IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

ESUROI CLAN,
Appellant,
v.
PALAU PUBLIC LANDS AUTHORITY,
Appellee.

Cite as: 2021 Palau 27
Civil Appeal No. 20-028
Appeal from LC/N 11-00071 & 11-00080 through 11-00084

Argued: June 14, 2021
Decided: September 9, 2021

Counsel for Appellant ..... C. Quay Polloi
Counsel for Appellee ..... Allison Nixon

BEFORE: GREGORY DOLIN, Associate Justice
KATHERINE A. MARAMAN, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice

Appeal from the Land Court, the Honorable Rose Mary Skebong, Acting Senior Judge, presiding.

OPINION

MARAMAN, Associate Justice:

[¶ 1] Esuroi Clan and the Palau Public Lands Authority ("PPLA") dispute the ownership of land that is the site of Airai Elementary School and part of a larger area known as *Belualruchel*. The Land Court found that *Belualruchel* was already public land—not owned by Esuroi Clan—long before it was taken by the Japanese government, so the site of Airai Elementary School remains public land held in trust by PPLA. Esuroi Clan now challenges that factual determination. Because the Land Court's decision was based on a plausible view of the evidence, we **AFFIRM**.

BACKGROUND

[¶ 2] The Land Court considered an extensive evidentiary record in determining the history and ownership of *Belualruchel* and the five lots comprising the Airai Elementary School site in particular. Given the limited scope of our review, we decline an exhaustive recitation of the evidence and only briefly summarize the parties' positions and the Land Court's determination.

[¶ 3] According to Esuroi Clan, the chiefs of Airai awarded land known as *Nglat el Chutem*—which the clan claims includes *Belualruchel*—to Esuroi Clan hundreds of years ago after a member of the clan spared Airai from attack by Koror. Esuroi Clan presented evidence that it used *Nglat el Chutem* for goat grazing until the land was wrongfully taken and used for a communication center during the Japanese occupation. After World War II, Esuroi Clan members testified that the clan resumed goat grazing on the land and, in the 1960s, gave permission for *Belualruchel* to be used as the site of Airai Elementary School. Esuroi Clan points to its repeated claims to *Nglat el Chutem*—particularly Claim No. 137 in 1957 and Civil Action No. 6-74 in 1974—as evidence that it owned *Nglat el Chutem* and *Belualruchel* at the time Japan wrongfully took the land.

[¶ 4] Other evidence, however, showed that the Airai Elementary School site had been public land since Japan obtained it first as a cattle ranch and then as a communication center. For instance, testimony from witnesses showed that a Japanese cattle rancher and then Japanese government obtained permission from the Rubaks of Airai to use *Belualruchel*. Testimony further showed that the chiefs and community of Airai decided on *Belualruchel* as the site for the school and that Esuroi Clan's chief, as well as the other chiefs of Airai, were part of that decision.

[¶ 5] After holding three days of hearings, the Land Court issued its Summary of the Claims; Findings of Fact; and Determination ("Determination"). The Land Court explained that to prevail on its return of public lands claim, Esuroi Clan must show that (1) it filed a timely claim; (2) the land became public land through a wrongful taking; and (3) the claimant owned the land before the taking. Determination at 9 (citing 35 PNC § 1304(b); *PPLA v. Ongalk ra Ngiratrang*, 13 ROP 90, 94 (2006)). The Land

Court concluded that Esuroi Clan satisfied the first two elements. But, for reasons discussed in more detail below, the Land Court found that Esuroi Clan had failed to prove that the clan owned *Belualruchel* at the time it was taken. As a result, the Land Court determined that the Airai Elementary School site remains public lands held in trust by PPLA. Esuroi Clan now appeals the Land Court's decision.

STANDARD OF REVIEW

[¶ 6] We review the Land Court's factual findings for clear error. *See Esuroi Clan v. Olngellel Lineage*, 2019 Palau 19 ¶ 5. The Land Court's factual findings "will be set aside only if they lack evidentiary support in the record such that no reasonable trier of fact could have reached the same conclusion." *Id.* "Where there are several plausible interpretations of the evidence, the Land Court's choice between them will be affirmed even if this Court might have arrived at a different result." *Id.* We will not "reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence." *Esuroi Clan v. Roman Tmetuchl Family Trust*, 2019 Palau 31 ¶ 12.

DISCUSSION

I.

[¶ 7] Esuroi Clan argues that the Land Court clearly erred in finding that the clan did not own *Belualruchel* when it was taken by the Japanese government. We have noted many times that "appeals challenging the factual determinations of the Land Court … are extraordinarily unsuccessful." *See*, *e.g.*, *Esuroi Clan*, 2019 Palau 31 ¶ 12. This case is no different.

[¶ 8] The Land Court's factual finding that Esuroi Clan did not own *Belualruchel* is reasonable and supported by the evidentiary record. First, the Land Court noted that Esuroi Clan's story for how the clan came to own *Nglat el Chutem*—and thus *Belualruchel*—was "inconsistent" with other evidence and that "no evidence corroborates" Esuroi Clan's claim to *Nglat el Chutem*. Determination at 12. Second, the Land Court found that Esuroi Clan's use of *Belualruchel* as land for goats to graze could not establish proof of ownership because goats can freely graze on open areas even if their owners do not own the land and, in fact, there was "evidence that the goats may not have been at

Belualruchel at all." *Id.* at 12–13. Third, the Land Court credited testimony that *Belualruchel* was part of the community or public lands of Airai prior to the taking and that Esuroi Clan's participation in activities on the land did not "stand[] out or apart from the chiefs or the community of Airai." *Id.* at 15–16.

[¶ 9] Esuroi Clan's challenge to the Land Court's factual determination would require us to reweigh the evidence, reconsider the credibility of witnesses, and draw new inferences in the light most favorable to Esuroi Clan. That is clearly beyond the scope of our review on appeal, and we decline to reengage in the weighing of the evidence the Land Court relied on against the evidence Esuroi Clan cites in its briefs when we do not find that the Land Court's factual determinations meet the clear error standard.

[¶ 10] One piece of evidence Esuroi Clan heavily relies on, however, is worthy of brief discussion. Esuroi cites a 1958 decision by the District Land Title Officer in Claim No. 137 as "crucial" evidence that the clan owned *Belualruchel* at the time of the taking.[1] Opening Br. at 21. Claim No. 137 found that "[p]art of the land known as *Belualruchel* and *Ngerulak*"—another tract of land located south of *Belualruchel*—was "formerly the property of the Tmelobech Lineage of the Esuroi [C]lan" before being taken by the Japanese government without any compensation. Esuroi Clan Ex. 2jj at 6.

[¶ 11] On its face, Claim No. 137 seems to provide at least some evidence for Esuroi Clan's current claim. But, as Esuroi Clan acknowledges, Claim No. 137 is not binding on the Land Court. Rather, the District Land Title Officer's findings in Claim No. 137 are simply evidence that can be "given such weight as the Land Court . . ., in the exercise of its discretion, deems appropriate." 35 PNC § 1304(b)(2). The Land Court considered Claim No. 137 and declined to give it significant weight. The Land Court found inconsistencies that rendered Claim No. 137 "unreliable as proof of ownership." Determination at 14. For instance, the Land Court noted that the

[1] In 1953, the Trust Territory Office of Land Management issued Regulation No. 1, which empowered a District Land Title Officer in each district, including Palau, to determine the ownership of any piece of land then or formerly used, occupied, or controlled by the United States or the Trust Territory government. *See* Antonio L. Cortés, *Land in Trust: The Invasion of Palau's Land-Tenure Customs by American Law*, 14 Asian-Pac. L. & Pol'y J. 167, 196 (2013).

claimant in Claim No. 137, Martin Ngirngeungel, originally claimed land named "*Beluwaruchel*"[2] on behalf of the Tmelobech Lineage, but that was later crossed out and replaced with "*Ngerulak*" in handwriting. Nothing in the record explains how *Belualruchel* reappeared in the claim. The Land Court also found Claim No. 137 irrelevant because that proceeding involved the eastern section of *Belualruchel* that was "outside of the school site," Determination at 14, a finding Esuroi Clan does not address in its briefs. Moreover, we note that Claim No. 137 provides no analysis for its conclusion that a lineage of Esuroi Clan owned *Belualruchel*, while the Land Court here considered and analyzed an extensive evidentiary record when reaching the opposite conclusion. We do not find that the Land Court committed clear error by not giving Claim No. 137 significant weight.

[¶ 12] In short, another reasonable fact-finder, weighing the same extensive evidentiary record and determining the credibility of witnesses who appeared before the Land Court, may well have found that Esuroi Clan owned the Airai Elementary School site when it was taken by the Japanese government. But weighing the evidence and determining the credibility of witnesses are "solely the province of the Land Court." *Koror State Pub. Lands Auth. v. Tmetbab Clan*, 19 ROP 152 (2012). Based on our review of the entire evidentiary record, the Land Court did not clearly err in finding that Esuroi Clan did not own the Airai Elementary School site at the time of the taking.

II.

[¶ 13] Esuroi Clan also argues that the Land Court erred as a matter of law by applying the wrong standard of proof. This argument is just a disguised challenge to the Land Court's weighing of the evidence. As discussed above, that challenge fails. In any event, the Land Court applied the correct standard of proof. The burden was on Esuroi Clan to prove, by a preponderance of the evidence, that each element of its return of public lands claim was satisfied. *See KSPLA v. Idid Clan*, 22 ROP 21, 24 (2015). The Land Court made its "findings of fact based on the preponderance of the credible evidence and the reasonable inferences to be drawn therefrom," Determination at 7, and found

[2] Presumably "*Beluwaruchel*" and "*Belualruchel*" are merely different spellings for the same property. When transliterating Palauan words into English, differences in spelling are not uncommon. *See, e.g., Etpison v. Ngeruluobel Hamlet*, 2020 Palau 10 ¶ 10, n. 12.

that "Esuroi clan failed to carry [its] burden of pro[of]," *id.* at 16. The Land Court did not commit any legal error in denying Esuroi Clan's claim.

III.

[¶ 14] PPLA argues that we should award it attorney's fees under ROP R. App. P. 38 because Esuroi Clan's appeal is frivolous. Several times we have "warned appellants and their counselors that an appeal that merely re-states the facts in the light most favorable to the appellant and contends that the Land Court weighed the evidence incorrectly borders on frivolous." *Ngarameketii/Rubekul Kldeu v. Koror State Pub. Lands Auth.*, 2016 Palau 19 ¶ 20. After reviewing the record, however, we determine that this appeal is not frivolous. In particular, the prior adjudication in Claim No. 137 raised at least a substantial issue of fact such that Esuroi Clan's arguments were not frivolous. While we reaffirm our prior warning that appeals challenging the Land Court's factual findings will often border on frivolous, this is not such a case.

IV.

[¶ 15] Finally, we express our disapproval of insults and disparaging comments directed at the Land Court by Esuroi Clan's counsel. For example, Esuroi Clan's counsel accuses the Land Court of:

- "d[igging] deep to contradict itself," Opening Br. at 8;
- "placing herself in the role of an adversarial advocate," *id.* at 38;
- "us[ing] an uncalibrated—perhaps even a rigged—scale," *id.* at 39;
- either "deliberate[ly] distort[ing] the evidence" or being "imcompeten[t]," *id.* at 40;
- "crafty advocacy by an advocate in a robe," *id.* at 41;
- "cunningly mischaracterizing evidence," *id.* at 42;
- being "downright delusional," *id.* at 44; and
- "operating under an improper motive," Reply Br. at 22.

[¶ 16] Esuroi Clan's counsel candidly concedes to employing "harsh language" in his briefs and attempts to justify that language based on his

"ethical obligation to be a zealous advocate." Opening Br. at 42 n.39. But "[r]espect and zealous advocacy are not mutually exclusive concepts." *Conklin v. Warrington Twp.*, 2006 WL 2246415, at *2 (M.D. Pa. Aug. 4, 2006), *aff'd*, 304 F. App'x 115 (3d Cir. 2008). As many courts have recognized, zealous representation of a client "never justifies the use of disrespectful, unprofessional or indecorous language to the court." *Id.*; *see*, *e.g.*, *United States v. Burton*, 828 F. App'x 290, 293 (6th Cir. 2020) (rebuking the attorney and explaining that his "efforts to attack the district court's (well-supported) factual and legal conclusions with disparaging comments have no place before this or any other court"); *Van Iderstine Co. v. RGJ Contracting Co.*, 480 F.2d 454, 459 (2d Cir. 1973) ("Lawyers, as officers of the court, must always be alert to the rule that zealous advocacy in [*sic*] behalf of a client can never excuse contumacious or disrespectful conduct."); *Enyart v. Coleman*, 29 F. Supp. 3d 1059, 1068–69 (N.D. Ohio 2014) (explaining that counsel's "insults and disparaging comments" addressed at a judge "stray[ed] beyond the bounds of zealous advocacy"); *In re Abbott*, 925 A.2d 482, 489 (Del. 2007) ("Zealous advocacy never requires disruptive, disrespectful, degrading or disparaging rhetoric.").

[¶ 17] The disparaging comments by Esuroi Clan's counsel directed at the Land Court stray well beyond the bounds of zealous advocacy and run afoul of his responsibility to "demonstrate respect for the legal system and for those who serve it, including judges." Preamble, ABA Model Rules of Professional Conduct; *see* ROP Disciplinary Rules and Procedures, Rule 2(h) (incorporating ABA Model Rules). These insults are particularly discouraging given that Esuroi Clan's counsel himself used to serve as a judge on the Land Court. While counsel may disagree with the Land Court's decision, "a pleading containing a hostile, undignified and insulting tirade against a particular judge or the court in general is obviously not the way to redress an unfavorable ruling or a judge's alleged unfairness." *In re New River Dry Dock, Inc.*, 2011 WL 4382023, at *7 (Bankr. S.D. Fla. Sept. 20, 2011). Counsel for Esuroi Clan—and all members of the Palau Bar—are advised to remember that, "[w]hen drafting briefs, attorneys must refrain from making disparaging remarks." *United States v. Burton*, 828 F. App'x 290, 294 (6th Cir. 2020). "Careful research and cogent reasoning, not aspersions, are the proper tools of our trade." *U.S.I. Properties Corp. v. M.D. Const. Co.*, 860 F.2d 1, 6 n.1 (1st Cir.

1988). We decline to impose sanctions at this time, but we will not tolerate further conduct of this sort and expect Esuroi Clan's counsel to take this admonishment seriously.

CONCLUSION

[¶ 18] For the reasons set forth above, we **AFFIRM** the decision and judgment of the Land Court.