

Re Intestate Estate of KIRIYA.

1903.  
August 12.

BILINDA v. UKKU.

D. C., Kandy, 2,024 (Testamentary).

Administration—Civil Procedure Code, ss. 727 & 740—Irregularity of procedure—  
Estoppel.

Where a child of a deceased intestate applied under section 726 of the Civil Procedure Code for a judicial settlement of the account of the administratrix, and, the administratrix failing to show cause against the citation issued by the Court in terms of section 727, the Court directed her on 9th March, 1900, to account on or before 6th April, 1900, on the footing that the applicant was an heir of the deceased to the extent of an undivided one-third of his estate; and where, her account being tendered, the Court ordered on 11th May, 1900, that the allegations of the parties for and against such account be heard on the 21st August, and after some delays and postponements certain issues were agreed to as regards the inventory of property and final account, and the administratrix suggested a further issue regarding the estate of the interest of the applicant in the acquired property of the intestate; and where it was contended that the minor's status as an heir to one-third of the estate had been determined by the order of Court dated 11th May, 1900,—

Held, that such order was not *res judicata* between the parties, and that the time for deciding upon the validity of the applicant's claim was open till the stage for distributing the estate comes.

D. C., Kurunegala, 576, 3 N. L. R. 173, explained.

Held also that, as the account filed showed that there was a surplus distributable to creditors or persons interested in the estate, it was the duty of the Court to issue a supplemental citation under section 727 requiring them to attend the accounting. Such a course would enable the Court, after ascertaining what was due from the administratrix to the estate, to further proceed to administer the estate in manner provided by section 740.

LETTERS of administration having issued to one Ukku in this case, Bilinda, an illegitimate child of the intestate, petitioned the District Court by her next friend Opalangu on the 6th September 1899, and prayed that the said Opalangu be appointed her next friend for the purpose of taking steps towards ascertaining her rights to the said estate. The application was allowed.

On the 18th October, 1899, Bilinda, by her next friend Opalangu, petitioned the Court to compel the administratrix to make a judicial settlement of the estate under chapter 45 of the Civil Procedure Code. A citation was ordered to issue on the administratrix.

1903. On the 11th December, 1899, the administratrix having filed  
August 12. her final account, it was referred to the secretary for audit. After several postponements had been applied for and granted on behalf of the administratrix for explanations and vouchers, the Court found on the 9th March, 1900, that she failed to show cause against the citation. Thereupon an order was made "directing her to account on or before the 6th April, 1900, on the footing that the petitioner is the heir of the deceased in respect of an undivided one-third share of the deceased's estate, and to attend Court from time to time for that purpose."

On the 6th April the administratrix was present and tendered some vouchers, and was given time till 11th May, 1900, to file an account.

On the 11th May, 1900, she tendered an account, and the Court fixed the 21st August, 1900, "to hear the allegations and proof of parties respecting the account."

After two postponements the case was taken up on the 30th November, 1900, when the petitioner Bilinda submitted an affidavit objecting to certain items of the final account, and tendered a list of property which was alleged to have been omitted from the inventory by the administratrix.

On the 11th December, 1900, certain issues were agreed to as to the inventory and the final account, and as to what was the acquired property of the intestate. A further issue was suggested by Mr. Proctor Sproule for the administratrix and placed on record, namely, "What is the extent of the interest of the petitioner Bilinda in the acquired property of the intestate." For eighteen months thereafter nothing appeared to have been done, but on the 24th June, 1902, when the case came on for hearing, it was contended on behalf of the minor that the issue last suggested could not be accepted, as the minor's status as an heir and her right to an undivided third part of the estate were *res judicata* by its order of 9th March.

The District Judge (Mr. G. A. Baumgartner) held that he could not review the order of Court of 9th March, 1900, though he thought that an illegitimate child was not entitled to succeed to the acquired property of its father, even if he does not leave a will.

The administratrix appealed from this order.

The case came on for argument before Layard C.J., and Moncreiff, J., on the 12th November, 1902, when it was ordered that the case be reserved for a Full Bench.

The appeal was heard by Layard, C.J., Wendt, J., and Middleton, J., on 12th August, 1903.

1903.  
August 12.

*H. Jayawardene*, for administratrix, appellant.—The intestate died some years ago, leaving the administratrix, who is a daughter by the first bed, and two children of the second bed; also an illegitimate child, the respondent. The administratrix obtained letters of administration. Then the present respondent, by her next friend, who is her mother, presented a petition praying for a judicial settlement of the estate. She claimed an undivided one-third share of the acquired property. In the application the children were made parties as well as the administratrix. The District Judge struck out the children. They were admittedly heirs, and the Court should have made them all respondents. (Civil Procedure Code, section 740.) The appeal is on the question whether the petitioner is entitled to any share. The Judge says the administratrix is estopped from disputing it now, as she submitted to the order to file an account. But we say we filed a final account independently of any claims of the petitioner. We never filed the account on the footing that petitioner was entitled to a one-third share. That claim must be decided afterwards, when the stage for distribution of the estate comes. [Layard, C.J.—The District Judge says you did not deny her right to one-third share.] It is not for us to deny it now. That question will be raised in due course when all the heirs are before the Court.

*Van Langenberg* (with *Vanderwall*), for petitioner, respondent.—The case reported in 3 N. L. R. 173 shows what the proper procedure is. The question of heir or no heir should be tried at the earliest stage of the case. The administratrix should have denied her title as soon as it was put forward. She did not do it then. She is estopped now, after the account has been filed on the footing ordered. Mr. J. S. Driberg, who heard the case in 3 N. L. R. 173, as District Judge, observed: "It appears to me unreasonable in the extreme, as contended for by Mr. Sampayo, that the petitioning creditor should be required to wait to prefer her claim to be named an heir till assets are ready for distribution." [Layard, C.J.—Such an issue may be tried early or late. There is nothing to prevent the administratrix from opposing the claims when the time for distribution comes. The order of 9th March, 1900, is simply made on the footing that the petitioner is an heir. The filing of the account has nothing to do with the distribution.] If that be so, the proper course would have been to have gone on with the inquiry under section 740.

12th August, 1903. LAYARD, C.J.—

The procedure in this case has been deplorably tedious, but the only way unfortunately in which we can deal with the matter now in appeal is to quash all the proceedings after the 11th May, 1900.

1903. One Bilinda, by her next friend Opalangu, on the 18th October, August 12. 1899, petitioned the Court under the provisions of chapter 55 of LAYARD, C.J. the Civil Procedure Code to make a judicial settlement of the estate of one Kiriya, to whose estate letters of administration had issued to one Ukku in these proceedings. The petition was duly received, and the Court directed that a citation should issue to the administratrix to appear or show good cause to the contrary. The administratrix frequently applied for and obtained time, after the citation had been duly served on her, to file an affidavit to meet the application of Bilinda for a judicial settlement of the accounts of her administration. On the 9th March, 1900, the administratrix having failed to show cause against the citation issued, an order was made directing her to account on or before the 6th April, 1900, on the understanding or footing that no cause being shown to the contrary the petitioner Bilinda was for the purpose of that order treated as entitled to call for such an account, as being an heir of the deceased. I understand that order simply to mean that, as the administratrix had not objected to the status of the petitioner, the administratrix must file an account. It was an order by the District Judge that, as no cause to the contrary had been shown for the purpose of that order merely, the petitioner must be treated as entitled to call for the account. On the 11th May, 1900, the administratrix's proctor tendered an account, which was accepted by the Court.

That account, if examined together with the inventory and other accounts filed in the record, appears to show that there is a surplus distributable to creditors or persons interested in the estate. Such being the case, the Court ought to have followed the provisions of section 727 and ordered the issue of a supplemental citation directed to the other heirs of the intestate, requiring them to attend the accounting. That would enable the Court, after ascertaining what was due from the administratrix to the estate, to further proceed to distribute the estate in manner provided by section 740. Then the heirs in due course would be able to raise the question as to whether the petitioner had any interest in the estate of the intestate. The order of the 9th March, 1900, cannot be taken as estopping the administratrix or the heirs, when distribution of the estate takes place, from denying that the petitioner is entitled to any share in the estate of the intestate.

As the District Judge on the 11th May, 1900, did not pursue the provisions of section 727 and order a supplemental citation, there is no other course open for us but to set aside all the orders and the proceedings which have taken place since the 11th May,

1900, and remit the case to the District Judge with instructions that he do issue a supplemental citation as provided in section 727.

1903.  
*August 12.*

LAYARD, C.J.

It appears to us that all parties are to blame for the proper procedure not having been followed in the Court below, so we order that parties do bear their own costs both in the District Court and in this Court.

WENDT, J.—I agree.

MIDDLETON, J.—I agree.

