

**IN THE  
SUPREME COURT OF THE REPUBLIC OF PALAU  
APPELLATE DIVISION**

<p><b>ELILAI CLAN,</b> <i>Appellant,</i> <b>v.</b> <b>NGARATULAU COUNCIL OF CHIEFS,</b> <i>Appellee.</i></p>
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Cite as: 2019 Palau 13  
Civil Appeal No. 18-040  
Appeal from Civil Action No. 16-105

Decided: April 25, 2019

Counsel for Appellant .....	Johnson Toribiong
Counsel for Appellee .....	Siegfried Nakamura

BEFORE:       ARTHUR NGIRAKLSONG, Chief Justice  
                  JOHN K. RECHUCHER, Associate Justice  
                  ALEXANDRO C. CASTRO, Associate Justice

Appeal from the Trial Division, the Honorable Lourdes Materne, Associate Justice, presiding.

**OPINION<sup>1</sup>**

PER CURIAM:

**INTRODUCTION**

[¶ 1] This case involves a dispute regarding Ngaratulau Council of Chiefs’ possessory interest in land owned by Elilai Clan and known as Bai, Cadastral Lot No. 071 M 07, in Ngchemiangel Hamlet in Aimeliik.

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<sup>1</sup> Although the parties request oral argument, we resolve this matter on the briefs pursuant to ROP R. App. P. 34(a).

[¶ 2] The Trial Division found that Ngaratulau Council of Chiefs retains a possessory interest granted to it by Elilai Clan. For the reasons set forth below, the Court now **AFFIRMS** the Trial Division's decision and judgment.

### **FACTS**

[¶ 3] As the Trial Division noted in its decision, "[t]his is not a complex case," Decision 2, as far as land disputes go in Palau. The land at issue, Bai, belongs to Elilai Clan. There is a certificate of title listing Elilai Clan as its owner with the Melachelbeluu, Elilai Clan's head male titleholder, as trustee of the property.

[¶ 4] Also not in dispute is the fact that the Ngaratulau Council of Chiefs, the Council of Chiefs of Ngchemiangel Hamlet in Aimeliik, are currently using their bai building that sits on Elilai Clan's property. Nor is there any dispute that in 2002, Wilhelm Rengiil, as Melachelbeluu on behalf of Elilai Clan, formalized an earlier use right that Ngaratulau Council of Chiefs had to the property. That use right was documented on November 16, 2002 in a Land Use Right Agreement executed by nine Chiefs of the Ngaratulau Council of Chiefs and Chief Melachelbeluu Rengiil.

[¶ 5] The Land Use Right Agreement was read into the record at the hearing before the Trial Division by the attorney for Ngaratulau Council of Chiefs and reads as follows:

This agreement is executed between Elilai Clan of Ngchemiangel Hamlet in Aimeliik State, represented by Chief Melachelbeluu Wilhelm Rengiil and the Ngaratulau Council of Chiefs, the Council of Chiefs of Ngchemiangel Hamlet in Aimeliik State.

This Agreement is executed based on the terms stated below:

- 1) There is an abai of the Ngaratulau Council of Chiefs, which is located on a land in Imelsubech, Ngchemiangel Hamlet in Aimeliik State.
- 2) The land in Imelsubech where the abai of the Ngaratulau Council of Chiefs is located belongs to the Elilai Clan headed by Chief Melachelbeluu Wilhelm Rengiil, today.

3) Based on a mutual agreement between the Elilai Clan and the Ngaratulau Council of Chiefs of a long time ago, Elilai Clan agreed for the abai of the Ngaratulau to be built on the land owned by the clan.

4) The Ngaratulau abai is ruined, and the Ngaratulau Council of Chiefs[] wish to restore it. The Ngaratulau Council of Chiefs[] and the Elilai Clan have come to a mutual understanding and the clan agrees for the Ngaratulau Chiefs to restore their abai.

Therefore, based on the terms listed above by the Elilai Clan and the Ngaratulau Council of Chiefs do hereby agree to the terms listed below:

1. The Elilai Clan agrees to the Ngaratulau Council of Chiefs to renovate their abai located on a land in Imelsubech.

2. In the event the Ngaratulau will have another abai or relocate their abai, the land in Imelsubed shall be returned to the Elilai Clan.

Henceforth, the two parties shall place their signatures on this document to declare true what is stated in this agreement.

Tr. 38:10–39:26.

### **STANDARD OF REVIEW**

[¶ 6] This Court has previously and succinctly explained the appellate review standards as follows:

A trial judge decides issues that come in three forms, and a decision on each type of issue requires a separate standard of review on appeal: there are conclusions of law, findings of fact, and matters of discretion. Matters of law we decide de novo. We review findings of fact for clear error. Exercises of discretion are reviewed for abuse of that discretion.

*Kiuluul v. Elilai Clan*, 2017 Palau 14 ¶ 4 (internal citations omitted).

[¶ 7] Elilai Clan’s two questions on appeal are 1) “Did the Trial Court commit error in declining to find that the 2002 use right granted to the Ngaratulau [Council of Chiefs] by Melachelbeluu was rendered null and void for failure of consideration?” and 2) “Did the Trial Division commit error in

finding that the Ngaratulau [Council of Chiefs] has [a] possessory interest in Elilai Clan land?” Opening Br. 1.

[¶ 8] In both instances, the issues raised by Elilai Clan involve the Trial Division’s conclusions of law, which are reviewed *de novo* in this forum. We address each, in turn, below.

## DISCUSSION

[¶ 9] Elilai Clan argues that the Trial Division erred in not finding that the Land Use Right Agreement failed for lack of consideration. It contends that the agreement itself does not discuss consideration and that “it is undeniable that [Ngaratulau Council of Chiefs’] acceptance of Wilhelm Rengiil as Melachelbeluu was the only consideration [they] had to offer, otherwise the contract would have failed at the start.” Opening Br. 10. Furthermore, Elilai Clan argues that “the withdrawal of [Ngaratulau Council of Chiefs’] acceptance of Wilhelm Rengiil as ‘friend’ and having effectively unseated him as Melachelbeluu likewise withdrew what consideration for the 2002 Use Right the Ngaratulau [Council of Chiefs] had, further invalidating and violating the contract.” *Id.* at 10–11.

[¶ 10] These arguments are unavailing. As Ngaratulau Council of Chiefs points out, Elilai Clan did not develop this legal theory before the Trial Division and has thus waived arguing the theory of lack of consideration on appeal.

[¶ 11] “The Court has consistently refused to consider issues raised for the first time on appeal. Arguments raised for the first time on appeal are deemed waived.” *Rudimch v. Rebluud*, 21 ROP 44, 45 (2014) (internal citations omitted). Though there are exceptions to this rule, none are present in this case. *See, e.g., id.* at 46 (recognizing exceptions for preventing the denial of fundamental rights and “when the general welfare of the people is at stake”).

[¶ 12] In its written closing argument, Elilai Clan mentioned lack of consideration as an issue before the Trial Division. Beyond that mere mention, however, the Court could find no reference to lack of consideration

in the record; nor has Elilai Clan cited to any portion of the record establishing that it raised this argument before the Trial Division.

[¶ 13] Furthermore, Elilai Clan now attempts to raise several additional arguments that it did not even mention before the Trial Division. It argues for the first time on appeal the theories of waste (Ngaratulau Council of Chiefs should not be allowed possession of the land because they failed for years to renovate the bai) and rule against perpetuity (the agreement violates the rule against perpetuity). Opening Br. 7–8. On appeal, Elilai Clan also refers to, but does not develop, an argument regarding the statute of frauds. *Id.* at 8. Even after Ngaratulau Council of Chiefs challenged Elilai Clan’s raising these arguments for the first time on appeal, Elilai Clan did not in its reply brief direct this Court’s attention to anywhere in the record where it made these arguments before the Trial Division. Regarding all of these theories, the record is inadequate to establish that these issues were properly raised before the Trial Division. As a result, these four theories are waived and not now considered.

[¶ 14] The second question raised by Elilai Clan is whether the Trial Division committed error in finding that the Ngaratulau Council of Chiefs has a possessory interest in the property where their bai sits.

[¶ 15] Apart from the waived theories (and only to the extent that it could be argued that Elilai Clan raises this argument apart from its consideration argument), the only other possible argument Elilai Clan raises to support its position that the Trial Division committed error in finding a possessory interest in Ngaratulau Council of Chiefs’ favor is that “the decision . . . to illegitimize and unseat Melachelbeluu Wilhelm Rengiil likewise extinguished the [ ] 2002 use right.” *Id.*

[¶ 16] Elilai Clan raised this argument before the Trial Division. By making such an argument, Elilai Clan admits that the 2002 Land Use Right Agreement granted a use right to the Ngaratulau Council of Chiefs, at least, that is, until the time that the Ngaratulau Council of Chiefs ceased recognizing Rengiil as Melachelbeluu. In considering Elilai Clan’s argument, the Trial Division concluded that “nowhere in the 2002 Use Right agreement does it say that Ngaratulau’s use of Clan land is conditional on its acceptance

of Wilhelm Rengiil as Melachelbeluu.” *See* Judgment 3.<sup>2</sup> This Court agrees. The 2002 Use Right Agreement does not contain a provision causing the use right to terminate because the Ngaratulau Council of Chiefs stopped recognizing Rengiil as Melachelbeluu. Because that is the case and Elilai Clan has presented no other reasons supporting its argument that the Trial Division erred in finding that Ngaratulau Council of Chiefs have a possessory interest in Bai, the Trial Division’s judgment and decision stand.

### CONCLUSION

[¶ 17] The Court **AFFIRMS** the Trial Division’s decision and judgment for the reasons stated herein.

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<sup>2</sup> The Trial Division also discusses a 2012 lease agreement between Ngaratulau Council of Chiefs and Beschel Kiuluul, who currently claims the title Melachelbeluu. Elilai Clan claims this lease to be invalid, so it is not considered here as a possible basis for Ngaratulau Council of Chiefs’ possessory interest or as a means of terminating the 2002 Use Right Agreement.