the pleadings, and the agreements or admissions made by the parties as to any of the matters considered. Should the action proceed to trial, **the order shall explicitly define and limit the issues to be tried. The contents of the order shall control the subsequent course of the action, unless modified before trial to prevent manifest injustice.**

X x x" [Emphasis supplied]

As the foregoing rules speak in clear and categorical language, there is thus no occasion for interpretation; there is only room for application.[35]

For another, even considering that this issue could have been considered by the court *a quo* as an exception to the aforementioned rules, We still find the evidence insufficient to consider Wally dela Cruz as an indispensable party in this case.

As may be noted, appellants repeatedly assert that Wally dela Cruz is an indispensable party in this case because he is purportedly a new co-owner of the property in question, having bought the shares of appellees. It cannot be gainsaid that a co-owner is an indispensable party in a partition case. However, for the courts to agree with appellants' posture, it is first imperative to establish by convincing proof that Wally dela Cruz is indeed a co-owner and to appellants rest such burden. *Ei incumbit probotio qui dicit, non qui negat.* "He who asserts, not he who denies, must prove."[36]

It should be pointed out that the alleged deed of sale between the appellees and Wally dela Cruz is not part of the records. Evidence is even insufficient to establish there was indeed a sale. Regardless, appellants incessantly harp herein on Danilo's purported "admission" in court about the execution of such document, claiming that this is enough proof that Wally dela Cruz is the new co-owner of the property.

However, even granting Danilo's "admission" about the alleged deed of sale, this does not automatically prove that appellees no longer own their shares, thus:

"X x x

By a contract of sale, 'one of the contracting parties obligates himself **to transfer ownership of and to deliver a determinate thing and the other to pay therefor a price certain** in money or its equivalent.' [Emphasis Supplied]

X x x"[37]