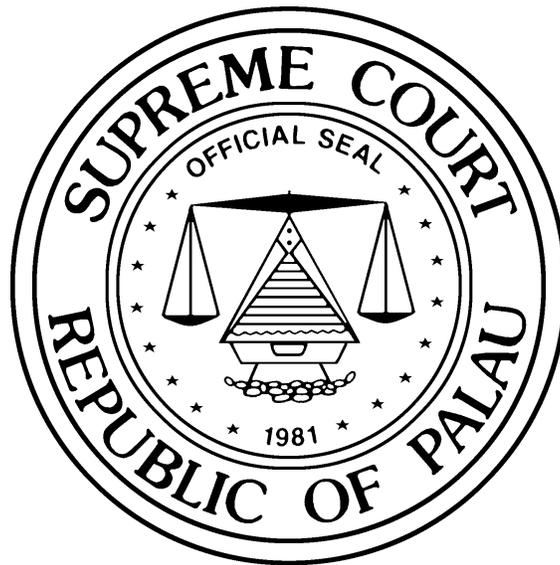


# Republic of Palau Reports

## Volume Twenty One



Consisting of Cases Determined by the

**THE SUPREME COURT OF THE REPUBLIC OF PALAU**

**APPELLATE DIVISION**

**with Selected Trial Division and Land Court Decisions**

**Published by the Supreme Court of the Republic of Palau**

**CITE THIS VOLUME AS**

**21 ROP \_\_\_\_**

# **Table of Contents**

Justices .....	ii
Tables of Cases Decided	
By Party Name .....	iii
By Docket Number .....	v
Cases Reported.....	1

# **JUSTICES**

**Serving During the Period Covered by this Volume**

---

## **CHIEF JUSTICE**

Arthur Ngiraklsong

## **ASSOCIATE JUSTICES**

Kathleen M. Salii  
Lourdes F. Materne  
R. Ashby Pate

## **ASSOCIATE JUSTICES PRO TEM**

C. Quay Polloi  
Senior Judge, Land Court

Rose Mary Skebong  
Associate Judge, Land Court

Honora E. Remengesau Rudimch  
Senior Judge, Court of Common Pleas

## **PART-TIME ASSOCIATE JUSTICES**

Katherine A. Maraman  
Richard H. Benson  
Daniel R. Foley

# **TABLE OF CASES DECIDED**

## **I. By Party Name**

Anson v. Ngirachereang	58
Baconga – Republic of Palau v.	119
Bukl Clan – Urebau Clan v..	47
Carlos – Yangilmau v.	30
Chidren of Llecholch v. Etumai Lineage	27
Diaz – Republic of Palau v. (Tr. Div.)	105, 115
Diaz Broad. Co. – Roll ‘Em Prods., Inc. v.	96
Diaz v. Republic of Palau	62
<i>Ebau</i> , In re (Land Ct.)	145
Estate of Reyes – Shiro v.	100
Etumai Lineage – Children of Llecholch v..	27
Hanpa Indus. Dev. Corp. – Shmull v.	35
Hanpa Indus. Dev. Corp. v. Republic of Palau	16
Henry v. Shizushi	52, 79
Ikluk v. Koror State Pub. Lands Auth.	66
Iyebukel Hamlet, In re Lots in (Land Ct.)	129
Koror State Pub. Lands Auth v. Wong	5
Koror State Pub. Lands Auth. – Ikluk v.	66
Koror State Pub. Lands Auth. v. Ngermellong Clan	1
Llecholch v. Republic of Palau	70
Ngermellong Clan – Koror State Pub. Lands Auth. v.	1
Ngirachereang – Anson v.	58

Rebluud – Rudimch v.	44
Rengiil v. Urebau Clan	11
Republic of Palau – Diaz v.	62
Republic of Palau – Hanpa Indus. Dev. Corp. v.	16
Republic of Palau – Llecholch v.	70
Republic of Palau – Yano v.	90
Republic of Palau v. Baconga	119
Republic of Palau v. Diaz (Tr. Div.)	105, 115
Republic of Palau v. Terekiu Clan	21
Roll ‘Em Prods., Inc. v. Diaz Broad. Co.	96
Rudimch – Tucherur v.	84
Rudimch v. Rebluud	44
Shiro v. Estate of Reyes	100
Shizushi – Henry v.	52, 79
Shmull v. Hanpa Indus. Dev. Corp.	35
<i>Siob</i> , In re (Land Ct.)	123
Terekiu Clan – Republic of Palau v.	21
Tochi Daicho lot 587, In re (Land Ct.)	145
Tucherur v. Rudimch	84
Urebau Clan – Rengiil v.	11
Urebau Clan v. Bukl Clan	47
Wong – Koror State Pub. Lands Auth v.	5
Yangilmau v. Carlos	30
Yano v. Republic of Palau	90

## II. By Docket Number

<b>Civil Appeals</b>	<b>Trial Division</b>
11-042 .....1	CA 13-008..... 105, 115
12-006 .....5	CR 13-165 ..... 119
12-048 .....35	
12-049 .....35	
	<b>Land Court</b>
13-001 .....62	LC/B 10-0032 ..... 145
13-003 .....44	LC/B 10-0035 ..... 129
13-004 .....11	LC/B 10-0036 ..... 129
13-005 .....47	LC/B 10-0037 ..... 129
13-007 .....16	LC/B 10-0038 ..... 129
13-008 .....30	LC/E 01-00713..... 123
13-009 .....21	
13-011 .....58	
13-012 .....27	
13-013 .....96	
13-014 .....100	
13-016 .....66	
13-017 .....84	
14-003 .....70	
14-004 .....52, 79	
<b>Criminal Appeals</b>	
14-001..... 90	



**KOROR STATE PUBLIC LANDS  
AUTHORITY**

**Appellant,**

**v.**

**NGERMELLONG CLAN,  
Appellee.**

CIVIL APPEAL NO. 11-042  
LC/B 04-098 & 04-099

Supreme Court, Appellate Division  
Republic of Palau

Decided: October 31, 2012

[1] **Constitutional Law:** Constitutional Avoidance

Judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.

[2] **Land Commission/LCHO/Land Court:** Claims

A claimant may claim the same land, in the alternative, under both a superior title and a return of public lands theory.

Counsel for Appellant: Mark Jespersen  
Counsel for Appellee: Raynold B. Oilouch  
BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Land Court the Honorable C. QUAY POLLOI, Senior Judge, presiding.

PER CURIAM:<sup>†</sup>

Appellant Koror State Public Lands Authority (“KSPLA”) appeals the Land Court’s determination of ownership of Worksheet Lots 40428 and 40429 in favor of Ngermellong Clan. Because the Land Court’s determination was not clear error, we affirm.

**I. BACKGROUND**

Lots 40428 and 40429 are located in Ngerkesoal Hamlet in Koror State. The Tochi Daicho numbers for the lots could not be reliably ascertained during the hearing below. Most of the claimants to the lots agreed that the lots do not correspond to any Tochi Daicho listing. One claimant, not party to the appeal, contended that Lot No. 40428 is part of Tochi Daicho Lot 460, but Lot 460 has no listed owner so was not helpful in ascertaining prior ownership.

During the proceedings before the Land Court, Ngermellong Clan’s principle witness, Yukiko Basilio testified in support of the Clan’s claim to the lots, which were originally claimed by her now-deceased uncle, Ocheraol. She testified that the lots were the site of her lineage’s principal house site.<sup>1</sup> According to Basilio, her family told her that the lands were taken by the Japanese military

<sup>†</sup> EDITOR’S NOTE: Readers are advised that this case was in part overruled by implication due to conflicting language in the later cases *Klai Clan v. Airai State Public Lands Authority*, 20 ROP 253 (2013), and *Idid Clan v. Koror State Public Lands Authority*, 20 ROP 270 (2013). The Appellate Division recognized this in a subsequent case, slated for publication in the next volume of this Reporter, *Koror State Public Lands Authority v. Idid Clan*, 22 ROP \_\_\_\_, Civ. App. No. 14-005, slip op at \* 5 n. 2 (May 26, 2015).

<sup>1</sup> Ngermellong Clan and Iwesei lineage “are the same people.”

during World War II. Although she was only three by the end of the war, Basilio recounted her memories of a constructed cave being located on the land. She also stated that “[i]t was never sold . . . no one has ever said it was sold so it continues to be our property.” She further testified that she knew of no compensation whatsoever being paid for the land and that the land was taken without her family’s knowledge. KSPLA presented evidence that it (or the prior Trust Territory government) maintained the lots as public land. This evidence was unrefuted.

The Land Court, in its Decision on August 3, 2011, first considered the appropriate legal standard to apply to the matter. In its discussion, the court noted that there are at least two possible avenues for a private claimant seeking title to a particular piece of land occupied by the government. A claimant may pursue a superior title theory. Under this theory, the claimant would attempt to show that the public occupant of the land is not the owner. In a case in which the Tochi Daicho listing is entitled to a presumption of accuracy, the burden on the private claimant would be to show by clear and convincing evidence that the listing was incorrect. However, in a case such as this, where the Tochi Daicho is not in play, the government and the claimant are, as the court put it “on equal footing,” and the court must decide who has superior title by a preponderance of the evidence. A claimant may also pursue a return-of-public-lands theory. In such a case, the private claimant admits that public title is proper, but argues that the land was wrongfully taken and the claimant is a proper heir to the prior owner. In return-of-public-lands cases, the burden is on the claimant to show that the requirements of 35 PNC § 1304(b) are met.

The Land Court found that this framework for analysis was in tension with the Constitution. Our Constitution requires the return of wrongfully taken public land. Article XIII, section 10 provides that “[t]he national government shall . . . provide for the return to the original owners or their heirs of any land which became part of the public lands as a result of the acquisition by previous occupying powers . . . through force, coercion, fraud, or without just compensation or adequate consideration.” By statute, public lands include all land “owned or maintained” by the government. The unusual result of the statutory language and the framework for adjudicating disputes over publicly-maintained land is that cases in which land is “public” actually have a higher burden for private claimants than typical title disputes. The court concluded that this result is acceptable with respect to publicly-owned lands, but not publicly-maintained lands.

The Land Court reasoned that the statutory definition, as applied to cases involving public maintenance rather than public ownership, was unconstitutional because the statutory definition’s wide scope ensured that more private claims against public land authorities would fail because of the onerous requirements of 35 PNC § 1304(b). In essence, the court concluded that, in cases in which public ownership is not presumed because of the Tochi Daicho listing,<sup>2</sup> the government land authority must “show[] to the satisfaction of [the c]ourt by a preponderance of the evidence that the lands

---

<sup>2</sup> There are several reasons why there may be no Tochi Daicho listing to support the government’s case that land is public. There may be no corresponding Tochi Daicho entry for the land, there may be no entry at all, or the land in dispute might be in Peleliu, where there is no presumption of Tochi Daicho accuracy. *See Kikuo v. Ucheliou Clan*, 15 ROP 69, 76 (2008).

at issue are public lands,” specifically publicly *owned* lands. In terms of the legal framework articulated above, this would mean that a private claim to land that is not listed as government-owned in the Tochi Daicho would be assumed at the outset to be a claim of superior title unless and until the government made a showing by a preponderance of the evidence that it owned the land.

Applying its newly-crafted standard, the Land Court nevertheless ruled in KSPLA’s favor, holding that, by the preponderance of the evidence the lots were public land. Thus, the private claimant bore the burden of showing that the elements of 35 PNC § 1304(b) were met.

However, the court ultimately ruled against KSPLA, finding that the statutory requirements were met for return of the lots to Ngermellong Clan. Crediting Basilio’s testimony, the Land Court found that there was strong evidence that the Japanese military took the land for military use during the war. The court noted that the very fact that the land was put to military use “should, per se, suffice to meet the element of” forceful taking. Additionally, the court found that, even if the taking was not forceful, Basilio’s testimony was sufficient to show that it was taken without compensation.

KSPLA appeals, contending (1) the Land Court erred in determining that the statutory definition of “public lands” was unconstitutional, and (2) the Land Court committed clear error in suggesting that a showing of military use of the land was sufficient to show that land was wrongfully taken.

## II. STANDARD OF REVIEW

This Court reviews the Land Court’s findings of fact for clear error and its legal conclusions *de novo*. *Palau Pub. Lands Auth. v. Ngiratrang*, 13 ROP 90, 93 (2006). This Court will reverse the Trial Division only if the findings “so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion.” *Ngerusebek Lineage v. Irikl Clan*, 8 ROP Intrm. 183, 183 (2000).

## III. ANALYSIS

### A. Constitutionality of 35 PNC § 101<sup>3</sup>

[1] This case is not an appropriate vehicle for testing the constitutional limits of the statutory definition of “public land.” First and foremost, the court found in *favor* of KSPLA on this issue, concluding that the lots were public land under even the court’s definition. [Dec. 35] “A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.” *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 445-46 (1988); *see also Davidson v. Office of the Special Prosecutor*, 16 ROP 214, 218 (2009) (Constitutional issues should be avoided if relief may be granted on other grounds.). Here, our opinion on the matter would be merely a rumination on the Land Court’s reasoning. Even if we

<sup>3</sup> We note that neither party appears to have notified the Republic that “the constitutionality of an[] act of the Olbiil Era Kelulau,” specifically, 35 PNC § 101, has been “question[ed].” Palau R. App. P. 44. The party questioning the constitutionality of the act is required to issue such notification. Here, that would be the Appellee. Absent such a notification, we will not hold any legislation unconstitutional. In such cases, the Republic is, in essence, a necessary party.

agreed completely with KSPLA, our ultimate conclusion would be the same as the Land Court's—that Lots 40428 and 40429 were public land. Where a positive decision by this Court would not afford a litigant any additional relief as compared to the lower court, a "constitutional decision would [be] unnecessary and therefore inappropriate." *Lyng*, 485 U.S. at 446.

Additionally, there is a clear cut alternative path to affirming the Land Court, which avoids the thorny constitutional issue. The court held that, in cases in which the Palau Administration is not listed as the Tochi Daicho owner, a land authority must first show that it is the owner of the land before the court may apply the return-of-public-lands statute. This rule is consonant with our holding in another case we issue today, *KSPLA v. Wong*, Civ. App. No. 12-006, slip op. at 6 (\_\_\_\_. \_\_\_, 2012). In *Wong*, we held that, absent clear evidence of government ownership, a private claim should be treated as a claim of superior title. In such cases, some maintenance of the land by the government will be probative of government ownership, but not dispositive.

[2] This rule does not run afoul of the definition of public land found in 35 PNC § 101 because that section only applies if a claimant pursues a return-of-public-lands theory. *See* 35 PNC § 1304(b) ("The Land Court shall award ownership of public land . . . to any citizens [who make a showing of wrongful taking and are proper heirs of the original owners]."). KSPLA suggests that a claimant may not pursue a superior title and return-of-public-lands theory simultaneously. However, we have long-recognized that claim of superior title is a separate, and occasionally overlapping, path to awarding land to a private claimant over the

objection of a putative government owner. *See, e.g., Kerradel v. Ngaraard State Pub. Lands Auth.*, 9 ROP 185, 185-86 (2002). If it becomes apparent that the government is the true title-holder, a claimant may attempt to argue that the land became government-owned or -maintained by the wrongful acts of a colonial power. 35 PNC § 1304(b).<sup>4</sup>

This understanding of the applicable law is consonant with our precedent and does not undermine the statutory language or the constitutional imperative on the government to return wrongfully taken public lands. We affirm the Land Court on that basis.

### **B. Taking of Lots 40428 and 40429**

KSPLA's next argument is that the Land Court erred in its application of the return-of-public-lands statute to the facts of this case. The statute requires a private claimant to show that the land at issue was taken "through force, coercion, fraud, or without just compensation or adequate consideration." 35 PNC § 1304(b). KSPLA contends that it was an error of law for the court to enunciate a per se rule that land taken for military use was necessarily taken by force. Although the court stated that evidence of military use "should" be sufficient for a

<sup>4</sup> KSPLA also suggests that the pursuit of a superior title claim should not be considered as an alternative to a return-of-public-lands theory because KSPLA has different defenses available to it under each theory. However, because the two theories are analytically distinct, KSPLA may pursue its defenses against a claim of superior title that are forbidden under a claim for return of public lands. *See* 35 PNC § 1304(b)(2). If it prevails on such a defense, the superior title claim is defeated and the burden is on the claimant to meet the statutory requirements for return of public lands. In other words, just as a claimant may pursue both theories, KSPLA may pursue all defenses available against each theory.

showing of a forceful taking, it went on to make clear that it credited Basilio's testimony that she had "no knowledge" of any compensation being paid for the land.<sup>5</sup> We need not affirm the Land Court's proffer of a per se rule in order to affirm its ultimate conclusion that military use of the land, combined with Basilio's testimony regarding compensation, is sufficient to show by a preponderance of the evidence that the land was wrongfully taken and is subject to return under 35 PNC § 1304(b). The Land Court did not commit clear error in rendering this finding. *See Ngiratrang*, 13 ROP at 93.

#### IV. CONCLUSION

For the foregoing reasons, we **AFFIRM**.

---

<sup>5</sup> KSPLA further submits that it was error for the Land Court, which admitted that Basilio could have no memory of events that occurred when she was a toddler, to nonetheless credit her testimony. However, Basilio's testimony was based not on her own memories of the Japanese occupation, but of her family history. This was proper because there is no hearsay rule applied to the Land Court. *See* Land Ct. R. P. 6 (all relevant evidence admissible).

**KOROR STATE PUBLIC LANDS  
AUTHORITY,  
Appellant,**

**v.**

**DIBECH SINAICHI WONG,  
Appellee.**

CIVIL APPEAL NO. 12-006  
Civil Action No. 11-143

Supreme Court, Appellate Division  
Republic of Palau

Decided: October 31, 2012

[1] **Appeal and Error:** Standard of Review

Summary judgment is a matter of law reviewed de novo. Drawing all inferences from the evidence in favor of the non-moving party, the Appellate Division evaluates whether there were no genuine issues of material fact and whether the moving party was entitled to judgment as a matter of law.

[2] **Land Commission/LCHO/Land Court:**  
Collateral Attack

A party attempting to collaterally attack a land determination must show by clear and convincing evidence that statutory or constitutional procedural requirements were not complied with" during the land claims process.

[3] **Land Commission/LCHO/Land Court:**  
Collateral Attack

Provided a party was given the opportunity to be heard in the manner anticipated by statute,

the Court will not void the Land Court's determination of ownership.

**[4] Land Commission/LCHO/Land Court: Claims**

Separate and distinct procedural rules apply to superior title and return of public land claims.

Counsel for Appellant: Mark Jespersen  
Counsel for Appellee: Raynold B. Oilouch

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Supreme Court, Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

**PER CURIAM:**<sup>†</sup>

Appellant Koror State Public Lands Authority ("KSPLA") appeals the grant of summary judgment by the Trial Division in favor of Appellee Dibeck Sinaichi Wong in this collateral attack on a Determination of Ownership issued by the Land Court. Because KSPLA was unable to show that the Land Court made a constitutional or

procedural error rendering its determination void, we affirm.

**I. BACKGROUND**

On April 15, 2005, a public Notice of Monumentation and Survey was issued for a registration area in Ngerbeched Hamlet, including Tochi Daicho Lot 1173 ("Lot 1173"), known as *Babremchimch*. Koror State Government was not specifically served with the notice until June 2, 2005, the day before the scheduled deadline for filing claims on June 3, 2005. Wong was among the claimants, but KSPLA filed no claim to the lot. Although it filed no claims specifically identifying Lot 1173, KSPLA has a standing claim to all public lands in Koror based on a letter sent from former KSPLA Director Alexander Merep to the Land Claims Hearing Office on December 5, 1988. In response to this letter, then-Senior Land Claims Hearing Officer Jonathan Koshiba gave KSPLA a list of "a total of 336 individual claims against public lands in Koror State." Among the listed claims is Wong's claim to Lot 1173, though Koshiba's letter warned that some of the claims listed "may be referring to private land."

On May 1, 2007, all of the other private claimants withdrew their claims, and the Land Court vacated a scheduled hearing on the land. The court issued a Determination of Ownership to Wong on May 22, 2007.

Around July 2010, a KSPLA lessee<sup>1</sup> residing on Lot 1173 informed KSPLA that he

<sup>†</sup> EDITOR'S NOTE: Readers are advised that this case was in part overruled by implication due to conflicting language in the later cases *Klai Clan v. Airai State Public Lands Authority*, 20 ROP 253 (2013), and *Idid Clan v. Koror State Public Lands Authority*, 20 ROP 270 (2013). The Appellate Division recognized this in a subsequent case, slated for publication in the next volume of this Reporter, *Koror State Public Lands Authority v. Idid Clan*, 22 ROP \_\_\_\_, Civ. App. No. 14-005, slip op at \* 5 n. 2 (May 26, 2015).

<sup>1</sup> Although KSPLA refers in its Opening Brief to a KSPLA lessee who had been living on the subject land in 2010, KSPLA did not make any reference to such a lease in its complaint or at the summary-judgment stage in the Trial Division. Moreover, KSPLA did not present any evidence at trial or on appeal to support its claim that it had leased the disputed lands, nor did it rely on the existence of any such lease in its arguments

heard the land was now owned by a private party. KSPLA filed a complaint with the Trial Division, asking that court declare void the Land Court's Determination of Ownership.

Wong and KSPLA filed cross-motions for summary judgment. The Trial Division acknowledged KSPLA's general claim to public lands in Koror, but determined that the evidence supported the conclusion that Lot 1173 was private land. The court pointed to the fact that Lot 1173 is listed as privately-owned in the Tochi Daicho and to the affidavits of representatives from BLS stating that they had no records indicating that Lot 1173 was public. Because it determined that the land was not public, the Trial Division granted summary judgment in favor of Wong.

KSPLA timely appealed, arguing that it was entitled to prevail in its collateral attack on the Land Court determination because (1) BLS and the LCHO should have determined that Lot 1173 is public and therefore KSPLA was not required to attend monumentation or file a claim and should have been treated as a party, and (2) KSPLA was entitled to, but did not receive, actual personal notice of the hearing regarding Lot 1173.<sup>2</sup>

---

to the Court. In addition, at summary judgment, Appellee Wong provided the affidavit of BLS employee, Akino Mekoll, who attested that BLS did not have any records suggesting public ownership of the land at issue. Thus, the Court's review of the record did not reveal any evidence to support a finding that KSPLA had leased the disputed land.

<sup>2</sup> KSPLA also argues the Trial Division erred in its application of ROP R. Civ. P. 60(b). However, because we affirm the trial court on other grounds, we need not address whether it was proper for the court to apply Rule 60(b)(4).

## II. STANDARD OF REVIEW

[1] Summary judgment is a matter of law reviewed de novo. *Giraked v. Estate of Rechucher*, 12 ROP 133, 139 (2005). Drawing all inferences from the evidence in favor of the non-moving party, we evaluate whether there was no genuine issue of material fact such that the moving party was entitled to judgment as a matter of law. *Id.*; see also ROP R. Civ. P. 56(c).

## III. ANALYSIS

[2][3][4] In a collateral attack on a Land Court proceeding, the burden of proof is squarely on the party seeking to set aside the court's determination. *Ucherremasech v. Wong*, 5 ROP Intrm. 142, 146 (1995). A party leveling such an attack must show by clear and convincing evidence that "statutory or constitutional procedural requirements were not complied with" during the land claims process. *Id.* at 147. The touchstone of our review in such cases is due process. See *Uchellas v. Etpison*, 5 ROP Intrm. 86, 89 (1995). Provided a party was given the opportunity to be heard in the manner anticipated by statute, we will not void the Land Court's determination of ownership.

Our initial task is to ascertain which statutory rules apply in this case. The applicable standard in a land claim case turns primarily on the nature of the claim being pursued. Generally, there are two types of land claims in Palau. First, a party may file a claim of *superior ownership*. This is usually done either pursuant to the procedure outlined in 35 PNC §§ 1307-1312, which describes the process by which the Bureau of Lands and Surveys ("BLS") and the Land Court are to

proceed with ownership determinations.<sup>3</sup> Briefly, the procedures outlined in these sections include (1) the issuance of public notice of monumentation and hearing and specific notice to “all persons personally known to the Registration Officer to claim an interest in the land, and to all persons listed on the Land Acquisition Records,” 35 PNC § 1309(b) & (c); (2) a thirty-day period in which all claims to the land must be filed or else they are forfeited, § 1309(a); (3) a monumentation session by BLS with participation by the parties, § 1307; and (4) some form of adjudication resulting in a determination of ownership, as a result of mediation, settlement, or hearing, §§ 1308, 1310, 1312.

The second type of claim is for *return of public lands* pursuant to 35 PNC § 1304(b). In these cases the public land authorities, as presumptive owners, have a leg up on other claimants. Claimants are private parties who argue that the land at issue was wrongfully taken from them or their predecessors-in-interest by a colonial power. *See* § 1304(b). In such cases, the claimant *admits* that title to the land is held by a public entity, but seeks its return. *Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161, 167 (2004). Unlike in superior ownership cases, return of public lands cases may be won by a public land authority who does not even participate in the proceedings. *Masang v. Ngirmang*, 9 ROP 215, 216 (2002). Because the land authority in such cases is the admitted owner, a court may decide that no private claimant has met its burden and award the land by default to the “prior public owner.” *Id.*

<sup>3</sup> A party may also claim superior ownership by filing a quiet title action in the Trial Division. In such cases, the determination of ownership proceedings are initiated by the claimant rather than by BLS and are preclusive against all defendants. *See* 65 Am. Jur. Quieting Title § 81 (2011).

### A. Nature of Wong’s Claim and the Applicable Legal Standard

KSPLA’s first argument is that it was not required to comply with the claim procedures outlined in 35 PNC § 1309(c)(1). KSPLA does not seem to dispute that Wong’s claim was styled as a claim of superior ownership, not one for return of public land.<sup>4</sup> However, KSPLA contends that because there was some evidence in the records available to BLS that Lot 1173 might be public land, this case should have been treated as a return-of-public-lands case, in which KSPLA was not obliged to stake its claim or make its case. KSPLA argues that, because 35 PNC § 101 defines “public lands” broadly,<sup>5</sup> public land authorities should be treated as parties whenever there is “any evidence that the lands were either ‘owned’ or ‘maintained’ as [public lands].”

We decline to adopt this standard. Instead, we determine that a public land authority must comply with the claim-filing procedures of 35 PNC § 1309(c)(1) in all cases involving claims of superior ownership, unless it is clear from the record available to BLS and the Land Court that the land is most likely publicly-owned. There is no statutory basis for treating public and private claims differently in superior ownership cases. Certainly, in return-of-public-lands cases,

<sup>4</sup> This understanding of Wong’s claim is supported by the evidence KSPLA submits on appeal, a copy of a quiet title petition in which Dibeck Wong asserted superior ownership of the land, denying any government ownership.

<sup>5</sup> 35 PNC § 101 defines public lands as “those lands situated within the Republic which were owned or maintained by the Japanese administration or the Trust Territory Government as government or public lands, and such other lands as the national government has acquired or may hereafter acquire for public purposes.”

KSPLA is exempt from the claim-filing rules. See *Masang*, 9 ROP at 216. However, § 1309(c)(1) does not distinguish between public and private claimants. It requires “[a]ll claims to be filed within 30 days.” This case illustrates the folly of giving land authorities the prerogative to forgo filing a claim. The result is that the Land Court does not receive the benefit of full argument on all possible claims. This short-circuits the adversarial process and jeopardizes the court’s ability to reach the correct outcome.

The standard we adopt is consistent with our previous holdings concerning the distinct procedural rules applicable to superior title cases and return-of-public-lands cases. In *Kerradel v. Ngaraard State Pub. Lands Auth.*, 9 ROP 185, 185-86 (2002), for example, we held that a private claimant asserting superior title to a parcel of purportedly public land need not abide by the claim-filing deadline that applies to return of public lands cases. See also *Carlos v. Ngarchelong State Pub. Lands Auth.*, 8 ROP Intrm. 270, 271-72 (2001).

An exception applies where it is clear from the record available to BLS and the Land Court that the land is public. For example, the land may be listed in the Tochi Daicho as publicly owned during the Japanese administration or BLS may have records that indicate current public projects or ownership of the land. See *Carlos*, 8 ROP Intrm. at 171-72 (holding that if the Tochi Daicho lists land as public, return-of-public-lands standard applies). In such cases, the styling of the claim is irrelevant. The appropriate standard to apply will be that in 35 PNC § 1304(b). Absent a showing by the private claimants that the land was not public, a land authority will be the presumptive owner and the private

claimants will be subject to the three-fold burden of § 1304(b).

The unique procedural posture of this case makes the burden higher on KSPLA than it would have been before the Land Court. KSPLA was obliged to show by clear and convincing evidence that the Land Court committed a constitutional or procedural error. *Ucherremasech*, 5 ROP Intrm. at 147. KSPLA failed to present evidence that Lot 1173 was clearly public land. Instead, before the Trial Division, KSPLA merely pointed to hints in the record that the land was public. On appeal, it does the same. First, KSPLA notes that a claim to Lot 1173 filed in 1979 lists the Tochi Daicho owner as “coveremnt” (sic). Nonetheless, KSPLA does not deny that the Tochi Daicho lists a private party as the owner of Lot 1173. It was not improper, in light of this document, for the Land Court to conclude that the land was private. KSPLA next relies upon a quitclaim deed, which KSPLA contends states that the “government continues claiming ownership of the said land at present.” However, this merely suggests the presence of a government *claim*, not government *ownership*.

We appreciate that a claim-focused approach may cause miscategorization of public land as private land. However, this can be remedied through the adversarial process. As we have cautioned in the past, a land authority that fails to participate in proceedings assumes a certain risk of error because of the Land Court’s virtually plenary power over fact-finding. *Palau Pub. Lands Auth. v. Ngiratang*, 13 ROP 90, 96 n.5 (2006). This is particularly true when the Land Authority does not deign to participate until a collateral action, in which the Trial Division reviews the Land Court’s determination only for apparent errors of law.

## B. Actual Notice

Section 1309(b) requires BLS to give notice describing the claim and stating “the date, time, and place of the monumentation” at least forty-five days before monumentation to “all persons personally known to the Registration Officer to claim an interest in the land.” We have made clear that “unless [an] appellant lacked either actual or constructive notice of the LCHO hearing regarding the property, the determination of ownership is binding on him.” *Ucherremasech*, 5 ROP Intrm. at 145. In the absence of a constitutional or procedural violation, land court determinations pursuant to the claims process are “conclusive as against the world.” *Uchellas*, 5 ROP Intrm. at 89.

Koror State<sup>6</sup> was served with notice four days before monumentation was to commence on June 6, 2005. KSPLA states that this was insufficient notice. However, we note that KSPLA does not provide any explanation whatsoever describing why the notice it received was defective. We decline to manufacture a basis for KSPLA’s objection beyond the obvious and conceded fact that the notice was served well after forty-five days before the hearing. The issue, then, is whether this *delay* constitutes a violation of the statute sufficient to release KSPLA from the Land Court’s judgment and to reopen the proceedings. We conclude that it is not.

This Court has set a high burden for collateral attacks on Land Court proceedings because of the importance of “finality in determinations of ownership of real property.” *Ucherremasech*, 5 ROP Intrm. at 146. However, collateral attack is allowed in order

<sup>6</sup> KSPLA does not argue that it was improper for BLS to serve a Koror State Government employee.

to ensure that all interested parties have a chance to argue their respective positions before the court. Regarding private parties deprived of notice, we have framed this as a due process issue.<sup>7</sup> See *Uchellas*, 5 ROP Intrm. at 89. Thus, unless a party has been deprived of a full and fair opportunity to be heard, a collateral attack must fail.

We assume without deciding that KSPLA was entitled to actual notice as a claimant under 35 PNC § 1309(b)(3).<sup>8</sup> KSPLA fails to explain how the untimely notice in this case was sufficient to deprive it of an opportunity to be heard. Once a party receives actual notice, it is incumbent on the party to vindicate its interest—not to take a wait-and-see approach, hoping for a positive outcome without expending any resources and relying on collateral attack as an alternative route to success. KSPLA gives no explanation for its inaction in this case. It did not elect to participate in monumentation and it did not seek to become a party by filing a claim or intervening in the action. Any of these avenues would have allowed KSPLA to have its day in court.

<sup>7</sup> Though land authorities do not have due process rights per se, reciprocity and an interest in accuracy favor ensuring that interested public parties have their day in court as well as private parties.

<sup>8</sup> It is not clear that KSPLA was entitled to personal notice. The statute only requires notice to all those who “claim an interest in the land.” 35 PNC § 1309(b)(3) (emphasis added). We have distinguished between “interested parties” (the phrase used in an earlier version of the statute) and those who *might* have some interest in an action. “[A] party is a person or entity who has expressed an interest in the outcome of an action, i.e., someone who has filed a claim.” *Nakamura v. Isechal*, 10 ROP 134, 137 (2003). Arguably, former Director Merep’s letter constitutes a claim to Lot 1173. Yet even this is unclear based on the foregoing discussion regarding whether the land is “public.”

**IV. CONCLUSION**

Unless it is clear from the records available to BLS that land is publicly owned or maintained, public land authorities have a duty to file a claim just like every other land claimant. The rule we announce today does not lessen the duties assigned to BLS or the Land Court by statute. Instead, it ensures that, in a disputed ownership case, the Land Court will have the benefit of the adversarial process in reaching its conclusion and the court's determination of ownership will create true repose.

For the foregoing reasons, we **AFFIRM.**

**WILHELM R. RENGIL, SIANG YUZI, BRENDA NGIRMERIL, and AUGUST RENGIL,**  
**Appellants,**

**v.**

**UREBAU CLAN,**  
**Appellee.**

CIVIL APPEAL NO. 13-004  
LC/N 09-0379

Supreme Court, Appellate Division  
Republic of Palau

Decided: November 11, 2013

[1] **Civil Procedure:** Jurisdiction

Standing is an element of a Court's subject matter jurisdiction. A court may dismiss, *sua sponte*, a matter over which it lacks subject matter jurisdiction.

[2] **Land Commission/LCHO/Land Court:** Standing to Appeal

Generally, in order to be a "party aggrieved," a person must have been a party to the action from which the appeal is taken.

[3] **Land Commission/LCHO/Land Court:** Standing to Appeal

A nonparty may even in the absence of privity possess a sufficient interest to be allowed to take an appeal. A nonparty has standing to appeal a judgment if he or she has a direct, immediate, and substantial interest which has been prejudiced by the

judgment or which would be benefitted by its reversal.

**[4] Land Commission/LCHO/Land Court: Monumentation**

Failure to attend monumentation is a violation of 35 PNC § 1307(d), which holds that a claimant who fails to personally attend or send a representative to a scheduled monumentation may not contest the boundary determinations and monumentation resulting from the session.

**[5] Land Commission/LCHO/Land Court: Collateral Attack**

A due process challenge should be brought as a collateral attack on the underlying judgment through a quiet title action against the party named in the allegedly void determination of ownership, rather than through a non-party appeal. A party may only collaterally attack a prior determination of ownership if it can carry the burden of proving non-compliance with statutory or constitutional requirements by clear and convincing evidence.

Counsel for Appellants: Moses Uludong  
Counsel for Appellee: Oldiais NgiraiKelau

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, Associate Judge, presiding.

PER CURIAM:

This appeal arises from a Land Court Determination awarding ownership of land known as *Ngerkesiwang* to Urebau Clan. For the reasons set forth below, the appeal is **DISMISSED**.

**BACKGROUND**

On October 6, 1976, Skalsol Uodelchad submitted a Land Acquisition Record in which she claimed and monumented a parcel of land identified as Lot No. 05N001-157 and known as *Ngerkesiwang* (Lot 157) on behalf of Oirei Lineage.<sup>1</sup> On October 6, 1998, Timothy Ngirdimau (Ngirdimau), as representative for Urebau Clan, filed a claim to Lot 157. On September 20, 2007, Ngirdimau submitted a Land Claim Monumentation Record in which he identified Lot 157 as part of the land known as *Ngerkesiwang*. No other person or entity monumented Lot 157, filed a claim to Lot 157, or objected to Urebau Clan's claim to Lot 157. The Land Court held its hearing on January 15, 2013, in which it noted that Urebau Clan was the sole claimant to Lot 157. On January 18, 2013, the Land Court issued its Adjudication and Determination of Ownership awarding Lot 157 to Urebau Clan in fee simple.

Despite filing no claim in the underlying Land Court action and despite failing to appear and contest Urebau Clan's claim at the hearing, Appellants Wilhelm R. Rengiil, Siang Yuzi, Brenda Ngirmeriil, and Augusta Rengiil (Appellants) filed a timely appeal to the Land Court's January 18, 2013

<sup>1</sup> It was established below—and Appellants have not challenged—that Urebau Clan and Oirei Lineage are the same entities.

Determination awarding ownership of Lot 157 to Urebau Clan.<sup>2</sup>

## DISCUSSION

[1] Appellants raise two issues on appeal: (1) Appellants lacked notice that Lot 157 had been monumented or set for a hearing, and, as a result, were denied due process; and (2) the Land Court erred in determining that Urebau Clan was the sole claimant to the land. Before addressing Appellant’s assignments of error, however, the Court must review Appellants’ standing as a threshold matter. For the reasons set forth below, we dismiss the appeal for lack of standing. *See Gibbons v. Seventh Koror State Legislature*, 11 ROP 97 (2004) (standing is an element of a Court’s subject matter jurisdiction); *see also, Pac. Sav. Bank, Ltd. v. Ichikawa*, 16 ROP 1 (2008) (a court may dismiss, *sua sponte*, a matter over which it lacks subject matter jurisdiction).

### I. Standing

#### A. Ulochong and the “aggrieved parties” standard

The Land Claims Reorganization Act of 1996 provides that “[a] determination of ownership by the Land Court shall be subject to appeal by any *party aggrieved* thereby directly to the Appellate Division of the Supreme Court in the manner provided in the Rules.” 35 PNC §1313 (emphasis added); *see also, Ngermechesong Lineage v. Children of Teocho Oiph*, 11 ROP 196 (2004). Thus, Appellants’ standing turns on whether they are “aggrieved parties” within the meaning of Act. To answer this question, this Court’s opinion

in *Ulochong v. LCHO*, 6 ROP Intrm. 174 (1997) is both factually and legally instructive.

In *Ulochong*, the original land proceeding involved a parcel of land in Ngaraard for which Ulochong Amalei (Ulochong) filed the only claim. At the hearing in 1982, Ulochong asked the Ngaraard Land Registration Team (NLR Team) to divide the land between his and his sister’s various children. Based on these assertions and on Ulochong’s status as the only claimant, the NLR Team issued an adjudication dividing the land in this way. However, for reasons not set forth in the record, the Land Claims Hearing Office (LCHO) never acted on the NLR Team’s adjudication and never issued a determination of ownership pursuant thereto.

Thirteen years later, Ulochong finally requested that the LCHO issue the determination; however, instead of requesting a determination dividing the land between his and his sister’s children as he had previously requested, Ulochong asked that the determination be issued in his name alone. Noting the inconsistency, the LCHO nonetheless issued a determination to Ulochong in fee simple because it found that the record—namely Ulochong’s status as the only claimant—provided a sufficient basis upon which to issue a final determination to Ulochong alone.

[2] One of Ulochong’s sons, Damaso, who stood to benefit from the earlier NLR Team adjudication but who never filed a claim in the underlying action, appealed the determination for various reasons, including one which amounted to a due process challenge for lack of notice of the earlier proceedings. In holding that Damaso lacked standing to appeal the LCHO determination because he was not a claimant in the underlying proceeding, the

<sup>2</sup> Appellants were present in Land Court on the day of the Lot 157 hearing for a hearing in another case, LC/N 09-0392 for Lot No. 171-001; however, they made no representations during the hearing for Lot 157.

Court held that an appellant must be an “aggrieved party” in order to bring an appeal. In doing so, the Court defined the term within the meaning of the Land Claims Reorganization Act as follows:

Generally, in order to be a “party aggrieved,” a person must have been a party to the action from which the appeal is taken. “To have standing to appeal, a person generally must be a party to an action below . . .” *Hana Ranch, Inc. v. Kumakahi*, 720 P.2d 1023, 1024 (Hawaii App. 1986). *See* 5 Am. Jur. 2d, *Appellate Review* § [231]<sup>3</sup> (“An appeal is generally available only to persons who were parties to the case below.”).

*Ulochong*, 6 ROP Intrm. at 176.

[3] The Court also recognized a narrow exception to the general rule. It admitted that “[a] nonparty may even in the absence of privity possess a sufficient interest to be allowed to take an appeal. . . . A nonparty has standing to appeal a judgment if he or she has a direct, immediate, and substantial interest which has been prejudiced by the judgment or which would be benefitted by its reversal.” *Id.* (citing 5 Am. Jur. 2d *Appellate Review* § [232]<sup>4</sup>). Despite raising the specter of the narrow exception, the *Ulochong* Court nonetheless determined it did not apply. It held that the NLR Team’s prior adjudication never gave Damaso a vested or exercisable right to the property because whatever potential interest he possessed existed prior to the determination of ownership. Consequently, Damaso did not possess a

“direct, immediate, and substantial interest” that had been prejudiced by the judgment. *Ulochong*, 6 ROP Intrm. at 177. The Court determined *Ulochong* lacked standing to pursue the appeal.

**B. Appellants are not “aggrieved parties” within the meaning of the Act**

It is undisputed that Appellants here were not parties to the Land Court action for which they now seek an appeal; thus, in order to establish standing, Appellants would have to meet the narrow exception outlined in *Ulochong*. We find that Appellants do not meet this exception and in fact possess an even smaller interest, if any, than the similarly situated appellant in *Ulochong*.

Appellants’ only purported interest in the property, for purposes of meeting the exception, arises from a 1976 Land Acquisition Record listing Appellant Wilhelm Rengiil<sup>5</sup> as the claimant not to Lot 157 but for a large parcel of land called *Omisayars*, which, they contend, encompasses Lot 157. Appellants admit that Lot 157 was monumented separately from the other lots allegedly comprising *Omisayars*. Appellants also admit that they were not present at Lot 157’s monumentation.

[4] Failure to attend monumentation is a violation of 35 PNC § 1307(d), which holds that “[a] claimant who fails to personally attend or send a representative to a scheduled monumentation may not contest the boundary determinations and monumentation resulting from the session.” Nonetheless, Appellants

<sup>3</sup> Original Opinion incorrectly cites to §264.

<sup>4</sup> Original Opinion incorrectly cites to §265.

<sup>5</sup> The name on the Land Acquisition Record reads Wilhelm “Rengsuul;” however, Appellant maintains that this record evidences the recording of a claim by Wilhelm Rengiil and Appellee does not challenge this assertion.

argue that Lot 157 was monumented without their presence or knowledge and, thus, Appellants imply that the monumentation in their absence violated their due process rights.

[5] As a brief but necessary digression, Appellants' due process challenge in this appeal fails for two reasons. First, a due process challenge should be brought as a collateral attack on the underlying judgment through a quiet title action against the party named in the allegedly void determination of ownership, rather than through this non-party appeal. *Aimeliik State Pub. Lands Auth. v. Rengchol*, 17 ROP 276, 281 (2010) (“[P]rocedural deficiencies of an unappealed determination of ownership may be asserted on collateral attack.”); *Becheserrak v. Eritem Lineage*, 14 ROP 80, 83 (2007) (the party challenging Land Court notice procedures via collateral attack must do so by clear and convincing evidence); *West v. Ongalek ra Iyong*, 15 ROP 4, 8 (2007) (“[A] party may only collaterally attack a prior determination of ownership if it can carry the burden of proving non-compliance with statutory or constitutional requirements by clear and convincing evidence.”); *Ucherremascech v. Wong*, 5 ROP Intrm. 142, 144 (1995) (outlining requirements for collateral attack of an LCHO determination). Second, even assuming a non-party appeal is the proper forum for a due process challenge, Appellants fail to proffer any evidence—let alone clear and convincing evidence—to show that the Land Court failed to follow the procedural notice requirements outlined in 35 PNC § 1309 in noticing the monumentation and hearing of Lot 157. See *Becheserrak v. Eritem Lineage*, 14 ROP 80, 83 (2007) (holding that a party claiming that they failed to file a claim or attend a hearing because they did not receive notice must prove, by clear and

convincing evidence, that the Land Court did not follow their established procedural notice requirements.). On the scant record before us, we cannot simply assume a violation of due process.

Returning to the issue of standing, in determining that Appellants here fail to meet the *Ulochong* exception for non-party appeals, we hold that the mere existence of a 1976 Land Acquisition Record for an entirely separate parcel of land, which was monumented separately from Lot 157, coupled with Appellants' bald assertions that they lacked notice of the hearing on Lot 157, is simply not enough—they have failed to prove any vested or exercisable right to Lot 157. The appellants in *Ulochong* at least showed a direct link between themselves and the land in question, this being a prior interest, however tenuous, based on the NLR Team's prior division of the land for their benefit. Here, Appellants lack even this tenuous connection. Under even a generous reading of *Ulochong*, Appellants have no “direct, immediate, and substantial interest” in Lot 157 for purposes of establishing standing in the appeal.

From a purely doctrinal standpoint, we feel compelled to reemphasize the well-settled rule that any issue that is not raised in the trial court is waived and may not be raised for the first time on appeal. *Ngarametal Ass'n v. Ingas*, 17 ROP 122 (2010); *Children of Merep v. Youlbeluu Lineage*, 12 ROP 25 (2004); *West v. Ongalek ra Iyong*, 15 ROP 4 (2007); see also *Kotaro v. Ngirchchol*, 11 ROP 235, 237 (2004). Of relevance here, if a non-party filed no claim whatsoever, never attended the monumentation, and failed even to contest the claim at the lower proceeding (despite their coincidental attendance at that very hearing), then the corollary must hold

that that non-party failed to preserve any arguments for purposes of appeal. In this sense, the rule articulated in *Ulochong*, i.e., to be an “aggrieved party” one must actually have been a party in the underlying suit is, and should be, more ironclad than the rule articulated in *Ingas* above, i.e., arguments may not be raised for the first time on appeal. Although the *Ulochong* Court acknowledged the existence of what must be the narrowest of exceptions to the rule requiring that one be a party to the original action in order to appeal the judgment, no Court of this Republic, in nearly two decades, has permitted an appellant to squeeze through it. We also decline.

We hold that Appellants were not aggrieved parties within the meaning of the Act and are without standing to appeal the Land Court’s determination of ownership. The appeal is dismissed and we need not address Appellants’ assignments of error.

### CONCLUSION

For the foregoing reasons, the appeal is **DISMISSED**.

**HANPA INDUSTRIAL  
DEVELOPMENT CORPORATION and  
SOON SEOB HA,**

**Appellants,**

**v.**

**REPUBLIC OF PALAU,  
Appellee.**

CIVIL APPEAL NO. 13-007  
Civil Action No. 12-040

Supreme Court, Appellate Division  
Republic of Palau

Decided: November 29, 2013

[1] **Constitutional Law:** Equal Protection  
A plaintiff asserting an equal protection violation need not show the existence of a separate constitutional right to the benefit at issue.

[2] **Constitutional Law:** Equal Protection  
The Constitution allows preferential treatment of Palauan citizens on the basis of their citizenship.

[3] **Constitutional Law:** Equal Protection  
In negotiating and securing foreign aid, the government acts within the field of foreign affairs.

[4] **Constitutional Law:** Equal Protection  
Laws in the area foreign affairs that distinguish among individuals based on citizenship are subject to intermediate scrutiny.

Counsel for Appellant: William L. Ridpath  
Counsel for Appellee: Sara L. Bloom

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

Appellants Hanpa Industrial Development Corporation and its Korean citizen owner, Soon Seob Ha, (hereinafter collectively referred to as “HIDC”) appeal from the trial court’s judgment dismissing their equal protection challenge to eligibility criteria that limit bidding on projects funded by Republic of China (“ROC”) to companies whose shareholders are of Taiwanese or Palauan nationality. For the following reasons, the decision of the Trial Division is **AFFIRMED**.<sup>1</sup>

### BACKGROUND

The ROC provides assistance to the Republic of Palau (“the Republic”) in the form of stimulus grants. A document entitled *Grant Assistance: Guidelines & Procedures* (“Guidelines”) “provides the guidelines and procedures for implementing the grant assistance from the [ROC] to the [Republic].” Under the Guidelines, the Republic is responsible for choosing which projects will receive grant money, selecting contractors to

complete those projects, and submitting project plans to the ROC Embassy for approval. In completing those tasks, the Republic must comply with the terms and conditions of the ROC grant assistance.

This lawsuit arises out of the contractor eligibility requirements established by the Republic for ROC grant-funded projects. In selecting contractors, the Republic generally uses a sealed bid or competitive negotiation process, in accordance with the Republic of Palau Procurement Act. However, the Guidelines require that “ROC grant assistance projects shall be awarded to and only to enterprise(s) whose majority stakeholder(s) is/are of [Palauan] or ROC nationality.”

In December 2011, the Republic issued a “Fifteen Days Public Notice and Request for Qualifications/Proposals” (“RFP”) soliciting proposals from construction companies for the paving of a road in Ngaraard state. The project was funded by an ROC grant, and the RFP included eligibility criteria as follows:

Based on grant conditions imposed by the granting agency/donor country, companies who intend to participate in the Stimulus Program have to be:

- Wholly owned Palauan Construction Company; and/or
- Wholly owned Taiwanese Construction Company; and/or
- Joint Venture between wholly owned Palauan and Taiwanese Construction Companies; and/or
- Partnership between wholly owned Palauan and Taiwanese Construction Companies; and/or

<sup>1</sup> Pursuant to ROP R. App. P. 34(a), we determine that oral argument is unnecessary to resolve this matter.

- Wholly owned Palauan construction company subcontracting another wholly owned Palauan company or Taiwanese company; and/or
- Wholly owned Taiwanese construction company subcontracting another Taiwanese company or wholly owned Palauan company.

In short, any company not wholly owned by Palauans and/or Taiwanese are not allowed to participate in the Stimulus Bid Program.<sup>2</sup>

Despite these criteria, Korean-owned construction company HICD submitted a bid for the project. The Bureau of Public Works rejected HICD's bid both because of a technical error and because HICD was disqualified "in accordance with the current conditions imposed by the granting agency on the stimulus program of the government." The parties do not dispute that HICD is ineligible to bid on such projects because its owners are not Palauan or Taiwanese.

HICD then filed this action against the Republic, arguing that the eligibility criteria contained in the RFP violated the Equal Protection Clause of the Constitution by discriminating on the basis of national origin. The Republic filed a motion to dismiss, arguing that HICD had failed to state a cognizable equal protection claim. The trial court denied the Republic's motion to dismiss but invited the parties to submit motions for summary judgment.

<sup>2</sup> The RFP criteria appear to be stricter than the Guidelines in that they require wholly Palauan or Taiwanese ownership, rather than majority ownership. However, this distinction does not affect HICD's eligibility to bid because it is wholly owned by Korean citizens.

In November, the Republic filed a motion for summary judgment. The trial court denied that motion and dismissed the case. HICD timely appeals.

### STANDARD OF REVIEW

We review de novo the trial court's grant of summary judgment and may affirm on any basis supported by the record. *ROP v. Carreon*, 19 ROP 66, 70 (2012). Factual findings are reviewed for clear error. *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002).

### ANALYSIS

The Equal Protection Clause of the Constitution provides that "[t]he government shall take no action to discriminate against any person on the basis of sex, race, place of origin, language, religion or belief, social status or clan affiliation except for the preferential treatment of citizens[.]" Palau Const. art. IV, § 5, cl. 1. To establish an equal protection claim, HICD must show that it is "in a class of people similarly situated to a group that is treated differently under the law." *Carreon*, 19 ROP at 71. If HICD belongs to a suspect class and alleges that it is treated differently on the basis of its class membership, some form of heightened scrutiny applies. *Id.* at 72. If its class is not suspect, rational basis scrutiny governs the claim. *Id.* at 73.

HICD argues that the eligibility criteria governing ROC grant-funded projects discriminates on the basis of place of origin by privileging Palauans and Taiwanese over all other nationalities. Accordingly, HICD asserts that it is a member of a class, namely non-Palauan and non-Taiwanese construction companies and shareholders, which is

similarly situated to its Palauan and Taiwanese counterparts but is treated differently by the government because it is ineligible to bid on ROC grant-funded projects. The Republic does not contest HIDC's factual assertions, but it argues that HIDC's equal protection claim fails as a matter of law because (1) HIDC is not constitutionally entitled to bid on government contracts; (2) HIDC is not similarly situated to the privileged class; and (3) even if the eligibility criteria do discriminate on the basis of place of origin, that discrimination passes constitutional muster under the applicable standard of scrutiny.

[1] As an initial matter, it is clear that HIDC need not demonstrate that it has a constitutionally protected right to bid on ROC grant-funded projects in order to sustain its equal protection claim. Such a showing might be necessary if HIDC were asserting a due process claim, but it is not. Instead, the constitutional right at issue in this case is equal protection itself. *See Carreon*, 19 ROP at 72 (“The plain language of § 5 makes equal protection a fundamental right . . . Plaintiffs need not show a violation of an *additional* fundamental right in order to raise their equal protection claim.”). The Republic's argument to the contrary is unconvincing.

HIDC has established that the Republic treated it differently than other similarly situated entities on the basis of its membership in a particular class. The Guidelines and the eligibility criteria are discriminatory on their face because they distinguish those who may bid on projects from those who may not solely on the basis of nationality. For example, the Guidelines provide that “ROC grant assistance projects shall be awarded to and only to enterprise(s) whose majority stakeholder(s) is/are of

[Palauan] or ROC nationality.” Similarly, the RFP eligibility criteria limit bidding to Palauan or Taiwanese construction companies. Accordingly, it is clear that bidding eligibility is determined by whether the shareholders of the construction company are Palauan or Taiwanese, or whether they are some other nationality. HIDC has thus adequately identified the class to which it belongs (non-Palauan and non-Taiwanese companies and their shareholders) and the class which has been treated differently by the government (Palauan and Taiwanese companies and their shareholders).

Moreover, no meaningful difference, aside from nationality, distinguishes HIDC from the privileged class of Palauan and Taiwanese companies and shareholders. HIDC is licensed to do business in Palau, and the Republic has not suggested that some other nationality-neutral factor renders HIDC ineligible to bid on the projects. Instead, the Republic argues that HIDC is not similarly situated to Palauan companies because it is not Palauan, and HIDC is not similarly situated to Taiwanese companies because it is not owned by citizens of the nation that provided the grant money. But that explanation still relies on nationality as the key distinguishing factor for determining whether a company is eligible to bid on ROC grant-funded projects. Ultimately, the Republic points to no nationality-neutral characteristic that distinguishes HIDC from the eligible companies, and we can find none. *See Carreon*, 19 ROP at 71 (“If the only difference between the two groups is a protected classification . . . the disadvantaged group may raise an equal protection claim.”).

Finally, the eligibility criteria discriminate on the basis of a classification that is explicitly protected by the Constitution.

Although the precise meaning of the word “nationality” as it is used in the Guidelines (or “Palauan” and “Taiwanese” as used in the RFP) is not entirely clear, the most reasonable interpretation is that it refers to a person’s citizenship, and the parties seem to assume as much in their briefing.<sup>3</sup> The Equal Protection Clause explicitly singles out discrimination on the basis of “place of origin,” which includes discrimination based on citizenship. See *Carreon*, 19 ROP at 75 (“the phrase ‘place of origin’ includes citizenship”). HIDC has therefore established that the eligibility criteria discriminate on the basis of a protected classification.

The question, then, is whether the disparate treatment required by the eligibility criteria passes constitutional muster. We conclude that it does.

[2] With respect to the favor shown to Palauan companies, the answer is simple. The Constitution explicitly allows “for the preferential treatment of [Palauan] citizens.” Palau Const. art. IV, § 5, cl. 1. Accordingly, although the eligibility criteria discriminate against HIDC in favor of Palauans, this type of discrimination is sanctioned by the Constitution itself.

[3][4] With respect to the preferential treatment of Taiwanese companies, the analysis is more involved. Ordinarily, government action that discriminates on the basis of a protected classification is subject to

strict scrutiny. *Carreon*, 19 ROP at 75. But there are exceptions to that rule. In *Carreon*, we concluded that intermediate scrutiny, rather than strict scrutiny, should apply to “review of laws in the area of immigration and foreign affairs that distinguish among individuals based on citizenship.” *Id.* at 75. Recognizing that the Olbiil Era Kelulau and the President must have the power to “conduct foreign affairs as they see fit,” we held that government action that implicates foreign affairs will survive an equal protection challenge if it “is substantially related to an important government interest.” *Id.* at 80.

Here, the challenged eligibility criteria arise out of significant grants from the ROC to the Republic for important infrastructure projects. The issues in this case implicate the government’s ability to negotiate with other nations to obtain foreign aid for the benefit of the Republic. In conducting these negotiations and agreeing to the terms under which the Republic may receive grant money from foreign nations, the government is acting within the field of foreign affairs. Accordingly, under *Carreon*, intermediate scrutiny applies.

Under that standard, the Republic must show that the challenged eligibility criteria are substantially related to an important government interest. *Id.* The record in this case shows that foreign financial assistance, particularly from the ROC, is very important to the Republic. Obtaining that financial assistance allows the government to complete vital infrastructure projects that might otherwise go unfinished, to the detriment of Palauan citizens and the Republic as a whole. Accordingly, we conclude that securing foreign aid for infrastructure projects constitutes an important government interest.

---

<sup>3</sup> Alternatively, it might refer to a person’s ancestry or place of birth. However, given the practical difficulties of ascertaining that type of information about company shareholders, this interpretation is unlikely. Moreover, we have previously noted that the concepts of ancestry and citizenship are often difficult to disentangle and would likely all fall under the “place of origin” classification articulated in the Constitution. *Carreon*, 19 ROP at 75.

We also conclude that the eligibility criteria are substantially related to that interest. The Republic has introduced evidence suggesting that ROC assistance would be placed in jeopardy if the government did not agree to and obey reasonable restrictions placed on grant money under the Guidelines, including the limitation that contracts be awarded only to ROC or Palauan companies. As the trial court observed, it seems reasonable that a nation who provides a large sum of money for another nation’s infrastructure projects might wish to benefit its own citizens in doing so. The eligibility criteria provide a privilege to ROC companies in return for significant financial assistance, and they do so without disadvantaging Palauan companies, which are also given preferential treatment under the Guidelines. There is no evidence that the ROC would continue to provide financial assistance were the Republic to refuse to limit eligibility to ROC and Palauan companies when awarding the projects. In fact, evidence in the record suggests the contrary. Accordingly, we conclude that the eligibility criteria are substantially related to an important government interest and therefore do not violate equal protection. Because no material facts are in dispute and this conclusion is purely a matter of law, summary judgment in favor of the Republic was appropriate.

**CONCLUSION**

For the foregoing reasons, the decision of the Trial Division is **AFFIRMED**.

**REPUBLIC OF PALAU and MINISTRY OF EDUCATION, Appellants,**

**v.**

**TEREKIU CLAN, Appellee.**

CIVIL APPEAL NO. 13-009  
Civil Action No. 03-384

Supreme Court, Appellate Division  
Republic of Palau

Decided: January 13, 2014

[1] **Property:** Eminent Domain

When the Republic takes property for public use, it is required to provide just compensation. Just compensation includes the payment of interest for the time period between the time of the taking and the time of payment.

[2] **Contracts:** Interpretation

The terms of a contract are generally strictly construed against the party drafting the agreement.

[3] **Contracts:** Interpretation

A settlement agreement is a contract that is interpreted according to general principals of contract law.

[4] **Property:** Eminent Domain

Just compensation’ entitles the property owner to receive interest from the date of the taking

to the date of payment unless modified by contract.

Counsel for Appellant: AAG Sara L. Bloom  
Counsel for Appellee: Yukiwo P. Dengokl

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

Appeal from the Trial Division, the Honorable R. ASHBY PATE, Associate Justice, presiding.

PER CURIAM:

This case concerns the amount of interest due in an inverse condemnation case. For the following reasons, the decision of the Trial Division is affirmed.

### BACKGROUND

The facts of this case are not in dispute. On February 17, 2003, Appellant Republic of Palau (“ROP”) took Appellee Terekieu Clan’s land for public use without providing compensation. On November 19, 2003, Terekieu Clan, as represented by Wilhelm Rengiil and others (“the Rengiil Group”), filed suit against the ROP. On June 7, 2006, a second group of individuals led by Gloria Salii (“the Salii Group”) intervened as third-party plaintiffs. The Salii Group claimed to be the true representatives of Terekieu Clan.

Despite the internal clan dispute, on May 29, 2009, the ROP, the Rengiil Group, and the Salii Group filed a joint stipulation agreeing that the ROP would pay the Clan

\$158,444 as just compensation for the land, plus three percent interest from February 17, 2003, “until the date of the judgment herein.” The Stipulation further directed:

The ROP shall pay the judgment as soon as funds have been certified as appropriated by the Olbiil Era Kelulau (“OEK”) and available. The ROP shall deposit the sum of \$158,444.00, plus interest thereon, and upon receipt the Certificate of Title showing the [Palau] Public Land Authority as owner thereof, the judgment amount shall be delivered to the Terekieu Clan by the Clerk of Courts.

Despite the trial court not being a party to the Stipulation, the Stipulation was drafted in such a way as to order the court to take action:

The Court shall issue an order of Inverse Condemnation pursuant to which the ROP shall pay just compensation to the Terekieu Clan in the amount set forth herein and granting the ROP/Palau Public Lands Authority a fee simple interest in the Property, and an order that a Certificate of Title to the Property be issued showing the Palau Public Lands Authority as the owner of the Property.

On June 15, 2009, then-presiding Justice Foster issued an order specifically declining to enter judgment pursuant to the Stipulation due to the unresolved dispute between the representatives of Terekieu Clan. Instead, Justice Foster granted a motion to continue the trial after no party objected. The case proceeded to trial and on January 21, 2011, the trial court entered a judgment and order finding that Wilhelm Rengiil was the proper representative of Terekieu Clan to receive the just compensation. The Salii

group appealed. The ROP received title to the property after the execution of the Stipulation, but before the appellate decision in this matter. The trial court's decision was affirmed on July 5, 2012.

Approximately two and a half months later, on September 24, 2012, the National Treasury of Palau issued a check in the amount of \$158,444 and presented it to the Terekieu Clan. That sum matched the agreed upon fair market value, but included none of the interest promised in the Stipulation.

On March 20, 2013, Terekieu Clan filed a motion with the trial court in which it sought payment for the interest pursuant to the signed stipulation. In its response, the ROP conceded that interest was due from February 17, 2003 (the date of the taking of the land), to May 29, 2009 (the date the Stipulation was signed). The ROP argued that the latter date marked the day that it effectively removed itself from the litigation. Under the ROP's theory, any additional interest beyond May 29, 2009, was foreclosed based on sovereign immunity. Despite the trial court's offer allowing the ROP to file additional briefing, it failed to avail itself of the opportunity. Accordingly, the trial court, finding no judgment was ever issued pursuant to the Stipulation, disposed of the ROP's sovereign immunity argument and entered a final judgment of inverse condemnation against the ROP in accordance with the terms of the parties' Stipulation. The ROP was directed to pay three percent interest on the amount of \$158,444, as calculated from February 17, 2003, until the date of the judgment, June 17, 2013. This appeal followed.

## STANDARD OF REVIEW

[1, 2] A lower court's conclusions of law are reviewed de novo. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001). Factual findings of the lower court are reviewed using the clearly erroneous standard. *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002).

## ANALYSIS

The ROP presents two arguments on appeal: First, that no interest accrued beyond the signing of the stipulation on May 29, 2009. Second, that the ROP is not responsible for any interest after September 24, 2012, the date the ROP tendered the Clan a check for \$158,444.

### **I. Accrual of interest from the signing of the Stipulation on May 29, 2009, to the issuance of the check on September 24, 2012.**

In its brief, the ROP begins by conceding that an award of interest is part of just compensation. *Wally v. ROP*, 16 ROP 19, 22 (2008) (finding an award of interest to compensate the owner for that delay is itself part of the just compensation to which the owner is entitled). However, it is the ROP's position that by signing the Stipulation it effectively removed itself from the case. Under this theory, interest stopped accruing when the Stipulation was signed. The ROP enumerates three reasons for its position: (1) pursuant to the terms of the Stipulation, accrual of interest was to stop with the signing of the Stipulation; (2) that the intentions of the parties and general fairness should prevent the accrual of interest while the Rengiil group and Salii group fought over clan leadership; and

(3) that the OEK was unable to appropriate funds to pay the Clan until the Court issued a Judgment. Terekui Clan responds that interest is constitutionally required as part of just compensation and contractually required per the terms of the Stipulation.

[1] We agree with the Clan. As succinctly put by the trial court, when the ROP takes property for public use, it is required to provide just compensation. Palau Const. art. XIII, § 7. The default rule of just compensation requires the government to pay interest for the entire time period between the time of the taking and the time of payment. *See Wally*, 16 ROP at 22 (“[A]n award of interest to compensate the owner for that delay is itself part of the just compensation to which the owner is entitled”). Accordingly, under a just compensation analysis, interest continued to accrue after the signing of the Stipulation until the time of payment. The question then is, does the Stipulation modify the default rule in such a way as to terminate the accrual of interest before the time of payment? We answer the question in the negative.

#### A. The Stipulation

The Stipulation requires the payment of interest between the time of the taking and the entry of judgment, which indisputably occurred after the ROP paid \$158,444 on September 24, 2012. Per the Stipulation, the parties agreed that “[t]he sum of \$158,444.00 will be paid in accordance with the stipulation plus interest at the rate of three (3%) per annum from February 17, 2003, until the date of the judgment herein.”

When asked to interpret a contract, the Court’s goal is to ascertain the parties’ mutual intent at the time of contracting. Under Palauan law, courts look first to the actual language

used in a contract to discern the parties’ intent. The words used in the contract are assigned their ordinary and plain meaning unless all parties have clearly intended otherwise.

*Estate of Rechucher v. Seid*, 14 ROP 85 (2007) (internal quotations and citations omitted). A plain reading of the Stipulation requires the accrual of interest until the entry of judgment.

#### B. Intention of the Parties/Fairness

[2] At times, the ROP argues that the terms of the Stipulation toll the accrual of interest with the signing of the Stipulation (“the intent of the parties *per the Stipulation/Agreement* was not for the ROP to pay interest during the time the parties were contesting rightful ownership of the clan”) (emphasis added). However, at other times, the ROP argues that interest should have stopped “*shortly after* the Stipulation/Agreement was signed” (emphasis added). To the extent that the ROP is now asking the Court to look beyond the plain words of the Stipulation, the Court declines to do so. The ROP, in its opening brief, admitted to drafting the Stipulation. The terms of a contract are generally strictly construed against the party drafting the agreement. *Trust Territory v. Edwin*, 8 TTR 23, 34 (1979). Further, the Stipulation also contains an integration clause, which states in part, “[t]his Stipulation supersedes any and all agreements, either oral or written, between the Parties hereto and contains all of the covenants and agreements between the Parties.”

[3] The trial court relied on *Mesubed v. Urebau Clan*, Civ. App. No. 12-045, slip op. at 4 (May 21, 2013), for the position that a stipulated judgment is a contract; and *Omega*

*Engineering, Inc. v. Omega, S.A.*, 432 F.3d 437, 443 (2d Cir. 2005), for the position that “a settlement agreement is a contract that is interpreted according to general principals of contract law.” Additionally, the trial court concluded that when just compensation is determined by a contractual agreement, the terms of the agreement control. The trial court quoted *American Jurisprudence* for the general rule which states, “where the owner of the condemned property parts therewith under an agreement as to the price, the condemnor’s obligation to pay is controlled by the terms of the contract, precluding an allowance of interest *unless* the contract so provides.” 26 Am. Jur. 2d *Eminent Domain* § 323 (emphasis added).

[4] We consider the trial court’s reasoning to be sound. As stated in *United States. V. Thayer-West Point Hotel Co.* 329 U.S. 585 (1947), “‘just compensation’ entitles the property owner to receive interest from the date of the taking to the date of payment as a part of his just compensation.” *Id.* at 588. However, in “an ordinary contractual relationship between the [government and a party] . . . the inclusion or exclusion of interest depends upon other contractual provisions, the intention of the parties and the circumstances surrounding the use of the term.” *Id.* at 589-590; see *Leichter v. Lebanon Bd. of Educ.*, 917 F.Supp.2d 177, 186 (D. Conn. 2013) (“it is axiomatic that parties can contract out of the default rule”).

The ROP and Terekieu Clan entered into a contract. That contract modified the default interest rule of just compensation. The terms of the modification are clear. Under

contract law, holding the parties to the terms of the Stipulation is appropriate.<sup>1</sup>

### C. The OEK’s appropriation of funds

The ROP also contends that the trial court’s refusal to enter judgment prevented the OEK from appropriating the Stipulation funds. This is plainly incorrect. First, the Court notes that the OEK eventually appropriated \$158,444 in funds and the Clan was paid this sum more than eight months before the entry of judgment. Second, as discussed in *Wally*, Title 35’s “quick take” procedure allows for appropriation of funds and payment without court action. *Wally v. ROP*, 16 ROP at 19.<sup>2</sup>

While the trial court’s refusal to enter judgment may have been unforeseen by the ROP drafter, the ROP could have attempted to mitigate the accrual of interest. Yet, as pointed out by the trial court, the ROP did nothing for over three years (“The ROP never offered to pay the amount of the stipulated judgment into the Court pending resolution of the Clan issue; it never sought to withdraw the

<sup>1</sup> See 44B Am. Jur. 2d *Interest and Usury* § 75 (“The pendency of legal proceedings between a debtor and his or her creditor will not stop the running of the interest on the debt if the money is not paid into court, or if it is evident from the contract that the parties did not intend to postpone payment in the event of legal proceedings.”); See also 44B Am. Jur. 2d *Interest and Usury* § 21 (Stating in part, “[u]ndoubtedly, persons who occupy or intend to assume the relation of debtor and creditor may contract for the payment of interest within the limits allowed by statute, and such a contract is controlling because interest expressly reserved in a contract is recoverable as a right.”).

<sup>2</sup> Under this takings procedure, the ROP must pay the Clerk of Courts fair market value for the land, “which sums shall draw interest at the rate of three percent per annum *from the date of the summons until claimed by the defendant* or ordered paid to the defendant by the court.” 35 PNC § 318(b)(2) (emphasis added).

Stipulation; and it still has not paid the interest that it concedes it owes . . .”).

In sum, the ROP’s argument that the accrual of interest stopped after the signing of the Stipulation is without merit. Under a constitutional just compensation theory, or under the terms of the Stipulation, accrual of interest continued from the signing of the Stipulation at least to the issuance of the payment of \$158,444 on September 24, 2012.

**II. Accrual of interest from September 24, 2012, the date the check was tendered to June 17, 2013, the date of judgment**

In its second argument, the ROP contends that just compensation only entitles the property owner to interest from the date of the taking to the date of payment of the principal. In other words, the ROP argues that no interest is owed after the ROP paid \$158,444 on September 24, 2012.<sup>3</sup> However, the ROP points to no case holding that, where there is a contractual agreement between the parties as to the accrual of interest, the contract is invalid if it requires the accrual of interest beyond the date of payment of the principal.

As discussed above, it is clear that the parties were free to contract out of the default rule terminating the accrual of interest at the time of payment. They have done so here. Under the plain language of the Stipulation, interest accrued from the time of the taking until the date of the judgment.

---

<sup>3</sup> We note that the ROP’s argument is flawed. Under general accounting practices, initial payments of a debt are, at a minimum, partially attributed to interest before principal. See 44B Am. Jur. 2d *Interest and Usury* § 72. Accordingly, even absent the Stipulation, the principal was not fully paid on September 24, 2012, and interest on the remaining principal would continue to accrue beyond that date.

**CONCLUSION**

For the foregoing reasons, the decision of the Trial Division is **AFFIRMED**.

**CHILDREN OF LLECHOLCH,  
Appellant,**

v.

**ETUMAI LINEAGE,  
Appellee.**

CIVIL APPEAL NO. 13-012  
LC/D NO. 11-0022

Supreme Court, Appellate Division  
Republic of Palau

Decided: March 18, 2014

[1] **Land Commission/LCHO/Land  
Court:** Claims

A claimant's historical failure to claim land may be circumstantial evidence that the claimant does not own the land.

[2] **Land Commission/LCHO/Land  
Court:** Lot Size

The Land Court may, in the absence of better evidence, make rough estimations of lot size and use those estimates in determining whether a piece of land is part of a particular Tochi Daicho lot.

[3] **Land Commission/LCHO/Land  
Court:** Determinations of Ownership

A claimant's historical ownership of land surrounding the disputed lot may serve as circumstantial evidence of ownership of the disputed lot.

Counsel for Appellant: Siegfried B. Nakamura  
Counsel for Appellee: Pro Se

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Land Court, the Honorable C. QUAY POLLOI, Senior Judge, presiding.

PER CURIAM:

This appeal arises from a determination of ownership awarding land in Ngiwal State to Etumai Lineage. For the following reasons, we affirm the decision of the Land Court.<sup>1</sup>

### BACKGROUND

This is the second appeal of the Land Court's determination of ownership of land in Ngersngai Hamlet of Ngiwal State, identified as worksheet Lot No. 018 D 02 (the Lot). In the underlying proceedings, Etumai Lineage argued that the Lot is part of Tochi Daicho Lot 55, which is owned by the Lineage. Although the Children of Llecholch Ingais (Children of Llecholch) did not dispute that Etumai Lineage owns Tochi Daicho Lot 55, they argued that the Lot is simply not part of Tochi Daicho Lot 55 but rather part of land they own, called *Olsarch*, which is part of Tochi Daicho Lot 464.

At the hearing, the Land Court heard extensive testimony from numerous witnesses. Both parties presented evidence that they had

---

<sup>1</sup> Appellant has not requested oral argument, and we determine that oral argument is unnecessary to resolve this matter. See ROP R. App. P. 34(a).

used the property for agriculture and had granted permission for others to use the land. Etumai Lineage also presented evidence suggesting that Llecholch Ingais failed to claim the Lot during the Japanese land survey, despite doing so for neighboring plots, and that his daughter, Anastasia, previously identified the boundaries of their land during a 1985 monumentation as excluding the Lot.

Ultimately, the Land Court concluded that the weight of the evidence favored Etumai Lineage. In reaching that conclusion, the Court drew inferences from Llecholch's and Anastasia's prior failures to claim the land. The Court also reasoned that including the disputed Lot in Etumai Lineage's Tochi Daicho Lot 55, rather than in Llecholch's Tochi Daicho Lot 464, would result in an apportionment that more closely approximated the listed sizes of the relevant Tochi Daicho Lots. Finally, the court noted that Etumai Lineage historically owned much of the land adjacent to the Lot. The Land Court therefore awarded ownership of the Lot to Etumai Lineage, and the Children of Llecholch appealed.

On appeal, this Court determined that the Land Court may have incorrectly applied a presumption of correctness to the Tochi Daicho size listings and that it erred in failing to afford the parties an opportunity to be heard before taking judicial notice of certain facts. Accordingly, this Court remanded the case to require the Land Court to clarify its reasoning and provide the parties with an opportunity to be heard on the issue of judicial notice. On remand, the Land Court heard from the parties regarding judicial notice, conducted a site visit, and clarified that it did not afford a presumption of correctness to the sizes listed in the Tochi Daicho. Again, it determined that Etumai Lineage owns the Lot.

The Children of Llecholch now timely appeal for the second time. Etumai Lineage did not file a response.

### **STANDARD OF REVIEW**

This Court reviews the Land Court's conclusions of law de novo and its findings of fact for clear error. *Rengiil v. Debkar Clan*, 16 ROP 185, 188 (2009). "The factual determinations of the lower court 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 shall be affirmed even if this Court might have arrived at a different result. *Ngaraard State Pub. Lands Auth. v. Tengadik Clan*, 16 ROP 222, 223 (2009).

### **ANALYSIS**

On appeal, the Children of Llecholch challenge the Land Court's factual findings. They argue that the evidence was insufficient to support a finding that Etumai Lineage owns the Lot and that the only reasonable conclusion to be drawn from the evidence is that the Lot belongs to the Children of Llecholch. Specifically, they raise three primary objections: first, to the Land Court's consideration of Llecholch's failure to claim the land during the Japanese survey as a legal waiver, second, to its size approximations relating to the Tochi Daicho Lots; and third, to its inference that Etumai Lineage's historic ownership of lands adjacent to the Lot was probative of its ownership of the disputed Lot. The Children of Llecholch cannot meet the "high standard" required to set aside the Land Court's factual determinations with respect to

any of the above objections. *Etpsison v. Tmetbab Clan*, 14 ROP 39, 41 (2006).

[1] First, contrary to the Children of Llecholch's assertions, the Land Court did not apply the legal doctrine of waiver to Llecholch's failure to claim the Lot during the Japanese occupation. Instead, the court simply considered Llecholch's failure to be circumstantial evidence suggesting that Llecholch did not believe the Lot to be his property. This is a reasonable inference, and it is distinct and apart from the legal concept of waiver.

[2] Second, the Land Court did not clearly err in making rough calculations and comparisons with respect to the listed Tochi Daicho sizes. Although the court did not have before it the exact size of the Lot in question, the court reasonably estimated the size by comparing it visually with neighboring lots of known sizes. This is an appropriate. The court acknowledged that the lot to the east of the disputed Lot is currently owned by Katosang, but noted that, historically, that land was listed in the Tochi Daicho as belonging to Etumai Lineage. Again, this evidence is simply probative—and not dispositive, as the Children of Llecholch suggest—of Etumai Lineage's claims of ownership. Indeed, the court's inference regarding Etumai Lineage's history of ownership of the neighboring lands was reasonable and lends additional support to its finding that the Lot belongs to Etumai Lineage.

In sum, the Land Court's determination of ownership was supported by sufficient evidence. The Land Court provided reasons for discounting some of the testimony that favored the Children of Llecholch and crediting testimony favoring Etumai Lineage. In reaching its conclusion, the Land Court

application of the court's extensive experience in reviewing Tochi Daicho lots. In any event, the court invited the parties to submit additional documentation if they felt that the court had significantly erred in its estimation, and neither party availed itself of this invitation. Accordingly, the court did not clearly err when it concluded, based on rough estimates, that including the Lot in Tochi Daicho Lot 55 would more closely approximate the sizes listed in the Tochi Daicho. *See Azuma v. Ngirchechol*, 17 ROP 60, 63 (2010) (noting that size comparisons can be probative as to whether disputed land is part of a particular Tochi Daicho Lot).

[3] Finally, the Land Court reasonably considered Etumai Lineage's historic ownership of land adjacent to the Lot on three of its four sides as circumstantial evidence that Etumai Lineage also owns the Lot in question.

drew reasonable inferences from the available evidence, and "it is not the appellate panel's duty to reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence." *Kawang Lineage v. Meketii Clan*, 14 ROP 145, 146 (2007).

## CONCLUSION

For the foregoing reasons, the decision of the Land Court is **AFFIRMED**.

**ANGELES YANGILMAU and  
FLORENTINE YANGILMAU ,  
Appellants,**

v.

**MARIANO CARLOS,  
Appellee.**

CIVIL APPEAL NO. 13-008  
Civil Action Nos. 09-204, -284, and -288

Supreme Court, Appellate Division  
Republic of Palau

Decided: April 4, 2014

[1] **Evidence:** Testimony of Witnesses

A trial court is not required to accept uncontradicted testimony as true.

[2] **Property:** Reasonably Exclusive Possession

With respect to *Echang* land, in a case where one party has clear legal title, both parties have use rights, and neither party can show continuous use of the land in question, the party who holds legal title is entitled to reasonably exclusive possession of the land.

Counsel for Appellants: J. Uduch Sengebau Senior

Counsel for Appellee: William L. Ridpath

BEFORE: KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice; and KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable R. ASHBY PATE, Associate Justice, presiding.

PER CURIAM:

Angeles Yangilmau and Florentine Yangilmau appeal the Trial Division’s Judgment and Decision in this trespass case stemming from competing gardens on a portion of Tochi Daicho Lot 1590 (Lot 1590) above the Echang road. For the reasons set forth below, the decision of the Trial Division is **AFFIRMED**.

## BACKGROUND

This is a trespass case stemming from a dispute over competing farms in *Echang* on a portion of Tochi Daicho Lot 1590 (“Lot 1590”) above the Echang Road on Arakebesang Island. The underlying dispute between the parties—Mariano Carlos and his family (“Carlos”) and Angeles Yangilmau and her family (the “Yangilmaus” or “Yangilmau”)—has been going on for over thirty years. A brief explanation of the earlier litigation concerning the land in *Echang* is necessary to discussion of this matter.

Civil Action No. 354-93 began in 1993 as a quiet title action over several lots in *Echang*. After an initial trial, the court concluded that the heirs of Borja owned the land, including Lot 1590, and that the ownership rights were “subject to the rights of all persons who have or had a family or lineage member who resided in *Echang* in 1962 to reside and use land in *Echang* without disturbance.” Judgment, *Dalton v. Choi Engineering Corp.*, Civ. Action No. 354-93 (Tr. Div. Apr. 15, 1997). The latter conclusion was based on the Echang Land

Settlement Act of 1962 (Settlement Act), which provides, in relevant part, that then-residents of *Echang* and their heirs would be allowed to peacefully use the land “for an indefinite period in the future.”

In the first of three appeals, we reversed in part and remanded for determination of who possessed legal title to Lot 1590 and other lots. *Heirs of Drairoro v. Dalton*, 7 ROP Intrm. 162, 168 (1999). But we affirmed the trial court’s determination that “all of the land in question located within Echang is subject to a use right in the residents of Echang as of 1962 and their decedents.” *Id.* Florentine Yangilmau was a party to Civil Action 354-93, and, upon remand and during interrogatories, he stated that he had “no interest” in Lot 1590. Ultimately, pursuant to a quitclaim deed issued as compensation for his legal services, Mariano Carlos was adjudged the owner of a portion of Lot 1590, including the area above the Echang road, which is the subject of the present litigation. Order, *Dalton v. Choi Engineering Corp.*, Civil Action No. 354-93, at 6 (July 28, 2004).

In spite of Carlos’s legal title to the land, several others began or continued to farm the land. Of particular relevance to the matter before the Court, the Yangilmaus went so far as to obtain a temporary restraining order to prevent Carlos from entering or fencing in the land. The Yangilmaus contended that the land was part of their lot, which borders Lot 1590. Carlos found vegetables in his garden, including taro plants, uprooted. An employee hired to farm the land for the Yangilmaus admitted to removing some of the Carlos’ vegetables and to planting several mahogany, betel nut, coconut, and noni trees on the property.

Carlos sued the Yangilmaus and others for trespass and damage to his property, which resulted in the case presently before the Court. The history of that dispute is laid out in substantial detail in the two final decisions of the Trial Division. We recite only the facts that are salient to this appeal.

The Yangilmaus claimed a right to enter and farm Lot 1590 by virtue of their long tenure farming in the area and based on their dispute of the boundary line between Lot 1590 and their adjoining lot. After a trial, the Trial Division found in favor of Carlos. In particular, the court rejected the Yangilmaus’ claim to a use right to the land because it determined that the earlier case, Civil Action 354-93, was preclusive as to Carlos’s ownership. In the body of its decision, the court further stated that the Defendants were jointly and severally liable for the loss of the Carlos’s plants. The Yangilmaus appealed arguing that they have a right to farm Lot 1590 pursuant to the Settlement Act.

On appeal, we affirmed the Trial Division’s Judgment and Decision relating to the liability and the damages flowing from the underlying torts committed by the Yangilmaus on the land, but reversed the portion of the Trial Division’s Judgment dealing with the Yangilmaus’ use rights to the land in question. Specifically, we stated that, “[b]ecause the Trial Division erred in its determination that the judgment in Civil Action 354-93 precludes the Yangilmaus claim to a use right to portions of Lot 1590, we reverse the judgment against the Yangilmaus and remand for proceedings consistent with this Opinion.” *Carlos v. Carlos*, 19 ROP 53, 59 (2012) (original emphasis omitted).

On remand, the Trial Division considered whether the Yangilmaus possessed

use rights pursuant to the terms of the Echang Covenant contained in the 1962 Settlement Act to all *Echang* land and, if so, whether the portions of the Tochi Daicho Lot 1590 located within *Echang* to which Carlos holds title are subject to the Yangilmaus' use rights. On June 13, 2013, the Trial Division concluded that: (1) the Yangilmaus possess use rights in all *Echang* land; (2) Carlos possesses use rights in all *Echang* land; (3) the Yangilmaus failed to prove continuous farming activities on the portion of Lot 1590 owned by Carlos; (4) because the Yangilmaus failed to prove continuous farming activities on the portion of Lot 1590 owned by Carlos, the Yangilmaus are not entitled to "reasonably exclusive possession" thereof; (5) Carlos holds title to the portion of Lot 1590 at issue in this dispute; and (6) by virtue of possessing both title and a competing use right in this particular *Echang* land, Carlos is entitled to reasonably exclusive possession of these lands.

Appellants timely appeal.

### STANDARD OF REVIEW

We review findings of fact from the Trial Division for clear error. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Interm. 317, 318 (2001). As long as the court's findings are based on admissible evidence that could lead a "reasonable trier of fact" to the same result, we will not disturb those findings. *Id.* We review legal conclusions de novo. *Id.*

### ANALYSIS

The Yangilmaus assert that the Trial Court erred in concluding that Carlos's possession of both title and competing use right to the land in question entitles him to

reasonably exclusive possession of the land.<sup>1</sup> Specifically, the Yangilmaus contend that each of the Trial Court's conclusions discussed above is factually and legally erroneous.

### I. The Trial Court's Findings of Fact.

The Yangilmaus contend that the Trial Court erred in determining that they failed to prove continuous farming activities on the portion of Lot 1590 owned by Carlos. The Yangilmaus believe that they established that they had farmed the land in question from 1947 to 2009 and they rely on the testimonies of Celestine Yangilmau, Angeles Yangilmau and Florentine Yangilmau in support of this assertion. Further, they assert that Celestine's testimony regarding the boundaries on his father's lease was uncontradicted.

[1] As an initial matter, we note that a "trial court is not required to accept uncontradicted testimony as true." *Ngetelkou Lineage v. Orakiblai Clan*, 17 ROP 88, 92 (2010) (citing *Ngerungor Clan v. Mochouang Clan*, 8 ROP Interm. 94, 96 (1999)). However, the record in this case indicates that evidence and testimony were introduced which are contrary to the Yangilmaus' position

<sup>1</sup> Although the Yangilmaus pose this question as the central issue to be considered by this Court upon appeal, they do not further propound upon this assignment of error in their brief. Nevertheless, we address this issue in the course of our discussion resolving their other assignments of error. Additionally, in the Argument section of their brief, they present a different issue as the central issue upon appeal. Specifically, in the opening paragraph of their Argument section, Appellants assert that "[t]he issue is whether the Trial Court erred as a matter of law in failing to address whether Yangilmau's use right under covenant of the 1962 Land Settlement Agreement to his farm located on the portion of Tochi Daicho Lot 1590 at issue runs with the land." We address this issue in the course of our review of the Trial Court's findings.

regarding the location of the specific land in question. In its thorough Opinion, the Trial Division discussed its basis for reaching its ultimate conclusion that “whatever farming activities that Yangilmaus may have historically conducted in and around the land in question appear not to have been on Lot 1590, but rather on Lot 1718(b), which is well below Carlos’s parcel.” This conclusion was based upon the testimony of Carlos and his witnesses, upon the testimony of Florentine Yangilmau in which he expresses, at the least, confusion as to the exact location of the land in question, as well as upon Florentine Yangilmau’s failure to argue for—or even mention—the existence of a use right to Lot 1590 in Civil Action No. 354-93. Given the ample evidence in the record which could lead a reasonable trier of fact to the same result, we will not disturb the Trial Court’s findings in this regard.<sup>2</sup>

The Yangilmaus also appear to challenge the Trial Court’s finding that Carlos holds title to the portion of Lot 1590 at issue in this dispute. The Yangilmaus’ brief is unclear as to their rationale or basis for arguing that this conclusion is “clearly erroneous.” Carlos’s title to the land at issue in this dispute was established by the decision in *Dalton v. Choi Engineering Corp.*, Civil Action No. 354-93 (July 28, 2004). Therefore, this is not a determination that can be challenged by this appeal.

---

<sup>2</sup> It is also worth noting that, in their discussion regarding who was first in time to farm the land, the Yangilmaus appear to concede that Carlos did, in fact, farm the land in question. Thus, the Yangilmaus tacitly admit that whatever farming activities they may have conducted were interrupted and, as a corollary, were not continuous. This lends further credence to the Trial Division’s finding that the Yangilmaus failed to establish continuous farming activities on the land in question.

## II. The Trial Court’s Conclusions of Law.

The Yangilmaus challenge the Trial Division’s determination that Carlos is entitled to reasonably exclusive possession of the land by virtue of possessing both title and a competing use right. Although their argument is undeveloped at best, the Yangilmaus appear to argue that they should be entitled to reasonably exclusive possession and that Carlos’ possession of title cannot extinguish their use rights to the land.

As discussed at length in the lower court’s Opinion, and as clarified below in this Opinion, title to *Echang* land does not, in and of itself, trump a use right. However, neither does a use right, without more, establish reasonably exclusive possession to a particular parcel of land. In this case, it was not Carlos’s title to the land at issue, alone, which precluded the Yangilmaus’ reasonably exclusive possession. Rather, it was a combination of factors; most notably the Yangilmaus’ failure to establish a meaningful claim for reasonably exclusive possession of the land in question.

The Trial Court explained in its Opinion that its findings were, in part, an attempt to give meaningful effect to the Appellate Division’s announcement in *Torul v. Arbedul* that it was never the intent of the Echang Covenant to create entirely new rights in the land for *Echang* residents. *Torul v. Arbedul*, 3 TTR 486, 492 (Tr. Div. 1968) (The 1962 Settlement “sought to re-establish former rights rather than to create entirely new ones.”). In applying that theory to the matter before it, the Trial Division held that “if Yangilmau has not proven continuous farming activities, his use right should not entitle him to a reasonably exclusive possession of new

lands to which he previously had no meaningful claim.” This singular statement accurately captures the thesis of these types of cases which strive to protect *Echang* residents from unreasonable interference of their use and enjoyment of *their property*—meaning property *to which they have some entitlement*.

The Trial Division’s choice of words is also significant because it explains that its decision to extinguish the Yangilmaus’ use rights was not based solely upon the fact that Carlos held legal title to the land. Indeed, as the Yangilmaus point out, this is the precise concept which we determined did *not* eliminate their use rights in our previous Appellate decision. *Carlos*, 19 ROP at 59 (“while there may be some other reason that the Yangilmaus’ use rights have extinguished, the determination that [Carlos] has legal title did not do so.”). Neither was the Trial Division’s decision based exclusively on the fact that the Yangilmaus had not established continuous farming activities. The Trial Division even noted that Carlos had likewise failed to establish continuous farming activities. Rather, what the Trial Division established was that use rights alone, without more, did not create reasonably exclusive possession. Thus, the Yangilmaus needed some other tie to the land in question before reasonably exclusive possession could be established. This conclusion properly echoes the sentiment of the dicta in *Torul v. Arbedul* and the underlying purpose of the 1962 Settlement Act itself, which was to “re-establish former rights rather than to create entirely new ones.” *Torul*, 3 TTR at 492.

Rather than leave the matter unresolved because of both parties’ failure to establish continuous farming activities, the Trial Division relied on previous Appellate and Trial level decisions in this case and

determined that there existed other methods of establishing reasonably exclusive possession of *Echang* lands. Specifically, the Trial Division concluded that, “in addition to proving continuous farming activities as a means of establishing reasonably exclusive possession, an *Echang* resident with use rights may also establish reasonably exclusive possession in lands to which he or she holds title as against another *Echang* resident with use rights but no title.” Ultimately, the Trial Division’s finding that Carlos, and not the Yangilmaus, held reasonably exclusive possession to the land in question was premised upon that conclusion, which we now affirm.

The Yangilmaus also repeatedly assert that the covenant provided for in the 1962 Settlement Act runs with the land and, therefore, land owners—like Carlos—are bound indefinitely to the rights of the people residing in *Echang*. We agree to an extent. The covenant does run with the land; and land owners are bound indefinitely to refrain from unreasonably interfering with the use rights of residents of *Echang*. What the Yangilmaus fail to grasp, however, is that it must first be established that a party’s use rights are superior to the land owner’s own use rights in order to bind said land owner indefinitely pursuant to the terms of the covenant in the 1962 Settlement Act. Here, the Yangilmaus failed to establish that their use rights were superior to those of Carlos.

[2] Finally, in various sections of their brief, the Yangilmaus seem to suggest that they are entitled to reasonably exclusive possession because they were first in time to farm the land in question. The Court has conducted a review of the record below and, although they mention several times that they have farmed the land for many years, the

Court cannot find reference to the specific argument that merely being first in time entitles them to reasonably exclusive possession. Arguments not raised in the court below are waived and cannot be argued for the first time on appeal. *Children of Merep v. Youlbeluu Lineage*, 12 ROP 25, 27 (2004); *Tulop v. Palau Election Comm’n*, 12 ROP 100, 106 (2005). Furthermore, as a corollary to our ruling affirming the Trial Court’s factual determination that the Yangilmaus’ farming activities were not conducted on the land in question, Appellants’ “first in time” argument, even if properly preserved, similarly does not relate to the land at issue in this dispute. Therefore, we decline to address whether being first in time is yet another way *Echang* residents with use rights can establish reasonably exclusive possession of *Echang* lands. We simply hold that, in a case where one party has clear legal title, both parties have use rights, and neither party can show continuous use of the land in question, the party who holds legal title is entitled to reasonably exclusive possession of the land.

**CONCLUSION**

For the foregoing reasons, the decision of the Trial Division is **AFFIRMED**.

**TEMMY SHMULL,  
Appellant,**

**v.**

**HANPA INDUSTRIAL DEVELOPMENT  
CORPORATION,  
Appellee.**

CIVIL APPEAL NOS. 12-048 & 12-049  
Civil Action No. 03-384

Supreme Court, Appellate Division  
Republic of Palau

Decided: April 28, 2014

[1] **Damages:** Interest

Unless otherwise agreed, interest is always recoverable for the non-payment of money once payment has become due and there has been a breach.

[2] **Damages:** Liquidated damages

Liquidated damages are customarily unenforceable as penalties when they are in excess of actual damage caused by a contractual breach

[3] **Contract:** Interpretation

The term ‘agreement,’ although frequently used as synonymous with the word ‘contract,’ is really an expression of greater breadth of meaning and less technicality. Every contract is an agreement; but not every agreement is a contract

[4] **Appeal:** Record Below

Meaningful appellate review requires a lower court to clearly articulate both its findings of fact and its conclusions of law

Counsel for Shmull: Siegfried B. Nakamura  
Counsel for HANPA: William Ridpath

BEFORE: KATHLEEN M. SALII, Associate Justice; R. ASHBY PATE, Associate Justice; and KATHERINE A. MARAMAN.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

This case arises out of a series of construction contracts between Temmy Shmull (Shmull) and Hanpa Industrial Development Corporation (Hanpa) for construction work performed on Shmull's building in Ngesekes.<sup>1</sup> For the reasons stated below, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** to the trial court with instructions.

### BACKGROUND

On May 8, 2003, Hanpa filed a complaint against Shmull seeking payment for construction work performed on Shmull's building in Ngesekes. On June 24, 2003, Shmull filed an answer and counterclaim, denying Hanpa's claims and seeking damages for breach of contract and breach of warranty.

<sup>1</sup> We avoid using the terms "Appellant" and "Appellee" in this matter as both parties appealed the trial court's decision.

The trial court issued its Findings and Decision on November 2, 2012, finding that the parties (1) entered into two building contracts—one for the construction of the first floor of the building and another for the second floor; (2) reached an agreement to build a third floor for the building but ultimately failed to create an enforceable contract out of that agreement; and (3) signed off on two valid change orders that complied with the requirements of the first two contracts.

The trial court also found that both Hanpa and Shmull were in breach of the contracts and agreements. Shmull owed Hanpa \$188,118.43, and Hanpa owed Shmull \$110,469.36. The trial court ordered Shmull to pay Hanpa the difference, which amounted to \$77,649.07 in damages. On November 20, 2012, both Hanpa and Shmull appealed.

### STANDARD OF REVIEW

Challenges to the sufficiency of the evidence are questions of fact, which we review for clear error, only reversing the trial court's decision if its findings are not "supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion." *Dmiu Clan v. Edaruchei Clan*, 17 ROP 134, 136 (2010) (internal quotation marks and citation omitted). We review de novo the lower court's conclusions of law. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001). "In cases before this Court, United States common law principles are the rules of decision in the absence of applicable Palauan statutory or customary law." *Becheserrak v. ROP*, 7 ROP Intrm. 111, 114 (1998); *see also* 1 PNC § 303 ("[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not

so expressed, as generally understood and applied in the United States, shall be the rules of decision in the Courts of the Republic of Palau . . .").

## DISCUSSION

Although neither party carried its burden of establishing that the trial court's findings of fact were clearly erroneous, we have identified some calculation errors, as well as two instances where the trial court failed to articulate its findings of fact and conclusions of law in such a way as to allow for meaningful review. These concerns aside, we find the trial court's reasoning to be very sound.

The parties' claims on appeal are numerous and, at times, overlapping. The Court will address each argument in turn.

### I. The first and second floor extensions

Hanpa's first claim on appeal involves the cost of a change order that extended the footprint of the building. Because the change order was made pursuant to the first and second floor contracts, the contracts must briefly be addressed.

#### A. The first floor contract

The trial court found that, on February 22, 1997, the parties entered into a contract for the construction of the first floor of a two story building. Hanpa would construct the building and Shmull would pay Hanpa \$130,000. The contract specified progress payments: (1) \$30,000 upon completion of the foundation and columns, (2) \$30,000 upon completion of the second floor slabs, stairs and masonry, (3) \$35,000 upon completion of doors, windows, tiles, plumbing, and electric, and (4) the final installment of \$35,000 upon

completion of the finishings, painting and cleaning.

Hanpa received progress payments, but not in the sums listed in the contract. Hanpa received individual payments of \$27,000 on May 16, July 11, and August 20, 1997; a \$15,000 payment on October 10, 1997; and a final payment of \$13,053.02 on November 1, 1999; for a total amount of \$125,543.82. Both parties agree that the trial court properly found that Shmull owed Hanpa the remaining \$4,456.18, with an additional \$11,480.34 in interest and \$222.81 in late fees.

#### B. The second floor contract

The trial court found that Shmull and Hanpa entered into a contract for the construction of the second floor on March 22, 1997. The terms required Shmull to pay Hanpa \$200,000. In exchange, Hanpa would construct a second floor with a terrace, furnishings, and appliances. The contract, drafted by Hanpa, lacked a start date and a completion date. Pursuant to the contract, progress payments were to be made after each phase of work was completed. The trial court found that Shmull only paid Hanpa \$177,500 for its work, with an outstanding balance of \$22,500.<sup>2</sup>

#### C. The change order for first and second floor extensions

During trial, both parties alleged that a number of agreements, contracts, and change orders existed but were never put in writing. The signed contracts for the first and second floors required that any change orders

---

<sup>2</sup> On page seven of the trial court's Findings and Decision, it misstates the outstanding balance as "\$4,456.18." It is clear that this figure is the outstanding balance for the first rather than second floor. The trial court lists the correct outstanding balance for the second floor on page 23 of its Findings and Decision.

modifying the construction of the building be put in writing and be signed by both Shmull and Hanpa. Subsequently, a change order meeting these requirements modified the building's floor plan by extending its footprint by 17'. However, the change order did not specify price, date of completion, or other details. At trial, Hanpa argued that the parties had, pursuant to a subsequent change order, agreed upon a price of \$70,836.08 for the extensions. Believing there was no agreed-upon price, Shmull calculated the reasonable cost as \$44,247.60. The trial court concluded there had been no agreement on price, and the court accepted Shmull's figure.

On appeal, Hanpa contends that the trial court erred by accepting the \$44,247.60 cost estimate for these extensions. Hanpa claims that (a) Shmull ratified a change order that listed the cost for the work at \$70,836.08; (b) the square footage of the extensions was larger than the trial court's determination; (c) the trial court's reasonable cost figure was based on a miscalculation and that Hanpa has a better formula to determine the costs of the extensions; and (d) prejudgment interest at the rate of 18% should be awarded on the \$70,836.08 price. We will address each argument in turn.

**i. Alleged ratification of the change order**

Hanpa's first argument—that Shmull ratified a change order setting the price at \$70,836.08—fails because Hanpa presented no direct evidence of this ratification. Instead, Hanpa suggests that because Shmull admitted to ratifying a change order on the extension, the change order that lists a price of \$70,836.08 *must* be the ratified order. We disagree. Shmull testified that he never agreed to a change order for the extensions at the

price of \$70,836.08. The trial court did not clearly err in crediting this testimony.

**ii. The square footage of the extensions**

Next, Hanpa contends that the actual square footage of the extensions was larger than the trial court's determination thereof. The trial court concluded that the 17' extension resulted in an expansion of each floor by 612 square feet (36' long by 17' wide). Presently, Hanpa contends that the correct length is 44.5', rather than 36'. Hanpa cites to the testimony of its own witness, Mr. Ahamed, who worked for Hanpa, as well as to the original floor plans for the building. Specifically, Hanpa argues that the original floor plans show only one longer unit (presumably 44.5') at only one end of the building, with the other units being 36' long. In contrast, the final building has two longer units, one on each end of the building. Thus, Hanpa contends that the 17' expansion resulted in an additional longer unit that is 44.5' long by 17' wide.

We do not agree with Hanpa's characterization of the floor plans. While they are somewhat unclear, the original plans appear to show five units, with two longer units on each end of the building and only three units in the middle. Pictures of the final building show two longer units on each end of the building and four units in the middle.<sup>3</sup> We affirm the trial court's conclusion that the 17' extension was incorporated in the middle of the building. Furthermore, there was conflicting testimony on the extensions.

---

<sup>3</sup> The pictures reveal an additional flaw in Hanpa's argument: Hanpa's damage calculation is based on the assumption that the alleged 44.5' by 17' extension results in an additional longer unit on the first and second floor. However, pictures of the completed building reveal that no longer units are present on the second floor.

Hanpa's employee, Mr. Ha, testified that the extensions were 36' by 17'. Consequently, the trial court did not err in crediting the testimony that the extensions were each 36' by 17'.

**iii. Alleged error and better square footage formula**

In its third argument, Hanpa states that the trial court's figure of \$44,247.60 is based on a miscalculation, and that Hanpa has a better formula to determine the costs of the extension. The trial court accepted Shmull's figure, which was based on the total square footage for the first and second floors as described in their respective contracts. Using these figures and the price of each floor, Shmull calculated the cost per square foot for each floor and multiplied this number by the additional square footage resulting from the extension.

In contrast, Hanpa's proposed formula improperly inflates the cost of the extensions in two ways. First, as noted above, Hanpa calculates the length of the extension as 44.5', rather than 36'. This is wrong. Second, rather than using the total square footage of the first and second floors to determine an average cost per square foot, Hanpa only uses the square footage of the original five units of each floor. This smaller square footage total omits the square footage of the building's walkways and stairs, thereby inflating the average cost per square foot. Hanpa justifies omitting these other costs and inflating its estimate because the building cost for the units is higher than the building costs for non-units (walkway, stairs, etc) and the 17' extensions add additional units. While units may be more expensive to build than non-units, Hanpa cites to no evidence for this position. More significantly, we do not agree that a more

reasonable cost figure for the 17' extension is found by excluding the real costs of stairs and walkways. In sum, we conclude that the trial court did not err in accepting the reasoning of Shmull's reasonable cost estimate.

Although Shmull's reasoning, which was adopted by the trial court, is sound and reasonable, we note minor math errors in his calculations.<sup>4</sup> We therefore narrowly remand this issue so the trial court can perform a new calculation using Shmull's reasoning.

**iv. Pre-judgment Interest**

[1] Finally, Hanpa argues that it is entitled to prejudgment interest on the costs of the first and second floor extensions. The trial court concluded that it could not easily determine the amount due, or when the amount was due, because the memorandum signed by the parties did not specify a price or a completion date. Accordingly, the trial court awarded no pre-judgment interest on this claim. On appeal, Hanpa relies on § 354 of the Restatement of the Law, *Contracts 2d* for the position that prejudgment interest is appropriate. However, that section is only applicable "where the amount owed is fixed by the contract or can be determined with reasonable certainty." *Id.* As described above,

---

<sup>4</sup> Specifically, pursuant to the first contract, Shmull took the cost of the first floor (\$130,000) and divided it by the total square feet of the floor (4,215.69 sq.ft). Shmull calculates the answer as \$30.80 per sq.ft. We calculate the answer as \$30.84 per sq.ft. This sum multiplied by 612 sq.ft comes to \$18,874.08, rather than Shmull's calculation of \$18,849.60. Similarly, pursuant to the second contract, Shmull took the cost of the second floor (\$200,000) and divided it by the total square feet of the floor (4,815 sq.ft). Shmull calculates the answer as \$41.50 per sq.ft. We calculate the answer as \$41.54. This sum multiplied by 612 sq.ft comes to \$25,422.48, rather than Shmull's calculation of \$25,398. We calculate the grand total as \$44,296.56, rather than \$44,247.60.

the amount owed was not fixed or determinable with reasonable certainty by the parties. Rather, it was hotly contested. Furthermore, Comment C. to § 354 states, “unless otherwise agreed, interest is always recoverable for the non-payment of money *once payment has become due* and there has been a breach.” *Id.* (emphasis added). In this matter, the change order was also silent as to when payment was due. Accordingly, we uphold the trial court’s determination on this issue.

## **II. Liquidated damages awarded to Shmull**

The trial court awarded Shmull liquidated damages for the delayed completion of the first floor. Pursuant to the contract, the first floor was to be finished by June 30, 1997, and Hanpa agreed to pay Shmull \$100 each day until the project was finished. The floor was conditionally certified as complete on July 7, 1998. The trial court found that Hanpa was liable from June 30, 1997, to July 7, 1998. Both parties appealed this determination.

### **A. Hanpa’s arguments**

Hanpa begins by arguing that the trial court erred because Shmull substantially contributed to the delays of the first floor and is therefore barred from collecting liquidated damages. Hanpa cites to letters written in late 1997 and early 1998 by Mr. Ha to Shmull. While Mr. Ha testified that Shmull’s delayed payments contributed to the delay of the first floor, there was substantial evidence to the contrary. First, as noted by the trial court, the contract employed a progress payment plan and payments were to be distributed relative to completed construction phases. The trier of fact could have reasonably concluded that delayed payments were the consequence of

Hanpa’s delayed work.<sup>5</sup> Second, Mr. Ha acknowledged that Hanpa failed even to order the building materials until October of 1997, approximately four months past the contract completion date. Third, the letters which allegedly show financial difficulties that resulted from Shmull’s delays, actually suggest that Hanpa was in general financial trouble. It is telling that the letters do not specifically allege that this financial trouble was exclusively the result of Shmull’s delayed project, nor specifically the result of Shmull failing to make appropriate first floor progress payments. Accordingly, we determine that the trial court did not err in finding that Shmull did not substantially contribute to the delays of the first floor.

Failing to cite any case law, Hanpa also argues that Shmull waived any claim to liquidated damages by failing to assert his claim. In his response, Shmull points to a February 20, 1998, letter he wrote to Mr. Ha, in which he reminds Mr. Ha of the contractual completion date of the first floor and that the delay prevents rentals to tenants. We also note that Shmull wrote Mr. Ha on October 24, 1998, to remind him that, per the first floor contract, Shmull, Mr. Ha, and a representative from the Palau National Development Bank needed to sign a conditional certification of completion and that the liquidated damages

---

<sup>5</sup> Strong evidence supports this position. In a January 1998 letter to Shmull, Mr. Ha acknowledges that the first floor is still incomplete (he contends that 5% of the necessary work remains outstanding). Pursuant to the terms of the contract, the final payment of \$35,000 for the first floor was only due upon completion of the finishings, painting, and cleaning of the first floor. Nevertheless, by the time Mr. Ha was writing his letter in January of 1998, Shmull had already paid \$96,000 of the total \$130,000, and had made his last payment in October of the prior year. We calculate that this sum represents an overpayment of \$1,000 by Shmull at that time given the progress of the first floor.

clause called for \$100 payment each day the project remained incomplete. Accordingly, even assuming without deciding that a liquid damages claim can be waived, there was no waiver here.

**B. Shmull’s argument**

Shmull also argues that liquidated damages should run from July 1, 1997, through the date when Hanpa repudiated its obligation to complete the work by filing suit in 2003. Shmull calculates the damages as being over \$200,000. Significantly, Shmull does not allege that this sum amounts to an honest or legitimate sum of actual damages, nor that the trial court overlooked any such evidence.

In its response, Hanpa argues that if it is found liable for liquidated damages, the accrual of those damages stopped when the parties signed the Conditional Certificate of Completion on July 7, 1998. Hanpa contends that when Shmull signed the Conditional Certification of Completion for the first floor on July 7, 1998, the certification contained a clause where the parties agreed that “June 17, 1998 was the last day employees of HANPA completed work allowing the owner to make commitments to potential clients.” Additionally, Hanpa argues the liquidated damages clause’s purpose was to offset lost office space rentals, and that Shmull’s liquidated damage claim is an extreme calculation inconsistent with the facts and the law.

[2] We agree with Hanpa that liquidated damages ceased to accrue with the signing of the Conditional Certification of Completion. Awarding Shmull liquidated damages for over five and a half years, at a cost of over \$200,000, would be inconsistent with the purpose of the contract clause and would

amount to a penalty unanchored to an honest or legitimate estimate of delay damages.

Liquidated-damages clauses in construction contracts can be drafted to apply whenever work is begun and a specific amount of time is allowed for the work to be completed. Such liquidated-damages provisions are meant to provide an honest and legitimate estimate of damages in case of delay, promote economic efficiency, and provide an alternative resolution to contract disputes, and such damages are consistent with public policy as a means of inducing timely performance. . . . Such liquidated damages provisions will be enforced unless the provision is a penalty.

22 Am. Jur. 2d *Damages* § 516; see also *In re Late Fee and Over-Limit Fee Litigation*, 741 F.3d 1022, 1026 (9th Cir. 2014) (“Liquidated damages are customarily unenforceable as penalties when they are in excess of actual damage caused by a contractual breach”).

In sum, the trial court did not err in finding Hanpa liable for damages of \$100 a day for the time period between June 30, 1997, and July 7, 1998, the date the first floor was conditionally certified as complete. However, the trial court calculated the number of days from June 30, 1997, to July 7, 1998, as 552 days for a total of \$55,200. We calculate the number of days from, and including, Monday, June 30, 1997, to, but not including, Tuesday, July 7, 1998, as 372 days for a total of \$37,200. We consider the trial court’s error as nothing more than a scrivener’s error, but remand on this narrow issue so the proper calculation may be done.

### III. Parking lot paving

The trial court concluded that (1) the parties agreed to a change order whereby Hanpa would pave the parking lot and install window grills for \$25,000; (2) Shmull paid Hanpa \$22,000 for this work; and (3) Hanpa failed to install window grills, and Shmull had to hire a third party to do this at the cost of \$2,000. Accordingly, the trial court offset Shmull's liability by \$2,000 and determined that he owed Hanpa an additional \$1,000.

Hanpa contends that, despite the trial court's finding, the court simply failed to include the \$1,000 figure in its final damage award to Hanpa. In his response, Shmull concedes that the trial court found he owed an outstanding balance of \$1,000. We agree with Hanpa that the trial court failed to include this \$1,000 award in its final calculations.<sup>6</sup> Accordingly, we remand on this specific issue so a proper calculation may be done.

### IV. Third Floor

The trial court also found that (1) the parties had reached an agreement whereby

<sup>6</sup> The trial court's calculation of Shmull's liability to Hanpa, before reducing it by Hanpa's liability to Shmull, was \$188,118.45. We calculate this number as \$1,000 shy of the actual cost. From the trial court's own figures, we calculate Shmull's liability as follows: The remaining balance for the first floor (\$4,456.18 in principal, \$11,480.34 in interest, \$222.81 in late fees); the remaining balance for the second floor (\$22,500 in principal, \$63,716.70 in interest, \$1,125 in late fees); the remaining balance for the third floor (\$40,369.82); the remaining balance for the first and second floor 17' extensions (\$44,247.60\*); and the remaining balance for the paved parking lot and window grills (\$1,000). This total comes to \$189,118.45, \$1,000 more than the total calculated by the trial court.

\*In this calculation, we do not correct the trial court's figure for the first and second floor extensions so that that we may highlight and confirm the trial court's omission of the applicable \$1,000.

Hanpa would build a third floor for Shmull's building; (2) the parties never agreed upon a price for this work; and (3) the work was never completed. At trial, Hanpa argued that it completed 40% of the construction of the third floor; that the agreed upon total price for the third floor was \$213,897.66; and that 40% of the total price, \$96,253.95, is the fair value of the improvements done to the third floor.<sup>7</sup> Shmull argued, based on an assessment by a professional engineer, that the fair value of the improvements was \$40,369.82. The trial court accepted Shmull's valuation, finding that the professional engineer's report was "thoughtful and credible" and took into account the work and materials used. In contrast, the trial court found Hanpa's valuation "suspect" because there was no mutually agreed upon price for the third floor.

[3] On appeal, Hanpa contends that, because the trial court found that the parties agreed to the construction of a third floor, there must be a contract and therefore an agreed upon price for the performance of contract. We disagree. Though the trial court used the word "agreement" to define the understanding between the parties that a third floor would be built, the court was also clear that there was no contract. As *Black's Law Dictionary* states, "[t]he term 'agreement,' although frequently used as synonymous with the word 'contract,' is really an expression of greater breadth of meaning and less technicality. Every contract is an agreement; but not every agreement is a contract." *In re National Gas Distributors, LLC*, 556 F.3d 247, 255 (4th Cir. 2009); quoting *Black's Law Dictionary*, 74 (8th ed.2004); see also *Conkling v. Turner*, 138 F.3d 577, 579 (5th Cir. 1998) ("there was no contract because

<sup>7</sup> We calculate 40% of \$213,897.66 to be \$85,559.06, rather than \$96,253.95.

there was no agreement as to price”). We conclude that the trial court did not err in holding that there was no contract for the third floor, or in finding that Shmull’s valuation was more accurate.

**V. Prejudgment Interest Against Hanpa**

The trial court awarded pre-judgment interest against Hanpa at a rate of 9% from “May 8, 2003, to November 2, 1998,” which, according to the trial court, came to \$3,609.45. This stated time period is clearly incorrect as November 2, 1998, predates May 8, 2003. Thus, we cannot ascertain how the trial court calculated the figure of \$3,609.45.

Presently, Hanpa contends that the trial court committed reversible error in awarding pre-judgment interest to Shmull. Specifically, Hanpa argues that (1) the trial court’s determination is unclear as to whether it awarded prejudgment interest for the cost of repairing a poor paintjob of the building or for the liquidated damages, or both; (2) pre-judgment interest is only appropriate as to the repair costs; and (3) the period of time the trial court used in its calculation of prejudgment interest contains a clear error.

In his response, Shmull theorizes that the trial court intended to award pre-judgment interest both for the damages resulting from the poor paintjob as well as the repair costs. Shmull also theorizes that the trial court intended pre-judgment interest to accrue from May 8, 2003, to November 2, 2012.

[4] Meaningful appellate review requires a lower court to clearly articulate both its findings of fact and its conclusions of law. *Smanderang v. Elias*, 9 ROP 123 (2002). The trial court’s decision regarding pre-judgment interest against Hanpa is unclear. We will not

speculate, but instead remand this issue to the lower court.

**VI. Failure to Award Certain Damages to Shmull**

Finally, Shmull contends that the trial court erred in failing to award him damages for Hanpa’s omitted work. Shmull notes that a review by a professional engineer found discrepancies between the plans and the completed building. The alleged omissions included a concrete arch and second floor kitchen sinks, counters, cabinets, and broom closets. Shmull claims these omissions resulted in \$26,000 in savings for Hanpa and that this sum must be considered in the overall liability calculation of the parties.

Hanpa responds by citing to evidence that suggests Shmull verbally approved some of these changes and never objected to the omission of others. Hanpa also classifies these omissions as unsigned change orders that resulted from Shmull’s decision to change the purpose and intended use of the second floor. Given that these changes were neither memorialized in writing nor signed by both parties, Hanpa contends that these changes should not result in a damages award.

Hanpa’s argument is flawed. Hanpa claims that a change order that is not memorialized in writing and signed by both parties should not result in a damages award. While this is true for additional work that was not memorialized in writing and signed by both parties, this is not true for omitted work that was not memorialized and signed by both parties. The latter scenario applies here. According to the first and second floor contracts, Hanpa was required to construct the floors per the specification and drawings. If a change order requesting an omission was made, Hanpa needed to have the request

memorialized and signed by both parties to avoid liability.

Despite this flaw in Hanpa’s argument, we remand this issue to the Trial Division because, although the trial court referenced the alleged defective and omitted work, the court did not ultimately decide the issue.<sup>8</sup> Meaningful appellate review requires a lower court to clearly articulate both its findings of fact and its conclusions of law. *Smanderang v. Elias*, 9 ROP 123 (2002). Because the record is lacking on this issue, we remand.

### CONCLUSION

For the reasons stated above, we **AFFIRM** in part, **REVERSE** in part, and **REMAND** to the trial court with instructions so the damages may be recalculated in the following manner to include: (1) a new calculation using Shmull’s reasoning for the first and second floor extensions, as outlined above; (2) the liquidated damages awarded to Shmull from, and including, Monday, June 30, 1997, to, but not including, Tuesday, July 7, 1998; (3) the additional \$1,000 that Shmull owes Hanpa for the parking lot; and (4) the sum for pre-judgment interest Hanpa owes Shmull for the poor paintjob, or for liquidated damages, or both. We also remand so the trial court may consider whether Shmull is entitled to up to \$26,000 in damages for Hanpa’s allegedly omitted work.

**KUKUMAI RUDIMCH,**  
**Appellant,**

**v.**

**RAYMOND REBLUUD,**  
**Appellee.**

CIVIL APPEAL NO. 13-003  
LC/N 02-155A

Supreme Court, Appellate Division  
Republic of Palau

Decided: April 30, 2014

[1] **Appeal and Error:** Preserving Issues

Arguments raised for the first time on appeal will not be considered.

[2] **Appeal and Error:** Basis for Appeal

Appellate courts generally should not address legal issues that the parties have not developed through proper briefing. It is not the Court’s duty to interpret broad, sweeping arguments, to conduct legal research for the parties, or to scour the record for any facts to which the argument might apply.

Counsel for Appellant: J. Roman Bedor  
Counsel for Appellee: Ronald K. Ledgerwood

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and R. ASHBY PATE, Associate Justice.

<sup>8</sup> The trial court summarized the issue in its “Findings” section, but failed to address the merits of the issue later in its decision.

Appeal from the Land Court, the Honorable RONALD RDECHOR, Associate Judge, presiding.

PER CURIAM:

Appellant Kukumai Rudimch, through her daughter Eriko Singeo, appeals the Land Court's Decision awarding land identified as Lot No. 02N007-006 located in Ngerduais island, one of the rock islands of Airai state, to Appellee Raymond Rebluud. Because we find that Appellant has waived consideration of the issues presented on appeal, we **AFFIRM** the Land Court's decision.

**BACKGROUND**

Appellant Kukumai Rudimch, deceased, and Appellee Raymond Rebluud each claimed title to the land in question and the Land Court held a claims hearing in 2006. The recordings of that hearing were defective; so, it held a second hearing in 2012. Appellant Kukumai Rudimch had passed away by the time of the second hearing. As a result, her daughter, Eriko Singeo, represented her interests.

At the 2012 hearing, Eriko Singeo explained that her father, Indalecio Rudimch, bought the land in question in 1965 from Rebluud Ngiraibibngiil, Appellee Rebluud's father. Rebluud testified that his father never owned Lot 02N007-006, explaining that his mother, Etebai, owned the property instead. As a result, Rebluud argued that his father did not possess the legal right to sell the land to Rudimch.

After considering the testimony and the credibility of the various witnesses, the Land Court determined that Rebluud

Ngiraibibngiil never possessed the authority to sell the land in question. Further, the Land Court noted that both claimants testified that the property sold by Rebluud Ngiraibibngiil to Rudimch did not contain the lot at issue in this case. Because of this combination of factors, the Land Court awarded the property to Appellee Rebluud. Appellant Rudimch, through her daughter Eriko Singeo, filed a timely appeal.

**STANDARD OF REVIEW**

The Court has consistently refused to consider issues raised for the first time on appeal. *Ngiratereked v. Erbai*, 18 ROP 44 (2011). Arguments raised for the first time on appeal are deemed waived. *Id.*

**ANALYSIS**

Appellant Rudmich argues that the Land Court clearly erred in determining that Appellee Rebluud owns Lot No. 02N007-006 because (1) she is entitled to the land as a bona fide purchaser for value without notice of a defect in title of the seller; (2) any challenge to the sale of the land is barred by the statute of limitations; and (3) she is entitled to the land under the doctrine of adverse possession. Appellee Rebluud did not file a Response.

[1] It is well-settled that arguments raised for the first time on appeal will not be considered. *Rechucher v. Lomisang*, 13 ROP 143, 149 (2006) ("This Court has consistently refused to consider issues raised for the first time on appeal."); *see also Ngereketiit Lineage v. Ngerukebid Clan*, 7 ROP Intrm. 38, 43 (1998). Arguments not raised in the Land Court proceedings are waived on appeal. *Children of Merep v. Youlbeluu Lineage*, 12 ROP 25, 27 (2004); *see also Kotaro v.*

*Ngirchechol*, 11 ROP 235, 237 (2004) (“No axiom of law is better settled than that a party who raises an issue for the first time on appeal will be deemed to have forfeited that issue . . .”). The waiver rule is important, particularly in land litigation, because in order to bring stability to land titles and finality to disputes, parties to litigation are obligated to make all of their arguments, and raise all of their objections, in one proceeding. *Ngiratereked*, 18 ROP 44.

[2] Furthermore, the burden of demonstrating error on the part of a lower court is on the Appellant. *Ngetchab v. Lineage v. Klewei*, 16 ROP 219, 221 (2009) (“[I]t is the job of Appellant, not the Court, to search the record for errors.”). As noted in *Idid Clan v. Demei*, 17 ROP 221 (2010), “[i]t is not the Court’s duty to interpret . . . broad, sweeping argument, to conduct legal research for the parties, or to scour the record for any facts to which the argument might apply.” *Idid Clan v. Demei*, 17 ROP 221, 229 n.3 (2010).

In this case, the Court cannot find any reference to a statute of limitations or adverse possession argument in the record; nor has Appellant cited to any portion of the record establishing that she raised these arguments before the Land Court. In the section of her brief devoted to these issues, Appellant does cite to specific sections of the transcript. However, this scattered testimony, even when interpreted broadly and collectively, does not comprise a statute of limitations argument and does not address all the elements of adverse possession. See *Brikul v. Matsutaro*, 13 ROP 22, 25 (2005) (“To acquire title by adverse possession, the claimant must show that the possession is actual, continuous, open, visible, notorious, hostile or adverse, and under a claim of title or right for twenty years.” (citing

*Arbedul v. Rengelekel a Kloulubak*, 8 ROP Intrm. 97, 98 (1999)). The record is simply inadequate to establish that these issues were properly before the Land Court such that they can now be raised on appeal. As a result, they are waived.

The record is similarly ambiguous regarding Appellant’s bona fide purchaser argument. The testimony vaguely addresses some essential elements of this theory and it is arguable that at various times throughout the hearing Appellant testified that Appellant Rudimch bought Lot No. 02N007-006 in good faith, that she paid a valuable consideration for the land, and that she was without notice of any defects in the title. See *Ngiradilubch v. Nabeyama*, 3 ROP Intrm. 101 (1992). Thus, by scattershot, the basic criteria for a bona fide purchaser argument may have been presented to the Land Court throughout the entirety of Appellant’s testimony. However, we will not search the record for facts to which this recently articulated argument might apply. *Idid Clan*, 17 ROP 221. The bona fide purchaser theory was never expressed in a cohesive argument such that it could have been considered by the Land Court. Accordingly, it will not be addressed for the first time on appeal and is deemed waived. *Rechucher*, 13 ROP at 149; see also *Ngiratereked*, 18 ROP 44.

Notwithstanding the rule that this Court will not consider an issue first raised on appeal, we recognize two exceptions: (1) to prevent the denial of fundamental rights, and (2) when the general welfare of the people is at stake. *Rechucher*, 13 ROP at 149. Neither of these circumstances is present in this case. Appellant is a civil litigant, not a criminal defendant, and neither her life, her liberty, nor any fundamental right is at stake. See *Kotaro*, 11 ROP at 237. The issue of whether

Appellant could have proven an adverse possession, statute of limitations, or bona fide purchaser argument does not implicate any fundamental right, nor does it affect the general welfare of the people. Therefore, Appellant has waived these issues and we decline to address them on appeal. *See Ngiratereked*, 18 ROP at 46.

**CONCLUSION**

For the foregoing reasons, the Land Court's determination of ownership is **AFFIRMED**.

**UREBAU CLAN,  
Appellant,**

**v.**

**BUKL CLAN,  
Appellee.**

CIVIL APPEAL NO. 13-005  
LC/N Nos. 09-0396, 09-0348, & 09-0351

Supreme Court, Appellate Division  
Republic of Palau

Decided: May 1, 2014

[1] **Appeal and Error:** Adequacy of Lower Court Decision

If appellate court can discern the relevant findings of fact and conclusions of law from the lower court decision, meaningful review is possible.

[2] **Land Commission/LCHO/Land Court:** Claims

Clan's consistent claims of ownership over many years may be considered circumstantial evidence of actual ownership.

Counsel for Appellant: Oldiais Ngiraikelau  
Counsel for Appellee: Raynold B. Oilouch

BEFORE: KATHLEEN M. SALII, Associate Justice; R. ASHBY PATE, Associate Justice; and HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Land Court, the Honorable Salvador Ingereklii, Associate Judge, presiding.

PER CURIAM:

This appeal arises from the Land Court's resolution of competing claims for ownership of three lots in Ngetkib Village, Airai State in favor of Bukl Clan. For the following reasons, we affirm the decision of the Land Court.<sup>1</sup>

**BACKGROUND**

This case involves a dispute over the ownership of land identified as Lots 05N001-090, 05N001-091, and 05N001-096 (the Lots) in Airai State. Bukl Clan, Urebau Clan, Ucheliou Clan, and Ngermellong Clan each asserted claims to the Lots. Oscar B. Omelau also filed a claim for ownership of the Lots but failed to appear before the Land Court to present his claim.

On February 5, 2013, the Land Court held a hearing, at which David Orrukem appeared on behalf of Bukl Clan, Timothy Ngirdimau appeared on behalf of Urebau Clan, Bilung Gloria Salii appeared on behalf of Ngermellong Clan, and Rosiana Masters appeared on behalf of Ucheliou Clan.

Orrukem testified that he was pursuing the claim filed by the late Tmewang Remengesau on behalf of Bukl Clan. He explained that Omelau had earlier claimed ownership of the Lots on behalf of Bukl Clan because Omelau was, at that time, the eldest member of Bukl Clan. He also explained that

real name of the land is *Ked er Ngerbilang*, although some people call it *Itengedii*.

Ngirdimau testified that the Lots are part of a land known as *Sangelliou*, which belongs to the Urebau Clan. He explained that there has been a lot of confusion over the proper names for the lands in this area, but that *Sangelliou* includes the cemetery and the Lots at issue in this case.

Bilung testified that she was also pursuing the late Tmewang's claim, but that she decided to claim the land for Ngermellong Clan (and Techeboet Lineage) because Bukl is a land name, not a clan name.

Finally, Masters testified that she claims a portion of Lot 05N001-090 as part of a land known as *Ikidel*, which is owned by Ucheliou Clan.

On February 27, 2013, the Land Court issued a Determination of Ownership finding that the Lots belong to Bukl Clan. Urebau Clan timely appeals.<sup>2</sup>

**STANDARD OF REVIEW**

We review the Land Court's conclusions of law de novo and its findings of fact for clear error. *Rengiil v. Debkar Clan*, 16 ROP 185, 188 (2009). Where there are several plausible interpretations of the evidence, the Land Court's choice between them shall be affirmed. *Ngaraard State Pub. Lands Auth. v. Tengadik Clan*, 16 ROP 222, 223 (2009).

**ANALYSIS**

On appeal, Urebau Clan raises two related, but analytically distinct, arguments.

<sup>1</sup> Appellant has not requested oral argument, and we determine that oral argument is unnecessary to resolve this matter. *See* ROP R. App. P. 34(a).

<sup>2</sup> Ngermellong Clan and Ucheliou Clan have not challenged the Land Court's determination of ownership and are not parties to this appeal.

First, it asserts that the Land Court failed to articulate the basis of its ruling clearly, thereby precluding meaningful appellate review, and that the case must therefore be remanded to the Land Court for clarification and additional findings. Second, it argues that insufficient evidence supported the Land Court's determination that the Lots belong to Bukl Clan.

### **I. Adequacy of the Land Court's Opinion**

We first turn to the question whether the Land Court's opinion is detailed enough to allow for meaningful appellate review. We conclude that it is.

[1] "The Land Court must issue findings of fact and conclusions of law that make clear the basis for its determination of ownership in one party rather than another; if it does not, this Court cannot adequately review the determination and the case must be remanded." *Mesebeluu v. Uchelkumer Clan*, 10 ROP 68, 72 (2003). However, the Land Court "need not reiterate every fact presented at trial because the availability of a transcript allows meaningful review to take place." *Id.*

Here, the Land Court issued a ten-page determination of ownership, which included a summary of the proceedings, findings of fact, and conclusions of law. It described the testimony presented at the hearing, remarked on the difficulty of adjudicating land disputes in the absence of Tochi Daicho listings, explained its reasons for finding some witnesses to be credible and for discrediting other witnesses, and ultimately concluded that the Lots belonged to Bukl Clan. It is true that the Land Court's "Findings of Fact" section is rather sparse, but additional findings of fact are scattered throughout the "Analysis/Discussion" section. Moreover, the

Land Court's reasons for rejecting the claims presented by Ngirdimau, Bilung, and Masters are apparent from the opinion. It is clear from the Land Court's opinion that it disbelieved Ngirdimau's testimony because of inconsistencies and because Ngirdimau failed to correct ostensibly incorrect monumentation records despite having adequate knowledge and time to do so. Similarly, it is clear that the Court rejected Bilung's claim because it concluded that Bukl is indeed a clan and rejected Masters' claim because there was no evidence to support it aside from her own unsubstantiated assertions regarding the boundaries of *Ikidel*.

Because the Land Court's opinion adequately describes the factual and legal bases for its determination of ownership, we conclude that meaningful review is possible and remand is unnecessary.

### **II. Sufficiency of the Evidence**

Urebau Clan next argues that insufficient evidence supported the Land Court's determination that Bukl Clan owned the Lots. In particular, Urebau Clan objects to the Land Court's reliance on the fact that prior claims were filed on behalf of Bukl Clan as evidence that the Lots indeed belonged to Bukl Clan.

The standard for upsetting the Land Court's determination of ownership because of insufficient evidence is a high one. *See Singeo v. Secharmidal*, 14 ROP 99, 100 (2007) (noting that appellants have been "extraordinarily unsuccessful" in raising this type of challenge). "To prevail, an appellant must show that the Land Court's findings were clearly erroneous and that the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion." *Id.* (internal quotation

marks and citation omitted). “It is not the appellate panel’s duty to reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence.” *Kawang Lineage v. Meketii Clan*, 14 ROP 145, 146 (2007). “Put simply, Land Court determinations are affirmed so long as the factual findings are plausible.” *Ngaraard State Pub. Lands Auth. v. Tengadik Clan*, 16 ROP 222, 223 (2009).

Here, the parties presented scant evidence to aid the Land Court in determining ownership of the Lots. The only testimony at the hearing was offered by the claimants themselves, and few of them had any personal knowledge about the origin and history of title to the land. Indeed, the Land Court noted “the inherent difficulty of determining title to lands when claimants must rely on family history and hearsay to present their claims, and where witness[es] with personal knowledge of past transactions or events are deceased or unavailable ... and where the testimony of competing claimants [is] largely self-serving and affected with bias.” Because of the lack of direct evidence or testimony made with personal knowledge by unbiased witnesses, the Land Court was forced to base its ownership decision primarily on credibility determinations and circumstantial evidence.

Neither Ngirdimau nor Orrukem appeared to have substantial personal knowledge about how their respective clans allegedly came to acquire the Lots at issue. Ngirdimau testified that the land was conveyed by Ngermelkii Clan to Urebau Clan. When asked why his uncle, Rengulbai, failed to claim the land during the 1976 monumentation, Ngirdimau explained that his uncle had little knowledge of the area and that the monumentation records were unreliable. Orrukem, in turn, testified that he was simply

pursuing the claim filed on behalf of Bukl Clan in 1976 by Tmewang, who at that time bore the chief title Remengesau of Ngermellong Clan. He also testified that Omelau claimed the land in 2003 because, at the time, Omelau was the eldest representative of Bukl Clan.<sup>3</sup>

Faced with witnesses/claimants who possessed little salient personal knowledge, the Land Court made credibility determinations and drew inferences from the historical record. The Land Court found that Ngirdimau was not a credible witness because of inconsistencies in his testimony suggesting that “he is only taking his chances in claiming these lots.” The Court also drew reasonable inferences from Urebau Clan’s historical failure to claim the Lots. The Land Court found that Ngirdimau’s uncle, Rengulbai, represented Urebau Clan during the 1976 monumentation of lands in Ngetkib but failed to claim the Lots for Urebau Clan. Moreover, during the decades after that failure, Ngirdimau took no action to correct his uncle’s alleged mistake. The Land Court permissibly construed these facts as evidence that Urebau Clan did not own the Lots. *See Idid Clan v. Olngembang Lineage*, 12 ROP 111, 116 (2005) (holding that a clan’s historical failure to file a claim for a particular land may be considered evidence that it does not own that land).

The Land Court also reasonably took into account that, despite holding the highest male title of a different clan, Tmewang claimed the land on behalf of Bukl Clan in 1976. Moreover, the Court found that, at the time he made the claim on behalf of Bukl Clan, Tmewang was considered

<sup>3</sup> In its opening brief before this Court, Urebau Clan admits that “[t]here is no dispute that [Tmewang and Omelau] claimed the land on behalf of Bukl Clan.”

knowledgeable about land in the area. Accordingly, the Land Court concluded that Tmewang's decision to claim the land for Bukl Clan, rather than for his own clan, was "itself a strong indication that the land belongs to Bukl Clan." Given the lack of other evidence in the case, the Land Court afforded significant weight to Tmewang's choice to claim the land for Bukl Clan.

[2] We note that, contrary to Urebau Clan's protestations in its opening brief before this Court, the Land Court did not purport to create a bright line rule that the filing of a claim is sufficient to establish ownership of the land in question. Such a rule would be peculiar at best. Instead, the Land Court simply considered the fact that Bukl Clan had consistently claimed the land over a period of many years as circumstantial evidence of ownership. Because of the lack of other reliable evidence in this case and because of circumstances suggesting Tmewang's trustworthiness, the prior claim evidence took on greater significance.

In sum, we conclude that the Land Court did not clearly err in determining that Bukl Clan owns the Lots. In doing so, we do not revisit the Land Court's credibility determinations or reweigh the evidence. *See Edaruchei Clan v. Sechedui Lineage*, 17 ROP 127, 128 (2010). Instead, it is enough that some evidence supports the conclusion that Bukl Clan owns the Lots. *See Palau Pub. Lands Auth., et al. v. Tab Lineage*, 11 ROP 161, 165 (2004) ("[R]eversal under the clearly erroneous standard is warranted 'only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion.'"). Here, the Land Court provided reasons for crediting

some witnesses over others and drew reasonable inferences from the evidence presented. We therefore hold that sufficient evidence supported the Land Court's determination of ownership.

### CONCLUSION

For the foregoing reasons, the decision of the Land Court is **AFFIRMED**.

**JACKSON M. HENRY,**  
**Appellant,**

v.

**MUTOU SHIZUSHI,**  
**Appellee.**

CIVIL APPEAL NO. 14-004  
Civil Action No. 09-072

Supreme Court, Appellate Division  
Republic of Palau

Decided: May 8, 2014

[1] **Jurisdiction:** Subject Matter

Unlike the United States Constitution, which empowers Congress to determine a lower federal court's subject-matter jurisdiction, our Constitution contains no such limitation.

[2] **Appeal and Error:** Filing Deadlines

The Trial Court can only extend the time for filing the notice of appeal by 30 days and only for good cause or excusable neglect.

Counsel for Henry: Tamara D. Hutzler  
Counsel for Shizushi: Elyze McDonald Iraitte

BEFORE: LOURDES F. MATERNE,  
Associate Justice; R. ASHBY PATE,  
Associate Justice; and KATHERINE A.  
MARAMAN.

Appeal from the Trial Division, the Honorable  
Arthur Ngiraklsong, Chief Justice, presiding.

PER CURIAM:

Before the Court are two motions: (1) Appellee Mutou Shizushi's (Shizushi) motion to dismiss the appeal, in which Shizushi argues that Appellant Jackson Henry's (Henry) appeal is untimely and should be dismissed for lack of jurisdiction; and (2) Shizushi's counsel's motion to withdraw and stay proceedings. For the following reasons, Shizushi's motion to dismiss is **GRANTED** and his counsel's motion's to withdraw is **DENIED AS MOOT**. We will address each motion in turn.

#### I. Motion to dismiss the appeal

##### BACKGROUND

On October 12, 2012, the trial court granted Shizushi's Motion for Summary Judgment, entitling Shizushi to collect a judgment in the amount of \$1,000,000.00 against Henry. As there are remaining unresolved claims in the case, Shizushi filed a motion for Rule 54(b) certification, seeking a ruling that the order granting Shizushi's summary judgment was a final judgment separable from the other unresolved claims in the case. On April 30, 2013, the trial court granted the Rule 54(b) motion.

On May 17, 2013, Henry appealed the orders granting Shizushi's motion for summary judgment and his motion for Rule 54(b) certification. However, on August 5, 2013, Henry moved to dismiss his appeal after concluding that, pursuant to ROP R. Civ. P. 58, it was premature. He reached this conclusion because Rule 58 requires that "[e]very judgment shall be set forth on a separate document" and no separate final judgment had been entered. *Id.* Accordingly, after withdrawing his appeal, Henry filed a

motion requesting a final judgment that complied with Rule 58.

On October 21, 2013, with the agreement of Shizushi and Henry, the trial court issued a separate final judgment in compliance with Rule 58. Pursuant to ROP R. App. P. 4(a), Henry then had 30 days to file a notice of appeal. *See* ROP R. App. P. 4 (a) (“notice of appeal shall be filed within thirty (30) days after the . . . service of a judgment or order in a civil case.”). ROP R. App. P. 4(a).

Subsequently, Shizushi filed post-judgment motions before the trial court and, on November 12, 2013, Henry filed a motion for extension of time to respond to the new motions, as well as a motion for an extension of time to file the notice of appeal. Pursuant to ROP R. App. P. 4(c), the trial court could only extend the time for filing the notice of appeal by 30 days and only for good cause or excusable neglect. ROP R. App. 4(c) (“Upon a showing of excusable neglect or good cause, the trial court may extend the time for filing the notice of appeal by any party *for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this subdivision*. Such an extension may be requested by motion before or after the time otherwise prescribed by this subdivision has expired.”) (emphasis added). The court granted Henry’s motion in full, allowing Henry until December 18, 2013, to file both the responses to the trial motions and to file his notice of appeal.

On December 11, 2013, with only one week to spare before the responses and notice of appeal were due, Henry obtained new counsel, who filed her appearance and requested yet another 45 day extension to respond to the trial motions and to file the

notice of appeal. Apparently, Henry’s new counsel attempted to contact the trial court through repeated phone calls to the chambers clerk to obtain a ruling on the motion for extension of time, given the looming deadline.

On December 18, 2013, the day of the deadline, the trial court granted Henry an extension of time to respond to the trial motions, but did not grant the extension of time to file an appeal. In its order, the trial court stated, “[a]s to defendant’s intention to file a notice of appeal, defendant has to explain why an appeal is still timely. The Court entered its final judgment on October 18, 2013.”<sup>1</sup>

The next day, Henry filed a response to the court’s inquiry pointing out that the court had previously granted a 30 day extension, such that December 18, 2013, was the new deadline. This was little more than a reminder to the court that the court had granted one extension already. Notably, the response did not address ROP R. App. 4(c)’s clear statement that a “trial court may extend the time for filing the notice of appeal by any party *for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this subdivision*.” ROP R. App. 4(c) (emphasis added). That is, the response did not explain how, if granted, an additional request for a 45 day extension, made *after* the trial court had already granted the first 30 day

---

<sup>1</sup> We note that the trial court dated the final judgment near the signature line on October 18, 2013, which was a Friday, but, for administrative reasons, the judgment was not formally filed until October 21, 2013, the following Monday. The trial court erred in its order by referring to the date of signature rather than the date of filing as the date of final judgment, but because the three day difference has no bearing on the ultimate timeliness of the appeal or on the trial court’s inability to have granted an additional extension, we find that such error was harmless.

extension, could render an appeal timely under Rule 4(c)'s clear bar. The trial court issued no further order on the subject.

Concerned, counsel for Henry again repeatedly called the court's chambers to obtain a decision as to whether the extension to file the notice of appeal had been granted. In her sworn affidavit, counsel argues that she "was finally told that the Court accepted the explanation and the extension was granted." The affidavit goes on to state that she requested that another order be issued embodying the court's decision to grant the additional extension, but that "both of his office staff said they specifically asked him about an order in light of [her] concerns and he said there was no need for the Court to issue a new order." And then further, "I reasonably relied upon the Court's judgment as to its procedure," and "I believe the Chief Justice knows the procedures he used in his Court and relied upon representations of his staff . . . ." And lastly, "[t]his was the first Notice of Appeal I have filed in this jurisdiction." Finally, over one hundred days after entry of the October 18, 2013 final judgment, Henry filed a notice of appeal on January 31, 2014.

### APPLICABLE LAW

Rule 4(a) of the Rules of Appellate Procedure requires that the "notice of appeal shall be filed within thirty (30) days after the . . . service of a judgment or order in a civil case." ROP R. App. P. 4(a). "Upon a showing of excusable neglect or good cause, the trial court may extend the time for filing the notice of appeal by any party *for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this subdivision.* ROP R. App. P. 4(c) (emphasis added). The Appellate Division has repeatedly

held that "[w]e are without jurisdiction to entertain an appeal where the notice of appeal is untimely filed." *Bechab v. Anastacio*, 20 ROP 56, 60 (2013); *ROP v. Chisato*, 2 ROP Intrm. 227, 228 (1991); *Sebaklim v. Uehara*, 1 ROP Intrm. 649, 652 (1989); *Pamintuan v. ROP*, 14 ROP 189, 190 (2007) ("The late filing of a notice of appeal is a fatal jurisdictional defect") (quoting *Tellei v. Ngirasechedui*, 5 ROP Intrm. 148, 149 (1995); *Babul v. Singeo*, 1 ROP Intrm. 123, 126 (1984).

### DISCUSSION

Before turning to our decision on the merits, the controlling law on the issue of untimely appeals requires some semantic clarification. That is, although it is well settled that a late-filed notice of appeal bars review, our jurisprudence consistently refers to this bar as arising from a lack of "jurisdiction" and we are now convinced that this is an imprecise and overly expansive use of the term. We take this opportunity to depart from our past use of the word "jurisdiction" for the following reasons.

[1] Unlike the United States Constitution, which empowers Congress to determine a lower federal court's subject-matter jurisdiction (*see* U.S. Const., Art. III, § 1), our Constitution contains no such limitation. *See* Const., Art. X, § 5 ("judicial power shall extend to all matters in law and equity"). We have previously construed our "law and equity" clause "as a grant of jurisdiction over any and all matters which traditionally require judicial resolution." *Gibbons v. Seventh Koror State Legislature*, 11 ROP 97, 106 (2004). Consequently, expressing that we lack "jurisdiction" for an untimely appeal is imprecise.

The United States Supreme Court itself has noted past imprecision of the term “jurisdiction,” remarking that “[j]urisdiction [has been] a word of many, too many, meanings.” *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 467, (2007); *see also Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004); *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90 (1998). And in seeking to cure the semantic confusion, the United States Supreme Court has taken pains to clearly differentiate untimely filed cases, in which appellate review is barred on jurisdictional grounds, from untimely filed cases in which appellate review is precluded by non-jurisdictional court rules. *See Bowles v. Russell*, 551 U.S. 205, 211 (2007) (“[t]he distinction between jurisdictional rules and inflexible but not jurisdictional timeliness rules . . . turns largely on whether the timeliness requirement is or is not grounded in a statute”) (internal citations omitted).

Because jurisdiction in Palau is not limited by statute, we now hold that untimely appeals fail, not because of a lack of “jurisdiction” or any “jurisdictional defect” but because of the clear, inflexible time limits contained in our rules.<sup>2</sup> *See id.*

---

<sup>2</sup> We recognize that a statute addressing the time limits to file an appeal exists in Palau, but it does not limit our constitutional powers of jurisdiction. 14 PNC § 602:

When appeals may be taken. Any appeal authorized by law may be taken by filing a notice of appeal with the presiding judge or justice of the court from which the appeal is taken, or with the Clerk of Courts within thirty (30) days after the imposition of sentence or entry of the judgment, order or decree appealed from, or within such longer time and under such procedures as may be prescribed by rules of procedure adopted by the Chief

Having determined that the well-settled bar for untimely appeals is not based on jurisdictional grounds per se, but is instead a product of our own Rules of Appellate Procedure, we now turn to consider Henry’s arguments on appeal. In response to Shizushi’s motion to dismiss his appeal, Henry makes two arguments that merit consideration.

First, he argues that he filed his notice of appeal within the time frame allowed by the trial court. More specifically, he suggests that he “reasonably relied” on an alleged oral extension that his counsel received ex parte through the Chief Justice’s staff on December 19, 2013, and thus, his notice of appeal should be considered timely.

Our decision in *Sebaklim v. Uehara*, 1 ROP Intrm. 649 (1989) is particularly instructive in addressing Henry’s first argument. In *Sebaklim*, the trial court entered final judgment on November 8, 1985. One month later, the appellants requested a 30 day extension of time to file their notices of appeal, claiming only that extra time was needed, and the trial court granted the request. Another month passed before the appellants requested an additional week extension, which was again granted. The notices of appeal were eventually filed 67 and 68 days after the issuance of the final judgment, beyond the time limits of Rule 4. On appeal, appellants argued that (1) Rule 4 included the flexibility to allow the Appellate Court to expand the filing time limit and create jurisdiction, and (2) appellants were entitled to additional time because the trial court erroneously granted an

---

Justice of the Trust Territory under section 202 of Title 5 of the Trust Territory Code, or by the Chief Justice of the Supreme Court of the Republic of Palau pursuant to Article X, section 14 of the Constitution.

extension that violated the rule's time limits and appellants relied upon it. The Appellate Division disagreed, concluding that it lacked jurisdiction, and dismissed the appeal.

Because the facts of *Seblakim* track so closely to the facts here, we agree with the reasoning of *Sebaklim* and conclude that the untimeliness of Henry's notice of appeal precludes review. To explain the reasoning underlying both opinions, one need only look at the absurdity of arriving at the opposite conclusion. As alleged, Henry asks us to give him the benefit of clear legal errors made by the trial court. This runs afoul of the very purpose of appellate review.

Henry's second argument is a corollary to his first. Specifically, he argues that the Court's rules may suspend the time limits of ROP R. App. P. 4 under ROP R. App. P. 2, which reads, "[i]n the interest of expediting a decision, or for other good cause, the Appellate Division may suspend the requirements of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction." *Id.*

We begin by recognizing that this Court has only suspended the Rules of Appellate Procedure once before, in order to expedite a writ of mandamus. *See Klontg v. Paradise Air Corp.*, 7 ROP Intrm. 142 (1999). And we further recognize that suspension of our rules should be prudentially limited to extraordinary circumstances. With respect to Henry's specific argument, it is not entirely clear that Rule 2 suspension can or should be used to enlarge the time for filing a notice of appeal. That is, the United States' Federal Rules of Appellate Procedure explicitly prohibit the suspension of Rule 4's time limits. Fed. R. App. P. 2 states "[o]n its own or a party's motion, a court of appeals may—

to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, *except as otherwise provided in Rule 26(b).*" Fed. R. App. P. 2 (emphasis added). Rule 26(b), in turn, provides that "the court may not extend the time to file a notice of appeal (*except as authorized in Rule 4*) . . . ." Fed. R. App. P. 26(b)(1) (emphasis added). Although our Rules of Appellate Procedure do not contain this explicit bar, the United States' bar persuasively counsels in favor of employing heightened scrutiny before using Rule 2 suspension to enlarge the time for filing a notice of appeal.

[2] Even assuming that the suspension of Rule 4's time requirements is permissible under our rules, we determine that it is inappropriate in this case for the following three reasons. First, a notice of appeal is a formulaic motion that does not require substantive research or writing. It is generally no more than a few sentences. Requiring counsel, even newly-appointed counsel, to meet the time limits of Rule 4 is not an onerous burden. Even in this case, in which new counsel was hired with less than a week before the deadline, the filing of a notice of appeal does not require extensive review of "five years of pleadings" before doing so. Second, the time limits in which to file an appeal under the ROP Rules of Appellate Procedure are clear. Parties have 30 days, plus one 30 day extension, full stop. This brings us to the third reason. Our past jurisprudence has strictly applied the time limits of Rule 4. *Bechab*, 20 ROP at 60 (an appeal filed seven months after entry of judgment is untimely and must be dismissed); *Tellei* 5 ROP Intrm. at 148 (notice of appeal filed 47 days after service of the Trial Division judgment is untimely and dismissible); *Chisato*, 2 ROP

Intrm. at 228 (notice of appeal filed three days late requires dismissal). We decline, under the circumstances here, to depart now.

A final note is important here regarding the handling of extensions of time. This has been, and continues to be, a serious problem for attorneys. Motions for extension of time, while often routine, are just like any other motions governed by ROP Rule of Civil Procedure 7. Opposing counsel is normally afforded up to 14 days to respond to them, unless a court affirmatively shortens the response time. Moreover, motions for extension of time, which are not indicated as being unopposed at the time of filing and which are filed shortly before the deadline (or on the day of the deadline, which is far too often the case in the Republic),<sup>3</sup> place both the court and opposing counsel, in a difficult position.

There appears to be a pervading sense that parties are entitled to having their motions for extension of time granted as matter of right. But, as the old saying goes, failure to plan on your part does not constitute an emergency on my part. Motions for extension of time must be granted or denied before they become effective—the act of filing it entitles parties to no relief. Further, filing motions for extension of time on the day of the actual deadline, barring some serious personal emergency, is simply sloppy. It prejudices the opposing party’s right to respond, and often creates a situation in which the trial court must abandon the scheduling order agreed to by the parties and vacate future hearing or trial dates, which in turn results in the unnecessary delay

of cases that should have been decided long ago.

For all of the foregoing reasons, Henry’s appeal is dismissed.

## II. Motion to Withdraw and Stay Proceedings

Shizushi’s counsel has recently filed a Motion to Withdraw and Stay the Proceedings, pending an appearance of new counsel. Because we are dismissing the appeal, this motion is denied as moot.

## CONCLUSION

Shizushi’s Motion to Dismiss Appeal is **GRANTED**. The appeal is **DISMISSED** for failure to comply with the time limits of Rule 4. Mr. Shizushi’s Motion to Withdraw and Stay Proceedings is **DENIED AS MOOT**.

---

<sup>3</sup> We note here that, even in this case, after having been granted an impermissibly long extension to file a simple notice of appeal, Henry filed a motion for extension of time to file his opening brief on the day of the deadline.

**GEGGIE B. ANSON,**  
**Appellant,**

**v.**

**RON RONNY NGIRACHEREANG,**  
**Appellee.**

CIVIL APPEAL NO. 13-011  
LC/N 08-1130

Supreme Court, Appellate Division  
Republic of Palau

Decided: May 14, 2014

[1] **Land Commission/LCHO/Land Court:**  
Service of Process

The relevant portion of the Land Claims Reorganization Act of 1996 requires that the Land Court serve notice upon all persons known to claim an interest in the land in question by service in the same manner as a civil summons.

[2] **United States:** Precedential Value of United States Law

Because there is scant decisional law in the Republic defining agency by appointment for purposes of service of process, the Court looks to the law of other jurisdictions.

[3] **Civil Procedure:** Service of Process through an Agent

To establish agency by appointment, “an actual appointment for the specific purpose of receiving process normally is expected.”

[4] **Appeal and Error:** Fact Finding

Where a lower court has not clearly set forth the basis for its decision, remand for further elaboration is appropriate.

[5] **Constitutional Law:** Due Process

The deprivation of a party’s constitutional due process right to notice and an opportunity to be heard renders a court’s judgment on that issue void.

Counsel for Appellant: Moses Uludong  
Counsel for Appellee: Pro Se

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Land Court, the Honorable ROSE MARY SKEBONG, Associate Judge, presiding.

PER CURIAM:

Appellant Geggie B. Anson appeals the Land Court’s Determination of Ownership awarding land identified as Lots No. 05N001-043, 05N001-044 & 05N001-050, located in Ngeruluobel Hamlet in Airai State, to Appellee Ron Ronny Ngirachereang. She argues that the Land Court’s failure to provide her with adequate notice of the underlying hearing, pursuant to ROP R. Civ. P. 4(e), violated her constitutional right to due process. For the reasons set forth below, we **REMAND** to the Land Court for further proceedings.

## BACKGROUND

Appellant Geggie Anson (Anson) and Ron Ronny Ngirachereang (Ngirachereang) filed competing claims for the parcels of land at issue in this case, and the Land Court scheduled a hearing for July 17, 2013. The Notice of Hearing intended for Anson was never served on her personally but rather upon Ms. Dixie Tmetuchl at Ms. Tmetuchl's residence in Ngermid on July 5, 2013. As a result, only Ngirachereang appeared at the hearing. In its Determination of Ownership, the Land Court noted that Anson had not been served at the address she provided to the Court, but that, "[a]ccording to Court Mashall Raldston Ngirengkoi, Claimant Anson instructed him to deliver the notice of hearing on Dixie Tmetuchl in [sic] her behalf." The Land Court proceeded with the hearing and awarded the property in question to Ngirachereang.

Anson filed a timely appeal. Ngirachereang has not filed a Response.

## STANDARD OF REVIEW

We review the Land Court's factual findings for clear error. *Sechedui Lineage v. Estate of Johnny Reklai*, 14 ROP 169, 170 (2007). Conclusions of law are reviewed *de novo*. *Sechedui Lineage*, 14 ROP at 170. "[W]here a lower court has not clearly set forth the basis for its decision, remand for further elaboration is appropriate." *Estate of Tmilchol v. Kumangai*, 13 ROP 179, 182 (2006); *see also Eklbai Clan v. Imeong*, 11 ROP 15, 17-18 (2003).

## ANALYSIS

It is undisputed that the Notice of Hearing intended for Anson was served upon

Ms. Tmetuchl at her home address in Ngermid and not upon Anson at her home address in Airai. On appeal, Anson argues that (a) she did not authorize Ms. Tmetuchl to receive service for her in this case; (b) she was never properly served with notice of the hearing; and (c) she was therefore deprived of adequate notice and an opportunity to be heard, in violation of her due process rights.

[1] The relevant portion of the Land Claims Reorganization Act of 1996 requires that the Land Court serve notice upon all persons known to claim an interest in the land in question by service in the same manner as a civil summons. With respect to the service of summons, Rule 4(e) of the Rules of Civil Procedure states,

Unless otherwise provided by law, service upon an individual other than an infant or an incompetent person, may be effected in the Republic of Palau by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

ROP R. Civ. P. 4(e). Therefore, under the rules, Anson could either have been served personally or through an appropriate individual at her home address in Airai. Certainly, the Land Court was aware of this address because it served her with other documents at that address, including the final Determination of Ownership. In the alternative, the Court could have delivered a

copy of the notice to someone authorized by appointment or by law to receive service of process on Anson's behalf.

Here, the Land Court served Ms. Tmetuchl at her residence in Ngermid. At the hearing, for which Anson did not appear, the Land Court noted that Anson had not been served personally, went off the record (apparently to consult with the bailiff), and then went back on the record to report that the bailiff said that the Marshals said that Anson said to serve Ms. Tmetuchl instead. The Land Court then continued with the hearing, evidently having concluded that service in this manner was proper. The Land Court also subsequently noted in the Determination of Ownership that the Court Marshal claimed that he served the Notice to Ms. Tmetuchl pursuant to Anson's instruction.

On appeal, Anson first argues that any verbal instructions given to the Marshal by anyone, including herself, to serve Ms. Tmetuchl rather than Anson would have been insufficient to satisfy the requirements of Rule 4 and establish an agency by appointment. We decline to accept Anson's position as a broad concept; however, given the record before the Court, we agree that the facts of this case are insufficient to establish that an appointment was made.<sup>1</sup>

<sup>1</sup> Anson argues that the authorization of an agent to receive service of process by appointment under Rule 4 must be in writing, citing *Renguul v. Elidechedong*, 11 ROP 11 (2003) in support of this assertion. However, *Renguul* does not stand for the proposition that appointment of an agent for purposes of service of process must be in writing. Rather, it establishes that, where authorization to present a claim on a claimant's behalf has been reduced to writing (in the form of a power of attorney), the claimant's due process rights are not violated when her representative, rather than claimant herself, presents the claim at the Land Court hearing.

[2] Because there is scant decisional law in the Republic defining agency by appointment for purposes of service of process, the Court looks to the law of other jurisdictions. *Kazuo v. Republic of Palau*, 1 ROP Intrm. 154, 172 (1984); see also *Mesubed v. Urebau Clan*, 20 ROP 166, 167 & n.1 (2013) (citing 1 PNC § 303, which requires that "[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases . . .").

[3] To establish agency by appointment, "an actual appointment for the specific purpose of receiving process normally is expected." 4A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1097 (3d ed. 2002). "Although actual appointment is required, evidence of 'the requisite intent' of defendant to make that appointment may be 'implied . . . from the circumstances surrounding the service upon the agent.'" *Pollard v. District of Columbia*, 285 F.R.D. 125, 128 (D.D.C. 2012) (citing Wright & Miller, *supra*, § 1097). Thus, written authorization is not necessarily required to satisfy Rule 4.

Nevertheless, some evidence that an "actual appointment" took place is required. In this case, there is no satisfactory evidence before the Court indicating that Anson made any such appointment. The only suggestion in the record that Anson may have appointed Ms. Tmetuchl to receive service of process on her behalf is the whisper-down-the-lane allegation in which the Land Court Judge reported that the bailiff said that the Marshals said that Anson said to serve Ms. Tmetuchl instead. At her first opportunity to do so, Anson has

disputed the notion that she authorized anyone other than herself to receive service of process on her behalf, and she suggests that the Marshal may have confused this case with another in which Anson was a party, but Ms. Tmetuchl was the appropriate authorizing agent to be served.

[4] Given Anson's un rebutted affidavit certifying that she never authorized Ms. Tmetuchl to accept service on her behalf in this case, the lack of satisfactory evidence in the record to indicate that Ms. Tmetuchl was so authorized, and the plausible explanation as to how confusion may have arisen, the Land Court's conclusion, based on what is essentially triple hearsay, does not adequately support its determination that service was proper. Accordingly, we remand this case to the Land Court for further inquiry and explanation as to whether service was proper. *Tmilchol v. Kumangai*, 13 ROP 179, 182 (2006) ("[W]here a lower court has not clearly set forth the basis for its decision, remand for further elaboration is appropriate."); *see also Imeong v. Yobech*, 17 ROP 210, 215 (2010) ("An appellate court's role is not to determine issues of fact or custom as though hearing them for the first time. The trial court is in the best position to hear the evidence and make credibility determinations, and if the evidence before it is insufficient to support its findings, the Court should remand rather determine unresolved factual or customary issues on appeal.").

service was defective, its previous Adjudication and Determination shall be void and the Land Court shall proceed with a re-hearing so that Appellant may be heard on her claim of ownership. *In re Idelui*, 17 ROP 300, 304 ("The deprivation of a party's constitutional due process right to notice and an opportunity to be heard renders a court's judgment on that issue void.").

### CONCLUSION

[5] For the foregoing reasons, we **REMAND** the case to the Land Court for further inquiry and elaboration as to whether Appellant was properly served the Notice of Hearing. If the Land Court determines that

**ALFONSO DIAZ,**  
**Appellant,**

**v.**

**REPUBLIC OF PALAU**  
**Appellee.**

CRIMINAL APPEAL NO. 13-001  
Criminal Action No. 12-010

Supreme Court, Appellate Division  
Republic of Palau

Decided: June 24, 2014

[1] **Statutory Interpretation:** Ambiguity

If the statutory language is clear and unambiguous, the courts should not look beyond the plain language of the statute and should enforce the statute as written.

[2] **Statutory Interpretation:** Ambiguity

Statutory terms are to be interpreted according to the common and approved usage of the English language.

[3] **Statutory Interpretation:** Ambiguity

A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.

Counsel for Diaz: Siegfried B. Nakamura  
Counsel for the ROP: AAG Delaine D. Prescott-Tate

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

Appellant Defendant Alfonso Diaz (Diaz) appeals his four count conviction for Failure to Produce Records of Broadcast, in violation of 15 PNC § 131(b). For the reasons stated below, we affirm the trial court’s conviction.

## BACKGROUND

Diaz owns Diaz Broadcasting Company, which broadcasts music, news, and commentary on radio station WWFM. Diaz received his license to broadcast from the Division of Communication (DOC). Palau requires broadcast licensees to create and maintain a complete broadcast record. *See* 15 PNC § 131.<sup>1</sup> Specifically, § 131(b) divides broadcasts into two groups: live broadcasts and pre-recorded broadcasts. Live broadcasts—which the statute clumsily refers to as “not pre-recorded broadcasts,” but which the parties agree is synonymous with “live”—must be recorded and maintained by licensees for a period of 15 days. In contrast, pre-recorded broadcasts do not have to be re-recorded when they are broadcast, but, like live broadcasts, they must be maintained for a period of 15 days in order to facilitate

<sup>1</sup> 15 PNC § 131 has since been amended by the OEK. We cite to the previous version, which was in effect during the time period at issue here.

meaningful review. To that end, § 131 requires licensees to make their complete broadcast recordings available to the DOC for review upon request, and imposes criminal penalties for failing to comply.

On February 1, 2011, the DOC wrote to Diaz with such a request.<sup>2</sup> Specifically, it requested recordings for broadcasts for January 25, 2011, through January 28, 2011, from the hours of 7:00 a.m. to 10:00 a.m. The total sum of the requested hours was twelve. Diaz, however, only delivered approximately six hours of broadcast recordings. Believing that Diaz had failed to comply, the DOC sent a second and third request to Diaz for the full recordings, but he failed to produce them. The DOC referred the matter to the Attorney General's Office, which subsequently charged Diaz with four counts of Failure to Produce Records of Broadcast, in violation of 15 PNC § 131(b).

At trial, Diaz admitted he was aware of this statute, that he had previously received many DOC requests, and that he has previously been convicted of violating this statute. As a defense during trial, Diaz argued that he is only obligated to record live broadcasts, that only part of the broadcast at issue was live, and that he had produced all live broadcasts pursuant to the statute. Diaz was found guilty and he timely appealed.

### STANDARD OF REVIEW

The extent to which a broadcasting licensee is obligated to record and maintain broadcast recordings pursuant to 15 PNC § 131 is a question of law. We review a lower

<sup>2</sup> The DOC's request stemmed from a claim that Diaz's morning show, Ngerechelechelu, allegedly contained slanderous comments about Roll'em Productions and one of Roll'em's on-air hosts.

court's conclusions of law de novo. *See Wong v. Obichang*, 16 ROP 209, 211-12 (2009); *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

### DISCUSSION

On appeal, Diaz argues that 2§ 131(b) is ambiguous, or alternatively, unconstitutionally vague. We disagree and will address each argument in turn.

#### I. § 131(b) is not Ambiguous

[1, 2] Although Diaz acknowledges that §131 requires live broadcasts to be recorded in full, he argues that (1) the statute is ambiguous regarding the obligation to record or maintain pre-recorded broadcasts, and (2) that the term "pre-recorded" is ambiguous. "The first step in statutory interpretation is to look at the plain language of a statute. . . . [I]f statutory language is clear and unambiguous, the courts should not look beyond the plain language of the statute and should enforce the statute as written." *Lin v. ROP*, 13 ROP 55, 58 (2006) (internal citations and quotations omitted). Statutory terms are to be "interpreted according to the common and approved usage of the English language." 1 PNC § 202. "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *Noah v. ROP*, 11 ROP 227, 233 (2004). 15 PNC § 131, entitled "maintenance of records of broadcast," states:

- (a) No person may operate an AM or FM radio station or television station in the Republic of Palau unless the person first obtains the appropriate license from the Division.

(b) All AM or FM radio or television broadcasts the substance of which is not pre-recorded shall be recorded in full on audio or video tape, as the case may be, at the time of broadcast, and recordings of broadcasts shall be retained by the licensee and made available to the Division for inspection for not less than 15 days after the date of broadcast. The licensee shall maintain copies of pre-recorded broadcasts for inspection by the Division for not less than 15 days after the date of broadcast, unless otherwise authorized or required by the Division. The recordings must be clear and decipherable. No person may in any way edit or otherwise alter any recording. Any person who violates this subsection shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not less than \$500 and not more than \$1,000. A person convicted of a second violation shall be fined not less than \$1,000 and not more than \$10,000, shall be imprisoned not more than six months, or both. A person convicted of a third or subsequent violation shall be fined not less than \$10,000, shall be imprisoned for not more than one year, or both, and shall have his or her license suspended by the Division for a period of not less than six months or not more than one year.

(c) Any person aggrieved by any AM or FM radio or television broadcast may request that the Division obtain a tape of the recording from the broadcast for that person's review. The Division shall liberally grant these requests when it appears that the

request is made in good faith. If the Division grants the request, the aggrieved person shall have the right to bring an action in the Supreme Court to enforce this section.

(d) Each licensee shall maintain a log book of all broadcasts. The log book shall record all subjects discussed, guests interviewed and programs broadcast on that radio station. Each day's entry shall be maintained for a period of at least two years after the entry is made. The log books shall be available for inspection by the Division.

*Id.*

As § 131's title suggests ("maintenance of records of broadcast"), the statute requires licensees to create and maintain a broadcast record. As discussed above, §131(b)'s plain language requires live broadcasts to be recorded and maintained, and pre-recorded broadcasts to be maintained, both for a period of 15 days. In addition, § 131(d) requires broadcast licensees to "maintain a log book of all broadcasts" that includes a "record [of] all subjects discussed, guests interviewed and programs broadcast on that radio station." Finally, any person "aggrieved by any AM or FM radio . . . broadcast" may request a recording through the DOC. 15 PNC § 131(c).

[3] Diaz's reading of § 131—that he is only required to record and maintain live broadcasts, a reading which the trial court called "tortured,"—fails for three reasons. First, it requires us to accept that, while the parties agree that "not pre-recorded" is an unambiguous term that is synonymous with "live," the term "pre-recorded" is ambiguous. Second, it reduces §131(b) to repetitive and

superfluous language. That is, if only live broadcasts are to be recorded in full and maintained for 15 days, then the statute need not continue as it does: “The licensee shall maintain copies of pre-recorded broadcasts for inspection by the Division for not less than 15 days after the date of broadcast, unless otherwise authorized or required by the Division.” *Id.*; see also *Ucherremasech v. Hiroichi*, 17 ROP 182, 190 (2010) (quoting 73 Am. Jur. 2d *Statutes* § 164) (“As a general rule, a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.”). Third, Diaz’s reading ignores §131’s stated purpose: to maintain and make available a complete broadcast record.

We cannot ignore the statute as a whole. *Noah v. ROP*, 11 ROP at 233. If broadcast licensees were required only to maintain piecemeal broadcast recordings, there would be no possibility of meaningful review. While Diaz is correct that he is not required to re-record pre-recorded broadcasts, he must maintain copies of everything that he broadcasts for a period of 15 days after the air date.

## II. §131 is not Unconstitutionally Vague

Diaz also contends that § 131 is unconstitutionally vague. A vague statute violates the Due Process Clause of Article IV, Section 6 of the Constitution, and violates a defendant’s right to be informed of the nature of the accusation against him guaranteed in Article IV, Section 7.

[A] legislature is presumed to intend to pass a valid act, and that a law should be construed to sustain its constitutionality whenever possible. Nonetheless, vagueness may make a

criminal statute unconstitutional if it fails to adequately inform potential offenders of the proscribed conduct . . . . It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case. However, this principle does not invalidate every statute that a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness . . . and even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.

*Ngirengkoi v. ROP*, 8 ROP Intrm. 41, 42 (1999) (internal citations and quotations omitted).

As discussed above, § 131 requires licensees to record and maintain live broadcasts as well as maintain pre-recorded broadcasts. The statute adequately informs Diaz of the proscribed conduct. As a corollary, the Information also adequately informs Diaz as it simply parrots the unambiguous statutory language (“Diaz . . . failed to make a full recording . . . broadcast available to the [DOC] for inspection . . .”). To comply with the statute, Diaz only had to maintain, and produce 12 hours of live and/or pre-recorded broadcasts covering the hours requested. There is no vagueness here.

**CONCLUSION**

For the foregoing reasons, the decision of the Trial Division is **AFFIRMED**.

**SANTOS IKLUK,**  
**Appellant,**

**v.**

**KOROR STATE PUBLIC LANDS**  
**AUTHORITY,**  
**Appellee.**

CIVIL APPEAL NO. 13-016  
LC/B 04-137 & 04-138

Supreme Court, Appellate Division  
Republic of Palau

Decided: June 26, 2014

**[1] Public Land Authority:** Superior Title Claim

One of the elements to a superior title claim is evidence that the land never became public land.

**[2] Property:** Tochi Daicho

Where there is an adverse Tochi Daicho listing the land as public land, the claimant must produce clear and convincing evidence to the contrary to succeed on his claim.

Counsel for Appellant: Mariano W. Carlos  
Counsel for Appellee: Debra B. Lefing

BEFORE: ARTHUR NGIRAKLSONG,  
Chief Justice; KATHLEEN M. SALII,  
Associate Justice; R. ASHBY PATE,  
Associate Justice.

Appeal from the Land Court, the Honorable C. Quay Polloi, Senior Judge, presiding.

**PER CURIAM:**

This appeal arises from a Land Court Decision issued on September 9, 2013, following a remand from this Court, in which the Land Court granted ownership of the disputed land to Koror State Public Lands Authority (KSPLA). For the following reasons, the decision of the Land Court is affirmed.

**BACKGROUND**

This appeal concerns two parcels of land known as *Olang* in Ngerkesoaol Hamlet, Koror. On July 20, 2000, Appellant Santos Ikluk (Ikluk), acting pro se, filed a Claim of Land Ownership for the land in question. KSPLA claimed *Olang* as public lands. The matter was initially before Associate Judge Rdechhor. Hearings began on October 10, 2011, and concluded on February 24, 2012.

On May 7, 2012, the Land Court issued its Findings of Fact, Conclusions of Law, and Determination, granting ownership of *Olang* to KSPLA. In reaching this conclusion, the Land Court noted that *Olang* was listed as public land, and that Ikluk had “provided no evidence to show it was wrongfully taken or taken by force.” On May 21, 2012, Ikluk appealed.

On appeal, the Appellate Division determined that the Land Court had failed to perform a necessary superior title analysis. The case was remanded on this issue and assigned to Senior Judge Polloi because Judge Rdechhor had resigned in the interim. The Land Court held a hearing on July 18, 2013, and accepted written closing arguments thereafter. On remand, Ikluk argued that the legal analysis governing superior title claims should be modified in two ways: (1) the requirement

that a claimant prove that the disputed land in question was never public land should be eliminated; and (2) the requirement that a claimant must prove by clear and convincing evidence that a Tochi Daicho listing is wrong should be reduced to a preponderance of the evidence standard.

On September 9, 2013, the Land Court issued its new decision. In it, the court performed a superior title analysis and granted the land to KSPLA. Ikluk timely appealed.

**STANDARD OF REVIEW**

We review the Land Court’s conclusions of law de novo and its findings of fact for clear error. *Rengiil v. Debkar Clan*, 16 ROP 185, 188 (2009). Where there are several plausible interpretations of the evidence, the Land Court’s choice between them shall be affirmed. *Ngaraard State Pub. Lands Auth. v. Tengadik Clan*, 16 ROP 222, 223 (2009).

**DISCUSSION**

Ikluk presents numerous arguments on appeal. We will address each in turn.

**I. Land Court’s Finding of Fact as to the Trust Territory Release**

The crux of Ikluk’s appeal is that the Land Court erred by failing to credit a document that purports to return land that had been wrongfully taken by the Japanese. Ikluk contends that the document is a valid release whereby the Trust Territory transferred *Olang*, and other land, to Ngerketiit lineage. According to Ikluk, *Olang* eventually became the property of Adelbai Ollaol, who then gave Ikluk the land as repayment for a debt. Although he offered no other documentation of these transfers, Ikluk argues that the Land

Court committed clear error in ignoring the Trust Territory release.

We conclude that the Land Court did not ignore this document, nor did it commit clear error in giving it less weight. The document in question is problematic on its face. Although it purports to be a determination of ownership and release from the Trust Territory, its relevancy to the lands at issue here is questionable. That is, although the document releases an “Olang” and other land to “Ngerketiit,” what land was actually released is unclear. The release defines the released land by sketch #162 and Land Office map #k2. However, neither the sketch nor the map was entered in evidence and thus it is impossible to verify that it relates to the disputed land in this case. Given these problems, the Land Court did not err in crediting evidence that contradicted the release document. This contradicting evidence includes: (1) evidence that *Olang* was part of Tochi Daicho Lot 218, thereby creating a presumption that it remains public land; (2) evidence that Roman Remoket had been told by elders in the 1970’s that the land in question is public land; and (3) the fact that KSPLA has used and leased the land for several years now which, under the controlling law, creates an inference that they own the land in question. “It is not the appellate panel’s duty to reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence.” *Kawang Lineage v. Meketii Clan*, 14 ROP 145, 146 (2007). The Land Court did not clearly err in ascribing less weight to the release, especially given the contradictory evidence on the record.

## II. Land Court’s Legal Analysis of the Superior Title Claim

### A. Evidence that Land was Never Public Land

[1] Ikluk also argues that the Land Court’s legal analysis is flawed. Specifically, Ikluk argues that (1) the court erred in applying *Wasisang v. Palau Pub. Lands Auth.*, 16 ROP 83, 84 (2008), and (2) a superior title claim does not, or should not in this case, require him to prove the land was never public land. Ikluk is incorrect. *Wasisang* states that one of the elements to a superior title claim is evidence that the land “never became public land in the first place.” *Id.* Similarly, when we remanded this case to the Land Court to consider a superior title claim, we cited to *Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161 (2004). That case reiterated the long-standing rule that

in asserting superior title, a claimant is claiming the land on the theory that it *never became public land in the first place*. If the Tochi Daicho is in the name of the government, therefore, the claimant must prove, and must do so by the clear and convincing evidence standard to which we have long adhered, that that listing was wrong.

*Id.* at 167 (emphasis added) (internal citations and quotations omitted); *see also Kerradel v. Ngaraard State Pub. Lands Auth.*, 9 ROP 185 (2002); *Carlos v. Ngarchelong State Pub. Lands Auth.*, 8 ROP Intrm. 270, 272 n.8 (2001). We see no reason to depart from our past jurisprudence on this issue.

### B. Proper Standard of Proof with Respect to the Tochi Daicho

[2] Similarly, Ikluk challenges the standard of proof used by the Land Court in a

superior title claim. Ikluk argues that because the land in question allegedly became private land before it was given to him, his burden of proving ownership of the land should be by a preponderance of the evidence. We disagree. As Ikluk acknowledged in his closing brief before the Land Court, the main issue in this case is whether *Olang* is public or private land. We have consistently held that when a claimant asserts a superior title claim, he contends that the land in question never became public land. Where there is an adverse Tochi Daicho listing the land as public land, the claimant must produce clear and convincing evidence to the contrary to succeed on his claim. *Wasisang*, 16 ROP at 84; *Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161, 168 (2004). The requisite burden of proof for this type of claim is evident and we see no reason to alter it based on the facts of this case.

certificate of title was issued after a hearing before the Land Court, Land Claims Hearing Office, or Land Commission, nor is there any evidence of notice or due process. We decline to extend the holding of *Tebelak* to the facts of this case.

### C. Wrongful Taking

Lastly, Ikluk argues that the Land Court erred by construing his superior title claim as a wrongful taking claim. Ikluk is again incorrect. The Land Court began by stating that, to succeed on a superior title claim, Ikluk must prove that the land in question never became public land. The Land Court then noted that, rather than presenting such evidence, Ikluk introduced evidence that *Olang* was wrongfully taken by the Japanese and became public land. In other words, the Land Court simply highlighted Ikluk's failed trial strategy. Ultimately, the Land Court

Ikluk generally cites to *Tebelak v. Rdialul*, 13 ROP 150 (2006), for support of his position that the presumptive correctness of the Tochi Daicho listing is immaterial in this matter. However, *Tebelak* is not controlling. The *Tebelak* court stated that a

Tochi Daicho presumption is not necessary after a certificate of title has been issued based on evidence presented at a hearing before the Land Court, Land Claims Hearing Office, or Land Commission, so long as notice for the hearing was provided and due process was afforded to all interested individuals.

*Id.* at 154. Ikluk contends that the Trust Territory Determination of Ownership and Release should also negate the Tochi Daicho. But this would be a clear expansion of *Tebelak's* holding. Here, unlike *Tebelak*, no

properly applied the superior title analysis and concluded that Ikluk's claim failed because he did not prove that *Olang* was never public land.

## CONCLUSION

For the reasons set forth above, this matter is **AFFIRMED**.

**MARGO LLECHOLCH, ALFONSO DIAZ, and SHERRY TADAO**  
**Appellants,**

v.

**REPUBLIC OF PALAU,**  
**Appellee.**

CIVIL APPEAL NO. 14-003  
 Civil Action No. 13-008

Supreme Court, Appellate Division  
 Republic of Palau

Decided: July 24, 2014

[1] **Appeal and Error: Reviewability**

Decisions committed to the sole discretion of the executive are unreviewable as to their merits.

[2] **Appeal and Error: Reviewability**

Even when an action is committed to the discretion of another branch of government, this Court may review whether that entity exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations.

[3] **Constitutional Law: Pardon Power**

The Executive Clemency Act imposes only procedural requirements and does not infringe upon the president's substantive pardon power.

[4] **Constitutional Law: Statutes**

One cannot challenge a statute's constitutionality on the ground that it might injure some hypothetical individual.

[5] **Constitutional Law: Facial Challenge**

A facial challenge to a statute requires a showing that the law always operates unconstitutionally.

[6] **Constitutional Law: Equal Protection**

To establish an equal protection violation based on selective enforcement of a statute, the plaintiff must establish that he was treated differently than others who were similarly situated and that the selective treatment was motivated by an intention to discriminate on the basis of an impermissible consideration or by malice.

Counsel for Appellants Alfonzo Diaz and Margo Llecholch: Siegfred B. Nakamura  
 Counsel for Appellant Sherry Tadao: Yukiwo P. Dengokl  
 Counsel for Appellee: Craig D. Reffner

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

Appeal from the Trial Division, the Honorable R. ASHBY PATE, Associate Justice, presiding.

**PER CURIAM:**

Appellants Sherry Tadao, Alfonso N. Diaz and Margo Llecholch appeal the Trial Division's November 29, 2013 Order granting the Republic's Motion for Summary Judgment and its December 20, 2013 Final Judgment. For the reasons set forth below, the decision of the Trial Division is **AFFIRMED**.

**BACKGROUND**

The underlying lawsuit in this case arises out of former President Toribiong's decision to grant executive clemency to Appellants Sherry Tadao, Alfonso N. Diaz, and Margo Llecholch during the waning days of his administration.

Pursuant to the Constitution, the President is afforded the power to "grant pardons, commutations and reprieves subject to procedures prescribed by law." Palau Const. Art. VIII, § 7(5). The Executive Clemency Act (the "Act"), in turn, establishes the procedures by which the President may exercise that power. 17 PNC § 3201. Under the Act, any person convicted of a crime may file a petition for executive clemency, or the President may initiate the process himself by providing notice of his intent to exercise clemency to the Minister of Justice (the "Minister"). 17 PNC §§ 3201, 3206. After the Minister receives the petition, or notice of intent, as the case may be, the Minister must distribute copies of it to the Attorney General, the Director of the Bureau of Public Safety, and the Parole Board. 17 PNC § 3204. Those entities then have 60 days in which to review the petition or notice and submit written recommendations to the Minister. 17 PNC § 3204. Within five days of the receipt of all the written recommendations, the Minister

must prepare his own recommendation and submit the petition or notice, along with all of the recommendations, to the President. 17 PNC § 3205. "Based on these documents, the President shall decide whether or not to grant executive clemency." 17 PNC § 3205.

In late 2012 and early 2013, Appellants, who have been convicted of a variety of crimes, submitted petitions for executive clemency. Fewer than 60 days after those petitions were filed, former President Toribiong granted them. The Attorney General's office did not issue the required recommendations before the President signed the orders granting executive clemency to Appellants.

On February 5, 2013, the Republic of Palau (the "Republic") filed an action seeking a declaratory judgment that Appellants' pardons are null and void because the President failed to follow the procedures prescribed by the Executive Clemency Act. Appellants timely filed their Answers. The Republic then moved for summary judgment. After the matter was fully briefed, the Trial Division granted the Republic's Motion in an Order dated November 29, 2013. A Final Judgment in the matter was entered on December 20, 2013. Appellants' subsequent Motion for Reconsideration was denied. Thereafter, Appellants filed timely appeals.

**APPLICABLE STANDARDS**

We review a lower court's grant of summary judgment de novo. *See Becheserrak v. Eritem Lineage*, 14 ROP 80, 81 (2007). Our review is plenary, considering both whether there is no genuine issue of material fact and whether substantive law was correctly applied. *Ulechong v. Palau Pub. Utils. Corp.*, 13 ROP

116 (2006); *Dalton v. Bank of Guam*, 11 ROP 212 (2004).

Summary judgment is proper when the pleadings, affidavits, and other papers show no genuine issue of material fact, and that moving party is entitled to judgment as a matter of law. *Ulechong*, 13 ROP at 119 (citing ROP R. Civ. P. 56(c)). Summary judgment is therefore not appropriate when genuine issues of material fact persist. *See id.* A factual dispute is “material,” as that term is used in Rule 56(c), if it must be resolved before the fact-finder can determine whether an element of the claim has been established. *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 110 (1995). Summary judgment is appropriate against the party who fails to make an evidentiary showing sufficient to establish a question as to a material fact on which that party will bear the burden of proof at trial. *Becheserrak*, 14 ROP at 82. “The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment[.]” *Wolff*, 5 ROP Intrm. at 110. In considering whether summary judgment is appropriate, all evidence and inferences are viewed in the light most favorable to the non-moving party. *See Obeketang v. Sato*, 13 ROP 192, 194 (2006).

In cases before this Court, United States common law principles are the rules of decision in the absence of applicable Palauan statutory or customary law. *Becheserrak v. ROP*, 7 ROP Intrm. 111, 114 (1998).

### ANALYSIS

It is undisputed that former President Toribiong neglected to follow the procedures established by the Executive Clemency Act when he granted Appellants’ pardons without

receiving or considering any recommendations from the Attorney General and before the time for submission of those recommendations had expired.<sup>1</sup> Accordingly, the Trial Division, after rejecting Appellants’ arguments in opposition, granted summary judgment and declared the pardons null and void.

On Appeal, Appellants assert that the Trial Division erred in several respects. First, Appellants Diaz and Llecholch argue that it is not within the purview of the Court to set aside or declare void a facially valid pardon issued by the President. Next, Appellants contend that the Executive Clemency Act’s recommendation requirement is unconstitutional because it intrudes on the President’s pardon power. Finally, Appellant Tadao asserts that there exists an issue of material fact as to her equal protection argument, thus, an affirmative summary judgment ruling was inappropriate.

#### I. Reviewability

As an initial matter, we first address whether the Court may set aside or void a pardon issued by a President. Appellants Diaz

<sup>1</sup> Although Appellants Llecholch and Diaz continue to frame the Attorney General’s failure to provide a recommendation as a “supposed” event (*See* Llecholch and Diaz Opening Brief at 3), as the Trial Court noted in its Order granting Summary Judgment, the Republic attached the affidavit of the Attorney General at the time, R. Victoria Roe to their reply. Ms. Roe’s affidavit contains her sworn statement, made with personal knowledge, that the Office of the Attorney General did not issue the required recommendations before former President Toribiong signed each of the Appellants’ orders of pardon and commutation. Appellants do not introduce evidence to contradict Ms. Roe’s affidavit with their appeal. Therefore, no genuine dispute exists as to this issue. *See Wolff*, 5 ROP Intrm. at 110 (holding that “the nonmoving party must offer evidence to dispute the facts advanced by the movant.”).

and Llecholch argue that the separation of powers doctrine prevents a Court from doing so and on appeal they contend that the Trial Division should have refrained from setting aside or voiding the pardons issued by the former President.

[1][2] Case law does indicate that the merits of the President’s decision to grant a pardon are not reviewable by the Court. *See Kruger v. Doran*, 8 ROP Intrm. 350, 351 (Tr. Div. 2000) (observing that the Constitution “affords the President broad, unreviewable discretion to grant pardons”). However, the Republic has not asked the Court to review the merits of former President Toribiong’s decision to issue the pardons. Rather, the Republic has asked the Court to determine whether former President Toribiong’s issuance of the pardons was proper from a procedural standpoint. In making this determination, the lower court stated,

It is “the Court’s province and duty . . . to decide whether another branch of government has exceeded whatever authority has been committed to it by the Constitution.” *Francisco v. Chin*, 10 ROP 44, 49-50 (2003). Thus, even when an action is committed to the absolute discretion of another branch of government, this Court may review whether that entity “exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations.” *Guadamuz v. Bowen*, 859 F.2d 762, (9th Cir. 1988)[.]

*Republic of Palau v. Diaz, et al.*, Civil Action No. 13-008, slip op. at 6-7 (Trial Div. Nov. 29, 2013) (internal citations omitted). We agree with the lower court’s analysis and are persuaded by the case law it cited. Therefore, we determine that the question of whether

former President Toribiong exceeded his legal authority by granting pardons without following the procedures prescribed by the Act falls squarely within the purview of the Court.<sup>2</sup>

## II. Constitutionality

Appellants concede that former President Toribiong did not follow the procedures prescribed by the Executive Clemency Act when he granted their pardons. However, Appellants argue that former President Toribiong did not exceed his legal authority by issuing pardons in violation of the Act because the Act, itself, is unconstitutional. Appellants allege that the Act infringes upon the President’s Executive Clemency power by

---

<sup>2</sup> Appellants rely on *In re: Hooker*, 87 So.3d 401 (Miss. 2012) in support of their contention that the judicial branch may not set aside or void a pardon based solely on a procedural deficiency. The Trial Court reviewed that case and its applicability to the case at hand:

That case, which provoked vigorous dissents from several Mississippi Supreme Court Justices, is an outlier. The majority opinion relies on antiquated precedent and “fails to consider decisions of other states; fails to consider legal encyclopedias confirming that that conditions precedent to granting a pardon have repeatedly been found reviewable; contradicts learned treatises and encyclopedias on Mississippi law; and fails to consider that the United States Supreme Court has reviewed whether pardons were

imposing impermissible substantive, rather than procedural, limitations.<sup>3</sup>

[3] The Trial Division addressed this argument and ultimately determined that the Act's requirements are procedural in nature and do not impermissibly intrude on the President's discretion to exercise pardon power. Specifically, the Trial Division stated,

The Palau Constitution explicitly contemplates the enactment of legislation establishing procedures by which the President must exercise his pardon power. *See* ROP Const. art. VIII § 7 (providing that the President shall have the power "to grant pardons, commutations and reprieves *subject to procedures prescribed by law.*") (emphasis added). And, "[w]here a constitution directs that the pardoning power shall be vested in the [executive], under regulations and restrictions prescribed by law, the legislature may make such regulations and restrictions[.]" 59 Am. Jur. 2d *Pardon and Parole* § 33 (2012).

---

within the President's power on numerous occasions." *Id.* at 421-22 (J. Randolph, dissenting). Moreover, *In re: Hooker* concerned a constitutional provision that itself established procedural requirements for the exercise of the pardon power, not a statutory provision enacted by the legislature, as is the case here. Thus, the separation of power concerns in this case are distinguishable from those presented by *In re: Hooker*. This Court remains unconvinced that *In re: Hooker* is either correct or analogous to the instant case.

*Republic of Palau v. Diaz, et al.*, Civil Action No. 13-008, slip op. at 7, n. 5 (Trial Div. Nov. 29, 2013). We agree with the Trial Court's thorough analysis and decline to follow the rogue and controversial holding in *In re: Hooker*.

Accordingly, the plain text of the Constitution empowers the legislature to enact laws establishing procedural requirements for the exercise of executive clemency. *See Ucherremasech v. Hiroichi*, 17 ROP 182, 190 (2010) ("The first rule of construing a statute or constitutional provision is that we begin with the express, plain language used by the drafters and, if unambiguous, enforce the provision as written.").

The question, then, is whether the Executive Clemency Act imposes legitimate procedural requirements, as expressly sanctioned by the Constitution, or whether it goes too far by imposing substantive restrictions on the presidential pardon power. In answering this question, "[t]his Court presumes that the legislature intended to pass a valid act and construes an act to be constitutional, if possible." *Nicholas v. Palau Election Comm'n*, 16 ROP 235, 239 (2009).

"The purpose of [the Executive Clemency Act] is to set procedures by which the President may exercise his power pursuant to Article VIII, Section 7(5) of the Palau Constitution." 17 PNC § 1301. The Act requires the president to obtain and consider recommendations from the Attorney General, the Bureau of Public Safety, the Parole Board, and the Minister of Justice. 17 PNC §§ 3204-05. The president need not heed those recommendations; he must simply consider them. *See* 17 PNC § 3205. Nothing prevents the president from issuing a pardon even when all four entities recommend that the pardon be

denied. The Act thus imposes no substantive limits on the president's power to grant pardons—indeed, his discretion to pardon whomever he pleases for whatever reason remains wholly unfettered. *See Makowski v. Governor*, 299 Mich.App. 166, 175 (2012) (holding that statutory provisions requiring the governor to consider recommendations from the parole board before granting commutations “in no way limit the Governor’s absolute discretion with regard to commutation decisions”). Instead, the Act merely requires that the president follow certain procedures to ensure that his decision to grant or deny a pardon is a properly informed one.

Legislative history supports the conclusion that the Act imposes only procedural requirements and does not infringe upon the president's substantive pardon power. The first procedural rules governing the exercise of executive clemency were created by the executive himself, former President Haruo I. Remeliik, in Executive Order No. 27. The Senate bill that would eventually become the Executive Clemency Act was modeled on that Executive Order. *See* Stand. Com. Rep. No. 3-19 (Apr. 11, 1989) (noting that “[t]his bill is very similar in substance and form to Executive Order No. 27”). The Senate Committee on Judiciary and Government Affairs (Committee) recommended that “the procedures set forth in this Executive Order should be statutory, so as to ensure consistency in the application of the pardon authority.” *Id.*

Accordingly, the Committee translated the basic requirements established by the Executive Order into a legislative act. In doing so, the Committee observed that “this bill does not restrict the authority of the President to grant pardons.” *Id.* Instead, “[t]hese established procedures will ensure that the President is properly informed regarding any proposed clemency action.” Stand. Com. Rep. No. 21 (Jul. 25, 1989). The legislative history thus confirms that the Olbiil Era Kelulau intended to codify preexisting procedures governing executive clemency and did not intend to substantively restrict the president's pardon power.

*Republic of Palau v. Diaz, et al.*, Civil Action No. 13-008, slip op. at 8-10 (Trial Div. Nov. 29, 2013). We agree with the Trial Division's rationale.

We note that Appellants Diaz and Llecholch have refined their argument on appeal and more specifically argue that the Ministerial review prescribed by § 3204 is a substantive or impermissible limitation because it infringes upon the President's right to exercise his Executive Clemency powers “*at any given time.*” (Diaz and Llecholch Opening Br. 7) (emphasis added). Appellant Tadao similarly asserts that the Act restricts the President's power to exercise Executive Clemency “*at any time.*” (Tadao Reply Br. 3) (emphasis added). However, nothing in the Constitution suggests that the President may exercise his Executive Clemency powers *at any given time*; nor do Appellants cite any authority in support of this assertion other than to baldly suggest that the Constitution so empowers him. To the contrary, the Constitution explicitly calls for the imposition

of procedural limitations on the President's ability to grant pardons. *See* ROP Const. art. VIII § 7 (providing that the President shall have the power "to grant pardons, commutations and reprieves *subject to procedures prescribed by law.*") (emphasis added). The limiting procedures referenced in the Constitution are codified in §3204 and, as discussed above, we agree with the Trial Division's analysis and determine that those procedures are not unconstitutional.

[4][5] Appellants also pose hypothetical scenarios which purportedly demonstrate that the Act operates unconstitutionally. Appellants Diaz and Llecholch argue that the limitations prescribed by the Act would prevent the President from granting Executive Clemency to individuals who were serving less than 60 day sentences. (Diaz and Llecholch Opening Br. 7). Appellant Tadao suggests that the President may have to issue a pardon on short notice for national security reasons and that the Act, as it stands, would impermissibly restrict his ability to do so. (Tadao Opening Br. 8). The Court will not entertain these theoretical situations. The fact remains that these scenarios do not exist in this case and Appellants simply cannot challenge the Act's constitutionality on the ground that it might injure some hypothetical individual. *See* 16 Am. Jur. 2d *Constitutional Law* § 137 (2009) ("As a general rule, no one can obtain a decision as to the invalidity of a law on the ground that it impairs the rights of others."). Furthermore, Appellants do not challenge the constitutionality of the Act on its face, which would require a showing that "the law, by its own terms, always operates unconstitutionally." Am. Jur. 2d *Constitutional Law* § 137 (2009). As the Trial Division noted, "[i]t is enough that [Appellants] have failed to show either that

the Act always operates unconstitutionally or that it operates unconstitutionally as applied to them." *Republic of Palau v. Diaz, et al.*, Civil Action No. 13-008, slip op. at 11 (Trial Div. Nov. 29, 2013). Accordingly, we conclude that the Act is neither unconstitutional on its face nor unconstitutional as it applies to Appellants.

### III. Equal Protection

Appellant Tadao asserts that the Trial Division erred as a matter of law in granting summary judgment because there exists a genuine issue of material fact with respect to her equal protection claim. Although her argument is undeveloped at best, essentially Tadao complains that the Republic has chosen to prosecute a claim against her while failing to pursue claims against other persons to whom executive clemency was also granted in less than 60 days. In her most concise articulation of why a genuine issue of fact remains, Tadao states, "there was a clear case of uneven treatment granted to Senator Baules and [Tadao], and for no clearly articulated reason." (Tadao Reply Br. 6) This simply is not the standard for an equal protection argument. For the reasons set forth below, we conclude that there exists no issue of fact and Tadao's argument fails.

First, Tadao has failed to establish that she and the other individuals she claims were granted executive clemency in less than 60 days—specifically, that she, Ibedul Gibbons and Senator Baules—are similarly situated. Such a showing is a necessary prerequisite to an equal protection claim. *Ngerur v. Supreme Court of the Republic of Palau*, 4 ROP Intrm. 134, 137 (1994) ("[E]qual protection does not require identical treatment of persons who are not similarly situated."). Instead, Tadao seems to establish that the circumstances of her pardon and that

of Senator Baules, on whom she focuses in her Reply Brief, are actually quite dissimilar. Tadao ultimately concedes the fact that Senator Baules, though he was granted a temporary reprieve from his jail sentence, was granted a commutation only *after* the President received recommendations from the required entities. (Tadao Reply Br. 5) Thus, it appears as though the procedure prescribed by § 3204 was followed in Senator Baules' case.

[6] Regardless, even assuming that Tadao, Senator Baules, and Ibedul Gibbons are similarly situated, Tadao still fails to set forth a comprehensive equal protection argument. Specifically, she offers no evidence that the government discriminated against her on the basis of sex, race, place of origin, language, religion or belief, social status or clan affiliation. *See* Const. Art. IV, § 5, cl. 1 (listing impermissible bases for discrimination). The Trial Division, citing *Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir. 1995), addressed this deficiency in her argument:

Even assuming that [Appellants] have raised a question as to whether they have been treated differently from similarly situated persons, they have failed to offer any evidence whatsoever sufficient to raise a genuine issue of fact as to the second prong of the test. *See Zahra*, 48 F.3d at 684 (“The flaw in Zahra's equal protection claim is that Zahra assumes that to prevail he need only prove that he was treated differently from others.”); *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) (“Mere failure to prosecute other offenders is not a basis for a finding of denial of equal protection.”). [Appellants] have

neither alleged nor provided any evidence that the Republic decided to enforce the Executive Clemency Act in this case because it wishes to discriminate against them on the basis of an impermissible consideration, such as race, social status, gender, or religion. *See* Palau Const. art. IV, § 5, cl. 1 (listing impermissible bases for discrimination). Nor have [Appellants] alleged that the Republic intended to punish or inhibit their exercise of constitutional rights. Finally, the record is entirely lacking in any evidence that the Republic has acted with malice or a bad faith intent to injure [Appellants]. *See Zahra*, 48 F.3d at 684 (holding that evidence suggesting an individual “was ‘treated differently’ from others does not, in itself, show malice”); *LeClair v. Saunders*, 627 F.2d at 608 (“[E]qual protection does not require that all evils of the same genus be eradicated or none at all.”). Accordingly, [Appellants] have not demonstrated the existence of a genuine dispute of material fact as to whether their equal protection rights have been violated.

*Republic of Palau v. Diaz, et al.*, Civil Action No. 13-008, slip op. at 16 (Trial Div. Nov. 29, 2013). We agree with the Trial Division's analysis and determine that Tadao has failed to offer sufficient evidence to raise a genuine dispute of material fact as to whether she was treated differently than others similarly situated on an impermissible basis. As a result, her equal protection argument fails.

## CONCLUSION

For the foregoing reasons, we **AFFIRM** the Trial Division's ruling.

ARTHUR NGIRAKLSONG, Chief Justice, concurring:

The simple issue in this case is whether the Executive Clemency Act, (17 PNC § 3201), an enabling legislation for the constitutional provision on President's power to grant pardons, commutations or reprieves, is unconstitutional. Does the Act usurp the President's powers to grant pardons, commutations or reprieves in Article III, section 7 of the Palau Constitution?

The Act is constitutional. It is also a prerequisite to the President's exercise of the power to grant pardons, commutations or reprieves. Former President Toribiong failed to follow the constitutionally mandated procedures before granting executive clemency to appellants. I affirm.

There is an important difference between the Palau Constitution's executive clemency provision from the corresponding provision in the United States' Constitution. The Palau Constitution requires an enabling legislation before the President can exercise his power to pardon, commute or reprieve.

"The President shall have all the inherent powers and duties of a national chief executive, including, but not limited to the following:

- 1) . . .
- 2) . . .
- 3) . . .
- 4) . . .

5) to grant pardons, commutations and reprieves subject to procedures

prescribed by law... [emphasis added].

6) . . .

7) . . .

8) . . ."

Palau Const., art. VIII, § 7. Contrast with the US Const., art. II, § 2 which states, "he [the President] shall have power to Grant Reprieves and Pardons against the United States, except in cases of impeachment." This constitutional provision of the US Constitution is self-executing.

The Palau Constitution on the power of the President to grant pardons, commutations and reprieves is not self-executing. *See Gibbons v. Etpison*, 4 ROP 1, 4 (1993). This means this constitutional provision does not become operative until an enabling legislation is in place. The Palau Constitution specifically says the power of the President "to grant pardons, commutations and reprieves [is] subject to procedures prescribed by law..." The Executive Clemency Act, 17 PNC §3201, et seq., is the enabling legislation.

Appellants have not shown that the Act has diminished the constitutional powers of the President to pardon, commute or reprieve nor has it imposed cumbersome procedures that tantamount to infringements on the President's constitutional powers.

Since Appellants have failed to show that the Executive Clemency Act is constitutionally infirm and former President Johnson Toribiong failed to follow the procedures required by the enabling legislation and the Constitution, I affirm.

**JACKSON M. HENRY**  
**Appellant,**

v.

**MUTOU SHIZUSHI,**  
**Appellee.**

CIVIL APPEAL NO. 14-004  
Civil Action No. 09-072

Supreme Court, Appellate Division  
Republic of Palau

Decided: July 25, 2014

[1] **Appeal and Error:** Writs and Petitions

Petitions must state with particularly each point of law or fact that the petitioner believes the court has overlooked or misapprehended.

[2] **Appeal and Error:** Reconsideration of Appellate Opinions

Petitions for rehearsing should be granted exceedingly sparingly, and only in those cases where this Court’s original decision obviously and demonstrably contains an error of fact or law that draws into question the result of the appeal.

[3] **Appeal and Error:** Notice of Appeal  
The Rules of Appellate Procedure control the time limits in which to file a notice of appeal.

Counsel for Henry: Tamara D. Hutzler  
Counsel for Mr. Shizushi: Elyze McDonald  
Irairte

BEFORE: LOURDES F. MATERNE, Associate Justice; R. ASHBY PATE, Associate Justice; and KATHERINE A. MARAMAN.

PER CURIAM:

Before the Court is Appellant Jackson Henry’s timely filed Petition for Rehearing. For the reasons outlined below, it is denied.

**APPLICABLE LAW**

[1, 2] Petitions for rehearing are governed by ROP R. of App. P. 40. Petitions “must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended.” *Id.* We have previously stated that “[p]etitions for rehearing should be granted exceedingly sparingly, and only in those cases where this Court’s original decision obviously and demonstrably contains an error of fact or law that draws into question the result of the appeal [.]” *Espangel and Ucheliou Clan v. Tirso, et al.*, 3 ROP Intrm. 282, 283 (1993); *see also Western Caroline Trading Co. v. Philip*, 13 ROP 89 (2006); *Melaitau v. Lakobong*, 9 ROP 192 (2002); *Lulk Clan v. Estate of Tubeito*, 7 ROP Intrm. 63 (1998).

**DISCUSSION**

Henry’s fifteen-page petition argues that this Court misapprehended or overlooked numerous facts and points of law. We will briefly comment on his claims below.<sup>1</sup>

<sup>1</sup>Although this Order addresses this merits of Henry’s arguments, Henry’s petition could be dismissed summarily. *See Western Caroline Trading Co.* at 89 (limiting its analysis to “[w]e have carefully reviewed the Petition and the authorities cited therein and find

## I. Jurisdiction and Procedural Rules

Henry begins by contending that (1) we failed to recognize the difference between a strict procedural rule (a rule that, however stringently enforced, could allow an exception), and a jurisdictional bar (a standard prohibiting adjudication), and (2) we further failed to consider his late filing as violating a procedural rule rather than a jurisdictional bar.<sup>2</sup> Henry is mistaken. In fact, it is our clear understanding of this difference that led to our Opinion clarifying the term “jurisdiction.” Furthermore, had we simply determined that we were without jurisdiction, in the proper sense of the word, it would have ended our inquiry. Instead, our inquiry continued. Though we determined that the time limits of ROP R. App. P. 4 were “clear” and “inflexible,” we nevertheless considered whether we should grant an exception in this matter.<sup>3</sup>

---

that it does not meet the standard for granting a rehearing”). The petition is comprised almost entirely of arguments that he failed to make in his briefing; so, they do not form a proper basis for a petition for rehearing. *Nakatani v. Nishizono*, 2 ROP Intrm. 52 (1990) (stating “[t]his new and novel argument was neither made in appellant’s brief nor offered at oral argument and, therefore, it cannot now be raised.”); *Lulk Clan v. Estate of Tubeito*, 7 ROP Intrm. 63, 64 (1998) (Even a plausible argument that is “first made in a petition for rehearing . . . is not a proper basis to reverse . . .”).

<sup>2</sup> Henry focuses on our use of the term “semantic clarification.” Henry equates “semantic” with “meaningless,” but he misunderstands our use. We used the term to highlight the fact that the word “jurisdiction” has been used to mean different things.

<sup>3</sup> We direct Henry to our consideration of creating an exception to the procedural rule (“Even assuming that the suspension of Rule 4’s time requirements is permissible under our rules, we determine that it is inappropriate in this case for the following three

Henry also claims that consideration of our past jurisprudence on untimely filed notices of appeal was in error because of our determination that there is no jurisdictional bar in this matter. We disagree. First, we do not consider our Opinion in this matter to be such a departure from our past jurisprudence that factually similar cases are immaterial. Second, our past jurisprudence interpreted our Rules of Appellate Procedure, which are material in this case. Third, Henry presumes that, previously, the Appellate Division was not merely imprecise with its use of the word “jurisdiction,” but that it also applied a strict jurisdictional bar that precluded the possibility of review. This is not necessarily correct. In *Pamintuan, v. ROP*, 14 ROP 189 (2007), the Appellate Division began by noting that a late filing of a notice of appeal is a fatal jurisdictional defect, but then went on to excuse the late filing. *Id.* at 190. Although one reading of this contradiction is that the Appellate Division erred in excusing the filing as it lacked jurisdiction, an alternative reading is that the Court believed it had jurisdiction (in the proper use of the word), used the word jurisdiction imprecisely, and then consciously moved to consider the merits. In any event, we did not err in considering our prior case law.

## II. Adoption of the Unique Circumstances Doctrine

Next, Henry argues that we are obligated to adopt the unique circumstances doctrine to excuse his late filing. Again, we disagree. First, we are not bound by U.S. case law. *Yano et al. v. Kadoi*, 3 ROP Intrm. 174, 184 (1992). Second, we note that the United States Supreme Court has called into question

---

reasons.”). After reviewing our past jurisprudence, we determined that the facts did not warrant a departure (“We decline, under the circumstances here, to depart now.”).

the continued validity of this doctrine in the United States federal court. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007) (“Given that this Court has applied *Harris Truck Lines* only once in the last half century, several courts have rightly questioned its continuing validity.”) (internal citations omitted). Third, Henry’s argument, presented for the first time in Henry’s Petition for Rehearing, does not obviously and demonstrably show an error of fact or law that draws into question the result of the appeal. *Espangel and Ucheliou Clan v. Tirso, et al.*, 3 ROP Intrm. 282, 283 (1993). Thus, it is beyond the scope of his Petition for Rehearing. Fourth, as illustrated above, we need not adopt the unique circumstances doctrine in order to use our discretion to consider Henry’s late notice of appeal—the unique circumstances doctrine is merely one vehicle for the exercise of discretion with respect to untimely filings.

Finally, we are not convinced that Henry would be entitled to relief even if the unique circumstances doctrine were to apply. As illustrated by Henry, some state courts have continued to sparingly apply the unique circumstances doctrine post *Bowles*. Henry cites to *Cabral v. State*, 127 Hawai’i 175 (2012), but in that case the Supreme Court of Hawaii reviewed the United States Supreme Court law on unique circumstances and listed three elements necessary to apply the doctrine:

Like [the United States Supreme Court cases] *Harris* and *Thompson*, this case involves the reliance on a trial court’s order [that impermissibly extended a filing deadline] that: (1) was issued *prior* to the expiration of an original deadline; (2) extended the time to file a notice of appeal; and (3) was later deemed invalid.

*Cabral* at 183 (emphasis in original). These elements are not present in Henry’s case. No order impermissibly extended the December 18, 2013 deadline *prior* to its expiration. Rather, Henry allowed the deadline to expire without filing a notice of appeal. He alleges only that, after this expiration, he was orally granted relief through an ex-parte, third-party conversation. These facts, as alleged, would preclude relief under Hawaii’s unique circumstances doctrine.

In relying on *Mangus v. Stump*, 45 Kan.App.2d 987, 988 (2011), Henry focuses on the Kansas Appellate Court’s following statement: “[T]his case presents a situation where Mangus relied in good faith on the district court’s order extending the time for service of process, and this reliance played a substantial role in causing [him] to miss the statute of limitations.” *Id.* at 1218. Significantly, like the *Cabral* court, the *Mangus* court performed a but-for analysis when considering whether to grant a unique circumstances exception. Specifically, the trial court in *Mangus* found that, when it issued the improper order extending time, Mangus still had two days to effect service on the defendants and that there was “substantial reason to believe” that Mangus could have met the deadline but for the court order. *Id.* at 990. The appellate court agreed. *Id.* at 1000. Again, this contrasts with the facts of the present case. Because Henry did not rely on an order that improperly extended the December 18, 2013 deadline, and instead let the deadline expire in the absence of any order extending it, adopting the unique circumstances doctrine in this matter would not change the result.

### III. The ROP Rules that Govern Appeals

[3] Next, Henry suggests that we overlooked 14 PNC § 602, which allows for the filing of the notice of appeal with the presiding judge *or* the Clerk of Courts. Thus, because the delivery of the filing allows for filing with the presiding judge, Henry suggests it is reasonable to conclude that the ROP Rules of Civil Procedure should apply and that the time limits of ROP R. Civ. P. 6 could allow for a longer time in which to file a notice of appeal. The argument is deeply flawed. First, our previous opinion cited 14 PNC § 602 in full. It was clearly not overlooked. Second, where a notice or motion is delivered does not determine the applicable rules.<sup>4</sup> Third, the applicable sections of both the ROP Rules of Civil Procedure and the Rules of Appellate Procedure indicate that appeals are governed by the Rules of Appellate Procedure.<sup>5</sup> Fourth, and finally, the cross-reference at the bottom of 14 PNCA § 602, directs readers to the applicable rules: “For rules of appellate procedure promulgated by the Supreme Court pursuant to ROP Const. art. X, § 14 and Title 4, § 101, see Courts of Republic of Palau Rules of Appellate Procedure.” That the Rules of Appellate

<sup>4</sup> Further, we note that all filings, even filings for the presiding judge, are filed with the Clerk of Court.

<sup>5</sup> ROP R. Civ. P. Rule 1, entitled Scope of Rules, states in part, “Applicability. These rules govern procedure in all suits of a civil nature whether cognizable as cases at law or in equity in the Republic of Palau Supreme Court Trial Division . . . .” In contrast, ROP R. App. P. Rule 1, also entitled Scope of Rules, states in part, “Applicability. These rules govern procedure in appeals to the Appellate Division of the Supreme Court of the Republic of Palau from . . . the Trial Division of the Supreme Court.”

Procedure control the time limits in which to file a notice of appeal is unquestionable.

### IV. Requirements to File a Notice of Appeal

Henry also contends that we failed to appreciate the time required for his counsel to fulfill her ethical obligations prior to filing a notice of appeal. Henry claims that we suggested that he simply file a notice of appeal and decide later if any facts support it. We neither stated, nor suggested, any such thing. Rather we noted that a notice of appeal itself is a short and formulaic document that does not require extensive time to draft and we determined that Henry’s counsel had more than adequate time to review the applicable issues and the trial court’s orders, and then file a timely notice of appeal. We find it telling that Henry’s counsel never claimed she was incapable of meeting the filing deadline.<sup>6</sup>

### V. Suspension of the Rules of Appellate Procedure

Next, Henry takes issue with our statement that the Appellate Division has only suspended the Rules of Appellate Procedure once before. Henry cites to three past cases in which he claims parties were afforded relief from filing deadlines based upon official conduct that is “much less egregious than the facts of this case.” We begin by noting that none of the cases cited by Henry involve an

<sup>6</sup> Rather, in his Petition for Rehearing Henry acknowledges that he was capable of meeting the filing deadline (“Had the [trial court] acted properly and promptly . . . Henry would have had the opportunity to timely file this notice of appeal”).

As we have quoted Henry’s claim that the trial court acted improperly in failing to promptly rule on Henry’s 45 day extension, we note that the trial court’s order on the motion was issued within the suggested 14 day time period of ROP R. Civ. P. 7(b)(4).

untimely filed notice of appeal, nor do they cite ROP R. App. P. 2. See *Remeliik v. Luiu*, 1 ROP Intrm. 592 (1989) (involving a motion to dismiss for lack of prosecution with a lost transcript of a deceased witness); *Echerang Lineage v. Tkel*, 1 ROP Intrm. 547V (1988) (addressing delay resulting, in part, from an incomplete transcript because tape-recorded testimony of two witnesses was indiscernible); *Estate of Olkeriil v. Ulechong v. Akiwo*, 3 ROP Intrm. 83 (1992) (involving a delay resulting from the Clerk of Court failing to timely certify the record). In contrast to the cases cited in our Opinion that specifically address untimely notices of appeal, the cases upon which Henry relies are factually dissimilar to the situation at hand. Moreover, the results of Henry's cited cases appear to depend at least in part on whether the responsibility and resulting errors were the party's or the Clerk of Court's.<sup>7</sup> In the matter at hand, although perhaps not all errors were Henry's, the responsibility and failure to timely file a notice of appeal falls squarely on Henry's shoulders. The time limit to file a notice of appeal pursuant to ROP R. App. P. 4 is clear. While we considered the fact that Henry's counsel was unfamiliar with the appellate process, and that this unfamiliarity contributed to Henry's error, we ultimately determined that granting an exception in this matter was inappropriate.

Henry also claims that we misapprehended or overlooked relevant law in

<sup>7</sup> Compare *Echerang Lineage v. Tkel*, 1 ROP Intrm. 547V (1988) (granting the Motion to Dismiss where Appellant was responsible for the delay); with *Estate of Olkeriil v. Ulechong v. Akiwo*, 3 ROP Intrm. 83 (1992) (concluding that "[s]ince the error was administrative in nature, we cannot penalize Appellant"); and *Remeliik v. Luiu*, 1 ROP Intrm. 592, 593 (1989) ("[p]lainly, it would not be appropriate to punish the appellants for these administrative problems").

our so-called holding that ROP R. App. P. 2 prohibits relief in this matter. Henry misapprehends our Opinion. We did not hold that ROP R. App. P. 2 prohibits relief. Rather, we stated, "it is not entirely clear that Rule 2 suspension can or should be used to enlarge the time for filing a notice of appeal." We ultimately did not reach that question, concluding instead that "[e]ven assuming that the suspension of Rule 4's time requirements is permissible under our own [Rule 2], we determine that it is inappropriate in this case."

## VI. Review of Trial Court Errors

Finally, Henry claims that we failed to understand one of our most basic functions: to review and correct trial orders. In support of his position, Henry selectively quotes from our Opinion, claiming that we concluded that to correct "clear legal errors made by the trial court . . . runs afoul of the very purpose of appellate review." Henry misconstrues the Opinion. We concluded just the opposite: "As alleged, Henry asks us to give him the benefit of clear legal errors made by the trial court. This runs afoul of the very purpose of appellate review." In essence, Henry implies that we are somehow bound by an alleged oral, ex parte, trial court error, which impermissibly attempted to extend a fixed deadline and which, even taking Henry's allegations as true, occurred only after the deadline had already passed. We do not agree.

## VII. Warning to Counsel

We must comment on the language and tone used by counsel in the Petition for Rehearing. It is, more often than not, disrespectful and sarcastic. Although counsel does not have to agree with our Opinion, she

must treat the Court with dignity and respect.<sup>8</sup> Similar disrespect in the future may result in a finding of contempt.

### CONCLUSION

Henry's Petition for Rehearing is **DENIED**.

**NIRO TUCHERUR**  
**Appellant,**

**v.**

**KUKUMAI RUDIMCH,**  
**Appellee.**

CIVIL APPEAL NO. 13-017  
LC/B No. 12-0052

Supreme Court, Appellate Division  
Republic of Palau

Decided: July 28, 2014

[1] **Land Commission/LCHO/Land Court:** Determinations of Ownership

Failure to take actions consistent with ownership may be circumstantial evidence of lack of ownership.

[2] **Appeal and Error:** Harmless Error

We review for harmless error the Land Court possible failure to consider a piece of evidence.

Counsel for Appellant: Oldiais Ngiraikelau  
Counsel for Appellee: J. Roman Bedor

BEFORE: KATHLEEN M. SALII, Associate Justice; R. ASHBY PATE, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice Pro Tem.

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

---

<sup>8</sup> "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process." Preamble of the ABA Model Rules of Professional Conduct and incorporated into the ROP Disciplinary Rules and Procedures by Disciplinary Rule 2(h).

PER CURIAM:

This appeal arises from the Land Court’s determination of ownership awarding Tochi Daicho Lot 804 to the late Kukumai Rudimch. For the following reasons, we affirm the decision of the Land Court.<sup>1</sup>

**BACKGROUND**

This case involves a dispute over land identified as Tochi Daicho Lot 804, which is located in Iyebukel Hamlet, Koror State, and listed as Lot No. 182-213 on BLS Worksheet No. 2005 B 07. There were originally four claimants to the land—Niro Tucherur, Kukumai Rudimch, Rechuld Tucherur, and Haruo Ultrakl—but Haruo withdrew his claim and Rechuld’s granddaughter eventually testified on behalf of Kukumai. Accordingly, Niro and Kukumai (represented by her daughter, Miriam Chin) were the primary claimants in the proceedings before the Land Court.

Although Lot 804 was monumented in 1975, no formal action to adjudicate ownership was taken for thirty years. In 2005, the Bureau of Lands and Surveys (BLS) published a notice for re-filing of claims, momentation, and survey; designated Lot 804 as Lot 182-213 on the survey worksheet; and named Niro, Kukumai, Rechuld, and Haruo as claimants for Lot 804. No further formal action was taken until 2012, after a dispute arose when Niro’s grandson began to clear a portion of Lot 804 with the intention of building a house on it. Eriko Singeo, one of Kukumai’s daughters, filed a lawsuit to enjoin Niro’s grandson’s activities on the land. That

suit was dismissed without prejudice and the matter was referred to the Land Court for adjudication of the underlying ownership dispute.

On July 18, 2013, the Land Court held a hearing, which included a site visit. At the hearing, the Court heard testimony from Niro, Miriam Chin, Ochob Niro (Niro’s daughter), Elsie Rechuld Ucherbelau (Rechuld Tucherur’s granddaughter), Eyos Rudimch, and Chamberlain Ngiralmu. Eriko Singeo, one of Kukumai’s daughters and the plaintiff in the lawsuit discussed above, passed away before she could testify before the Land Court.

Niro claimed that Lot 804 belonged to him because he inherited it from his adoptive father, Barao Tucherur,<sup>2</sup> who was listed in the Tochi Daicho as the owner of Lot 804 (and of the adjoining Lot 803, which is not at issue here). Niro testified that Barao told Niro to build Niro’s house on Barao’s land, which Niro did. Barao later told Niro that the land on which Niro’s house stood would pass to Niro after Barao’s death. Barao died in 1969. Niro testified that, at his eldecheduch, it was discussed that all of Barao’s property would go to Niro. In 1971, Niro went to the Land Management Office and obtained a “certificate of ownership,” which he then took to Rechuld Tucherur and Bilung Ngerdoko, who signed it. That document stated, in essence, that title to Tochi Daicho Lots 803 and 804 vested in Niro pursuant to custom and to Barao’s intention.

Niro’s daughter, Ochob, testified on his behalf. She stated that they have lived in their present house since Typhoon Sally, that Niro’s grandmother had a tapioca garden on

<sup>1</sup> Although Appellant requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

<sup>2</sup> The Land Court decision refers to Niro’s adoptive father alternately as “Barao,” “Parao,” and “Barau.” For consistency, we will refer to him as “Barao.”

the land, and that Ochob used to collect mangos from the land despite being scolded by Rechuld's wife for doing so. Ochob also testified that both she and her father were aware when Elsie began constructing her home on Lot 804 in 1986, but that her father was a very calm man and did not object.

Kukumai, who filed a Land Acquisition Record in 1975, based her claim on the ground that she bought Lot 804 from Rechuld Tucherur in 1961. A 1977 Warranty Deed purports to record the transfer of Lots 574, 578, and 894 (with a handwritten correction stating that the actual lot number is 804) from Rechuld to Kukumai.

Elsie testified on behalf of Kukumai. She stated that she and her husband built their house in 1986 on land that belonged to her grandfather, Rechuld. She said that, for as far back as she can remember, her family has always used this land. She further testified that she saw Kukumai gardening on the land before 1967 and that she never saw Sekluk, Barao's wife, use the land. She also testified that her grandfather had leased the land to the Japanese. Finally, she stated that, to the best of her knowledge, the land that Niro received at Barao's eldecheduch was the land where Niro's house was standing.

Eyos testified that he and his father, Isidoro Rudimch, monumented the parcel claimed by Kukumai. He identified the land and explained that reference to Lot 894 contained in the 1977 Warranty Deed conveying land from Rechuld to Kukumai was a typo and that the correct lot number was the one written in the margin—Lot 804.

Miriam testified that her mother, Kukumai, owned Lot 804 and had a garden on it for years, dating back to before 1966. She

stated that she knew that her mother had obtained the land from Rechuld.

After the hearing, the Court ordered BLS to re-survey the land to clarify whether Niro's house and the Jehovah's Witness Church were located on Lot 804. The re-survey took place on August 15, 2013 and indicated Lot 804 did not contain either Niro's house or the Jehovah's Witness Church.

In September 2013, the Land Court issued a determination of ownership finding that Kukumai Rudimch owned Lot 804 in fee simple. The Court found that there was undisputed and credible evidence that Rechuld had used Lot 804 since at least the 1960s and possibly earlier. The Court determined that Elsie's house was located on Lot 804, while Niro's house and the Church buildings were located on Lot 803. The Court reasoned that Niro's failure to take action to prevent Elsie from building a house on Lot 804 or to in any way regulate others' use of that property was suggested that he was not the owner of that land. The Court ultimately concluded that Rechuld had authority to sell Lot 804 to Kukumai and that he did so.

Niro Tucherur timely appeals.

### STANDARD OF REVIEW

We review the Land Court's conclusions of law de novo and its findings of fact for clear error. *Rengiil v. Debkar Clan*, 16 ROP 185, 188 (2009). "The factual determinations of the lower court 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 shall be affirmed even if this Court might have arrived at a

different result. *Ngaraard State Pub. Lands Auth. v. Tengadik Clan*, 16 ROP 222, 223 (2009).

### ANALYSIS

Niro raises several challenges to the Land Court's decision. First, Niro argues that the Land Court erred in construing his inaction as evidence that he did not own Lot 804 and in relying on *Mesubed v. Iramek*, 7 ROP Intrm. 137 (1999), to do so. Second, he argues that insufficient evidence supported the Land Court's determination that, in the past, Rechuld, rather than Niro, owned the land and that Rechuld therefore had the authority to sell it to Kukumai. Third, Niro argues that the Land Court overlooked a claim that he filed in 1993. Fourth, Niro argues that the Land Court erred in awarding the entirety of Lot 804 to Kukumai because Kukumai's claim was limited to a portion of the Lot. And, finally, Niro argues that 39 PNC § 402, which requires a later transferee to be first in time to record the deed in order to prevail against an earlier transferee, precludes a finding that Lot 804 belonged to Kukumai. We address these arguments in turn.

#### I. Niro's Inaction

After the death of his adoptive father in 1969, Niro's actions relating to Lot 804 were few and far between. In 1971, Niro obtained a "certificate of ownership," which, in essence, indicated that title to Tochi Daicho Lots 803 and 804 vested in Niro pursuant to custom and to Barao's intention. Niro took the document to Rechuld and Bilung Ngerdoko, who signed it. Nearly thirty years later, in 2000, Niro filed a claim of ownership of Lot

804.<sup>3</sup> In the interim, Niro failed to participate in the monumentation of Lot 804, despite the fact that he lived on the neighboring tract, and failed to object when Elsie built a house on the land, in full view of Niro's own residence.

Niro argues that the Land Court erred in treating his failure to exercise control over Lot 804 as evidence that he did not own the land. Niro asserts that he is a non-confrontational man whose inaction was the result of his gentle nature rather than an indication of lack of ownership. He takes particular issue with the Land Court's reliance on *Mesubed*, arguing that that case is inapplicable to the facts presented here and that the Land Court misunderstood and misapplied its holding.

[1] Under Palauan law, a claimant's failure to perform acts consistent with ownership may be circumstantial evidence that the claimant does not and never did in fact own the land in question. *Obak v. Joseph*, 11 ROP 124, 128-29 (2004). The inverse is also true—evidence that a claimant consistently used and exercised control over land without eliciting objection may be circumstantial evidence of ownership. *Id. Mesubed* is simply "one of a line of cases holding that a court may infer a valid transfer of land to a claimant when that claimant has occupied the land without objection for a significant period of time." *Id.* at 128. "Implicit in these cases is the premise that although there may be no direct evidence of the disposition of a property, evidence of an individual's use and possession of the property may be relevant in ascertaining ownership." *Ikluk v. Udui*, 11 ROP 93, 96 (2004).

<sup>3</sup> On appeal, Niro claims that the Land Court overlooked a 1993 claim that he filed. That argument will be addressed below.

The Land Court permissibly applied the well-established rule from these cases in construing Niro's failure to perform acts consistent with ownership as evidence that Niro did not own the land. In the face of Rechuld and his family's use and dominion over the property, without objection on the part of Niro, the Land Court reasonably concluded that, at some point before Barao's death, there had been a valid transfer of Lot 804 to Rechuld.

Niro is correct that many of the cases applying this rule, including *Mesubed*, have involved more clear-cut and prolonged periods of inaction than the facts presented here. Niro did take some actions consistent with ownership, such as obtaining the 1971 document and filing a claim to the land, and Rechuld took at least one action inconsistent with ownership when he signed the 1971 document. However, the *Mesubed* line of cases merely stands for the proposition that the Land Court may construe a claimant's failure to take acts consistent with ownership as evidence that he did not own the land. The Land Court appropriately applied that proposition here.

## **II. Sufficiency of the Evidence of Ownership as Between Niro and Rechuld**

Niro next argues that insufficient evidence supported the Land Court's conclusion that Rechuld owned Lot 804 and therefore possessed the authority to transfer it to Kukumai. As discussed above, the Land Court correctly understood that a claimant's failure to act like a landowner could be evidence of lack of ownership and, inversely, that a claimant's use and dominion over land could be evidence of ownership. It was then up to the Land Court to determine the strength and weight of that evidence.

Here, the Land Court was faced with evidence that Niro had taken few actions consistent with ownership over a period of at least thirty years, including failing to object when Rechuld's granddaughter built her house on the land in full view of Niro's residence. Meanwhile, the evidence suggested that Rechuld and his family had used the land consistently without seeking Niro's permission and without eliciting any objection from him. Niro's own daughter testified that, when she would attempt to collect mangoes on the land, it was Rechuld's wife who objected. However, neither Rechuld nor Niro behaved entirely consistently; in particular, Niro executed the 1971 document claiming ownership of Lot 804, and Rechuld signed it.

Thus, the evidence in this case was not clear-cut, and it was up to the Land Court to weigh it. In doing so, the Land Court rejected Niro's contention that he had failed to object to others' use of the land out of politeness and concluded instead that he failed to object because he did not in fact own the land. The Land Court also apparently found Rechuld's consistent use and dominion over the land to be more convincing than his signature on the 1971 document. Accordingly, the Land Court concluded there had been a valid transfer to Rechuld at some point in the past and that Niro had never owned Lot 804. That was a reasonable interpretation of the evidence presented. *See Kawang Lineage v. Meketii Clan*, 14 ROP 145, 146 (2007) (“[I]t is not the appellate panel's duty to reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence.”).

## **III. Niro's 1993 Claim**

Niro argues that the Land Court erred in overlooking a claim to Lot 804 that he allegedly filed in 1993. He attaches a copy of that document to his opening brief and states

that he referred to the document during the Land Court hearing.

In its determination of ownership, the Land Court discussed only Niro's 2000 claim. An examination of the record reveals that, although Niro's attorney mentioned the 1993 claim and apparently showed that document to the Court and opposing counsel at the hearing, the document was never entered into evidence or labeled as an exhibit. It is well-established that we may not consider on appeal evidence not contained in the record below. *Pedro v. Carlos*, 9 ROP 101, 103 (2002).

[2] Moreover, any error is harmless. *See Rengiil v. Debkar Clan*, 16 ROP 185, 191 (2009) (reviewing for harmless error the Land Court's misstatement of testimony presented at the hearing). Even if Niro filed a claim in 1993, that fact does not "undermine the reasoning or validity" of the Land Court's conclusion. *Id.* Assuming Niro did file a claim in 1993, he still waited seven years after Elsie built her house before taking any action whatsoever, and the sum total of his ownership actions amounts to three documents over thirty years. Accordingly, nothing suggests that the existence of a 1993 claim would materially change the Land Court's determination of ownership.

#### **IV. Award of Entirety of Lot 804 to Kukumai**

Niro objects to the Land Court's determination that Kukumai owned the entirety of Lot 804, rather than just a portion of the Lot. He asserts that, at the hearing, Kukumai's representative expressly disavowed ownership of the entire lot and claimed only a portion of it.

Niro unfairly characterizes of the testimony at the Land Court hearing. At the

hearing, there was some confusion as to whether Worksheet Lot 182-213 (Lot 804) included Niro's house and the Jehovah's Witnesses buildings. The portions of the transcript to which Niro refers were instances in which Miriam Chin and Kukumai's counsel, Mr. Bedor, were clarifying that their claim did not include the land on which those buildings stood. To resolve the confusion, the Land Court ordered a survey, which revealed that Lot 804 did not in fact include those buildings. Accordingly, there is no tension between the award of Lot 804 to Kukumai and her representatives' statements at the hearing. Moreover, in awarding Lot 804 to Kukumai, the Land Court relied on a 1977 Trust Deed that purported to transfer Lot 804 in its entirety from Rechuld to Kukumai. The Land Court therefore did not clearly err in awarding ownership of the entirety of Lot 804, rather than just a portion of it, to Kukumai.

#### **V. Applicability of the Recording Statute**

Niro's final argument is that he recorded his interest in Lot 804 (by the 1971 document) before Kukumai recorded her interest (by the 1977 Warranty Deed), and that Niro therefore prevails under Palau's recording statute, 39 PNC § 402. That statute provides:

No transfer of or encumbrance upon title to real estate or any interest therein, other than a lease or use right for a term not exceeding one year, shall be valid against any subsequent purchaser or mortgagee of the same real estate or interest, or any part thereof, in good faith for a valuable consideration without notice of such transfer or encumbrance, or against any person claiming under them, if the

transfer to the subsequent purchaser or mortgagee is first duly recorded.

39 PNC § 402. The classic case in which this statute is applicable is that of the double-dealing landowner who sells his land to one person and then, later, sells that same land to another person. To determine who prevails between the first and second transferees, the court looks to whether the second transferee was a bona fide purchaser without value and to which of those transferees recorded her deed first. *See Ongalk Ra Teblak v. Santos*, 7 ROP Intrm. 1 (1998).

Under the Land Court's determination of the facts, the recording statute is inapplicable here because Lot 804 was simply never transferred to Niro. It did not pass to him by inheritance upon Barao's death, and no document purports to memorialize a transfer of the Lot from Rechuld to Niro. Indeed, the 1971 document purports to memorialize Barao's intentions with regard to his heirs, not a conveyance from Rechuld to Niro. Moreover, the Land Court described Rechuld's signing of the 1971 document as an "anomalous act," which was contradicted by Rechuld's use of the land both before and after that date. Accordingly, the Land Court reasonably concluded that there simply was no transfer of Lot 804 to Niro, ever. The recording statute is therefore inapplicable.

### CONCLUSION

For the foregoing reasons, the decision of the Land Court is **AFFIRMED**.

**ZYLDEN YANO**  
**Appellant,**

**v.**

**REPUBLIC OF PALAU,**  
**Appellee.**

CRIMINAL APPEAL NO. 14-001  
Criminal Action No. 13-077

Supreme Court, Appellate Division  
Republic of Palau

Decided: September 4, 2014

[1] **Appeal and Error:** Preserving Issues

Where no challenge to the information is raised until after the verdict has been rendered, the information must be construed liberally in favor of its sufficiency.

[2] **Appeal and Error:** Scope of Record on Appeal

In reviewing the denial of a motion under ROP R. Crim. P. 34, the record on appeal is limited to the information, plea, verdict, and sentence.

[3] **Criminal Law:** Attempted Murder

Attempted felony murder does not exist in Palau.

[4] **Criminal Law:** Grounds for Conviction

A guilty verdict must be set aside where the verdict is supportable on one ground, but the other ground is constitutionally or legally

inadequate, and it is impossible to tell which ground the jury selected.

Counsel for Appellant: William L. Ridpath  
Counsel for Appellee: Delanie D. Prescott-Tate

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

Zylden Yano appeals the Trial Division's denial of his Rule 34 Motion for Arrest of Judgment with respect to his conviction for Attempted First Degree Murder. For the following reasons, we reverse and remand with directions to vacate Yano's conviction for Attempted First Degree Murder.<sup>1</sup>

### BACKGROUND

On July 20, 2013, Nehemiah Pamitalan was brutally attacked during a robbery of the Bem Ermii burger stand near the KB Bridge in Airai. Three days later, the Republic charged Yano with Attempted Murder in the First Degree, Robbery, Aggravated Assault, Assault and Battery with a Dangerous Weapon, and Grand Larceny. He pleaded not guilty.

<sup>1</sup> Appellant has not requested oral argument, and we determine that oral argument is unnecessary to resolve this matter. See ROP R. App. P. 34(a).

During the course of the jury trial, Yano never challenged the sufficiency of the Information, requested a bill of particulars, or objected to the jury instructions. After a multi-day trial, the jury found Yano guilty on all five counts. Yano then filed a Rule 34 Motion for Arrest of Judgment, arguing that his conviction for Attempted First Degree Murder must be set aside because Count 1 of the Information failed to charge an offense. More specifically, Yano argued that Count 1 charged him with Attempted First Degree Murder on a felony-murder theory only, and that the crime of Attempted Felony Murder does not exist. The Trial Division denied the motion. Yano timely appeals.

### STANDARD OF REVIEW

[1] We review the sufficiency of an information de novo. *United States v. Enslin*, 327 F.3d 788, 793 (9th Cir. 2003); see also *Uehara v. Republic of Palau*, 17 ROP 167, 178 (2010). Where no challenge to the information is raised until after the verdict has been rendered, the information must be "construed liberally in favor of its sufficiency." *United States v. Gibson*, 409 F.3d 325, 331 (6th Cir. 2005).

[2] In reviewing the denial of a Rule 34 motion, our review is limited to the information, plea, verdict, and sentence. See, e.g., *United States v. Bradford*, 194 F.2d 197, 201 (2d Cir. 1952); *United States v. Stolon*, 555 F. Supp. 238, 239 (E.D.N.Y. 1983); *United States v. Guthrie*, 814 F. Supp. 942, 944 (E.D. Wash. 1993); see also 3 Fed. Prac. & Proc. Crim. § 601 (4th ed.) ("The purpose of a Rule 34 motion to arrest judgment is to give the trial judge another chance to invalidate a judgment due to a fundamental error appearing on the face of the record. The

‘record’ includes only the indictment, the plea, the verdict, and the sentence.”).

### ANALYSIS

The Republic charged Yano with Attempted Murder in the First Degree in Count 1 of the Information. Count 1 of the Second Amended Information reads:

**ATTEMPTED MURDER IN THE FIRST DEGREE**, in that Defendant **ZYLDEN YANO**, did unlawfully and intentionally attempt to take the life of **NEHEMIAH PAMITALAN** while in perpetration of a robbery, in violation of 17 PNC §§ 104 and 1701. This crime is classified as a felony, and upon conviction thereof the offender shall be imprisoned for 30 years.

As noted above, Yano did not make any substantive challenges to Count 1 during pretrial proceedings or at trial. However, after the verdict, Yano filed a Motion for Arrest of Judgment under Rule 34 requesting that his conviction on Count 1 be vacated.

Rule 34 provides that “the court on motion of a defendant shall arrest judgment if the complaint or information does not charge an offense or if the court was without jurisdiction of the offense charged.” ROP R. Crim. P. 34. Here, Yano argues that Count 1 of the Information fails to charge an offense. He does not argue that he had no notice that he was charged with Attempted First Degree Murder, but instead challenges the alleged theory underlying the crime. He asserts that the Republic charged him with Attempted First Degree Murder under a felony murder theory only—in other words, that it did not charge him with having the requisite intent for Attempted First Degree Murder, but instead charged him with almost killing the victim

(accidentally or otherwise) in the course of committing robbery. Yano argues that felony murder is not a legally cognizable premise for attempted murder and that Count 1 of the Information therefore fails to charge an offense.

The Republic’s response is two-fold. First, it argues that Attempted First Degree Murder may be prosecuted under a felony murder theory in the Republic, so the Information charging Yano under that theory and his subsequent conviction are valid. Second, the Republic argues that the Information actually charged Yano with Attempted First Degree Murder under two alternate theories: (1) that Yano attempted to kill the victim with the requisite intent (intent-based theory) and (2) that Yano attempted to kill the victim in the course of committing robbery (felony murder theory). Accordingly, the Republic argues that, even if the felony murder theory is legally insufficient, Yano’s conviction should stand because the Information still charges an offense—namely, Attempted First Degree Murder under an intent-based theory.

#### I. **Attempted Felony Murder Does Not Exist**

Section 1701 of the Palau Criminal Code defines the offense of Murder in the First Degree:

Every person who shall unlawfully take the life of another with malice aforethought by poison, lying in wait, torture, or any other kind of wilful, deliberate, malicious, and premeditated killing, or while in the perpetration of, or in the attempt to perpetrate, any arson, rape, burglary, or robbery, shall be guilty of murder in the first degree[.]

17 PNC § 1701. Section 1701 thus sets out two alternate means of committing Murder in the First Degree: (1) by killing another person with the requisite intent (malice aforethought plus some kind of premeditation), or (2) by killing a person in the course of committing or attempting to commit one of the enumerated felonies. *See State v. Bowerman*, 802 P.2d 116, 120 (Wash. 1990) (“Premeditated murder and felony murder are not separate crimes. They are alternate ways of committing the single crime of first degree murder.”). In felony murder, no intent to kill is necessary. *See People v. Viser*, 343 N.E.2d 903, 910 (Ill. 1975) “[T]he distinctive characteristic of felony murder is that it does not involve an intention to kill.”). Instead, an intent to kill is implied by legal fiction from the intent to commit the predicate felony. *See State v. Gray*, 654 So. 2d 552, 553 (Fla. 1995) (“[F]elony murder is based on a legal fiction that implies malice aforethought from the actor’s intent to commit the underlying felony.”) (overruled on other grounds by statute).

Section 104 is Palau’s attempt statute. It provides that “[e]very person who shall unlawfully attempt to commit murder, which attempt shall fall short of actual commission of the crime itself, shall be guilty of attempted murder[.]” 17 PNC § 104(b). It further specifies that Attempted Murder in the First Degree carries a sentence of 30 years’ imprisonment, while Attempted Murder in the Second Degree is punishable by a sentence of not less than 30 months and not greater than 30 years. 17 PNC § 104(b)(1)-(2).

The Republic’s argument in favor of the existence of attempted felony murder is deceptively simple. It argues that Section 104 criminalizes any attempt to commit murder that falls short of the actual commission of

murder, and Section 1701 provides that murder may be committed either with the requisite intent or in the commission of a felony, so falling short of killing someone while in the commission of a felony qualifies as attempted murder.

[3] What the Republic fails to apprehend, however, is that the crime of attempt requires a specific intent to commit the crime attempted. *See Trust Territory v. Rodriquez*, 8 TTR 491, 496 (1985) (“It is basic criminal law that an attempt to commit a crime requires specific intent, the performance of an act toward the commission, and the failure to consummate the act.”); *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1193 (9th Cir. 2000) (use of the word “attempt” in a criminal statute implies that specific intent is required). Felony murder, in contrast, exists for the purpose of punishing individuals who, while in the course of committing serious felonies, unintentionally kill others. *See Rodriquez*, 8 TTR at 495 (“The felony murder rule originated in England and at common law the author of an unintended homicide is guilty of murder if the killing takes place in the perpetration of a felony. Thus malice is implied by the law and what is intended is the felony and an unintended homicide.”) (citation omitted). Attempted felony murder is, therefore, a legal impossibility, because one cannot intend to do the unintentional.

This conclusion is supported by the fact that almost every U.S. state to have considered the issue has rejected the existence of attempted felony murder. *See, e.g., In re Richey*, 175 P.3d 585, 586-88 (Wash. 2008) (“In electing to charge first degree felony murder, the State relieves itself of the burden to prove an intent to kill or, indeed, any mental element as to the killing itself. It follows that a charge of attempted felony

murder is illogical in that it burdens the State with the necessity of proving that the defendant intended to commit a crime that does not have an element of intent.”); *State v. Kimbrough*, 924 S.W.2d 888, 890-92 (Tenn. 1996) (discussing logical and legal impossibility of attempted felony murder and collecting cases); *Bruce v. State*, 566 A.2d 103, 105 (Md. 1989) (“Because a conviction for felony murder requires no specific intent to kill, it follows that because a criminal attempt is a specific intent crime, attempted felony murder is not a crime in Maryland.”); *People v. Viser*, N.E.2d 903, 910 (Ill. 1975) (“[T]he offense of attempt requires an ‘intent to commit a specific offense’, while the distinctive characteristic of felony murder is that it does not involve an intention to kill. There is no such criminal offense as an attempt to achieve an unintended result.”) (citation omitted); *State v. Darby*, 491 A.2d 733, 736 (N.J. App. Div. 1984) (“‘Attempted felony murder’ is a self-contradiction, for one does not ‘attempt’ an unintended result.”).

Palauan case law largely supports this result. In *Rodriquez*, we observed that “[w]ithout a homicide the felony murder rule simply does not come into play” because an actual killing “is the most basic requirement for the application of the felony murder rule.” *Rodriquez*, 8 TTR at 495. Moreover, we acknowledged the fundamental incompatibility of attempt, which requires specific intent, and felony murder, which is designed to punish unintentional killings. *See id.* at 497. (“The common law fiction of *transferred* intent is used to support the felony murder rule. There is such a basic and logical inconsistency between the *specific* intent required for an attempted crime that an attempted felony murder is a legal impossibility.”). Our reasoning in

*Rodriquez* aligns perfectly with the majority position in the United States and remains as sound today as it was in 1985.

To be fair, in *ROP v. Ngiraboi*, 2 ROP Intrm. 257 (1991), we retreated from this well-reasoned conclusion without explanation and without any mention of *Rodriquez*. However, the issue of whether a felony murder theory could support a conviction for attempted murder was not squarely presented in *Ngiraboi*; so, that Court’s observations in dicta have little precedential value. Moreover, the *Ngiraboi* Court appears to have overlooked the fact that attempt requires specific intent, because it noted that mere recklessness would be sufficient to support an intent-based conviction for attempted second degree murder. *Ngiraboi*, 2 ROP Intrm. at 262. This is plainly wrong. *See, e.g., United States v. Kwong*, 14 F.3d 189, 195 (2d Cir. 1994) (holding that attempted murder requires proof of specific intent, and “mere recklessness will not suffice”). In any event, to the extent that *Ngiraboi* held that attempted felony murder exists in Palau, it is hereby overruled.

## II. Alternate Means

The Republic argues that, even if attempted murder cannot be predicated on a felony murder theory, Yano’s conviction should be affirmed because the Information charged intent-based attempted murder as well as felony murder. Count 1 includes the following language: “**ATTEMPTED MURDER IN THE FIRST DEGREE**, in that Defendant **ZYLDEN YANO**, did unlawfully and intentionally attempt to take the life of NEHEMIAH PAMITALAN while in perpetration of a robbery, in violation of 17 PNC §§ 104 and 1701.” The Republic asserts that the use of the word “intentionally” indicates an intent-based theory of the crime,

rather than simply a felony murder theory (in which, ostensibly, the intent to kill would be implied by legal fiction from the intent to commit the underlying felony). Accordingly, the Republic argues, the Information charged at least one acceptable theory of Attempted Murder in the First Degree.

Given that we must construe the Information with maximum liberality, the Republic's argument is plausible. It is true that, to distinguish intent-based Attempted First Degree Murder from intent-based Attempted Second Degree Murder, the Republic should have specified that the attempted murder was committed "by poison, lying in wait, torture, or any other kind of wilful, deliberate, malicious, and premeditated killing[.]" 17 PNC § 1701. However, it is clear from the caption and the statutes listed that the Republic was charging Attempted Murder in the First Degree, not Attempted Murder in the Second Degree. Thus, it is possible that the Information charged Attempted First Degree Murder under both an intent-based theory and a felony murder theory.

[4] Even assuming the Information charged alternate means, however, Yano's conviction cannot stand. A guilty verdict must be set aside "where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Yates v. United States*, 354 U.S. 298, 312 (1957). This rule applies "whenever one of the possible grounds of conviction was legally inadequate for any reason." *United States v. Holly*, 488 F.3d 1298, 1304-07 (10th Cir. 2007); *see also United States v. Howard*, 517 F.3d 731, 736-38 (5th Cir. 2008) ("[A] conviction must be vacated if a legally invalid theory was submitted to the jury and it is impossible to tell whether the jury's verdict of guilt relied on the invalid theory."). Here,

Yano was charged with Attempted First Degree Murder under both a valid theory of the crime (intent-based attempted murder) and a legally inadequate theory (felony murder). The jury's verdict simply states that it found Yano guilty of Attempted First Degree Murder. There is no way to discern from the verdict upon which theory the jury rested its decision.<sup>2</sup> Accordingly, Yano's conviction for Attempted First Degree Murder must be set aside.

## CONCLUSION

For the foregoing reasons, the decision of the Trial Division is **REVERSED and REMANDED** with instructions to vacate Yano's conviction on Count 1.

---

<sup>2</sup> Although we do not rely on this fact, we note that the jury instructions make it abundantly clear that the jury actually based its verdict on the improper felony murder theory, because that was the only theory of the crime upon which it was instructed. Indeed, the jury was specifically instructed that, if it found Yano guilty of Attempted Murder in the First Degree, it was required to find him guilty of Robbery "because Robbery is an element of Attempted Murder in the First Degree." Jury Instruction No. 10.

**ROLL 'EM PRODUCTIONS, INC., JEFF BARABE, and MICHAEL FOX, in their representative capacity**  
**Appellants,**

v.

**DIAZ BROADCASTING COMPANY d.b.a. MEDAL BELAU TV and ALFONSO DIAZ in his representative capacity,**  
**Appellees.**

CIVIL APPEAL NO. 13-013  
 Civil Action No. 08-209

Supreme Court, Appellate Division  
 Republic of Palau

Decided: September 9, 2014

[1] **Appeal and Error:** Standard of Review

Questions of statutory interpretation are reviewed de novo.

[2] **Statutory Interpretation:** Plain Meaning

When the meaning of a statute is plain, that meaning governs and no further analysis is necessary.

[3] **Statutory Interpretation:** Mandatory Language

In the context of attorneys' fees, the phrase "shall be liable to" mandates an award of fees.

Counsel for Appellants: Kassi Berg  
 Counsel for Appellees: Siegfried B. Nakamura

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; R. ASHBY PATE, Associate Justice.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

Appellants Roll 'Em Productions, Inc., Jeff Barabe and Michael Fox (collectively Roll 'Em Productions) appeal the September 9, 2013 Trial Division decision denying attorneys' fees. For the following reasons, we reverse the Trial Division and award Roll 'Em Productions \$37,550 in attorneys' fees.<sup>1</sup>

## BACKGROUND

This matter appears before us for the second time. The procedural history is long and we decline to repeat it here.<sup>2</sup> In summary, we previously found that Roll 'Em Productions owned the exclusive copyright to the video aired by Appellees Diaz Broadcast Company and Alfonso Diaz (collectively Diaz), reversed the Trial Division's judgment, and remanded the case for a determination of damages.

On remand, Roll 'Em Productions argued, among other things, that, under 39 PNC §841(e), it was also entitled to \$57,350.00 in attorneys' fees as the prevailing

<sup>1</sup> Although Roll 'Em Productions requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

<sup>2</sup> A full recounting of the case's background is contained in *Roll 'Em Productions, Inc., v. Diaz Broadcasting Co.*, 19 ROP 148 (2012).

party. In making its attorneys' fees determination, the Trial Division first considered the plain meaning of the fee-shifting statute, which reads:

Anyone who violates any of the exclusive rights of the copyright . . . shall be liable . . . to pay the copyright owner . . . reasonable costs associated with enforcement, including attorneys' fees.

*Id.* Despite this seemingly clear and unambiguous language, the Trial Division then rather inexplicably consulted an online dictionary and determined that the phrase "shall be liable" actually meant "shall be *likely* liable." In doing so, the Trial Division determined that it maintained discretion in whether to award any attorneys' fees at all, and subsequently awarded Roll 'Em Productions no attorneys' fees, concluding instead that Roll 'Em Productions was only entitled to \$1,000.00 in statutory damages and \$851.68 in court costs. Roll 'Em Productions appealed.

## STANDARD OF REVIEW

[1] We review *de novo* all legal conclusions of the Trial Division, including those based on statutory interpretation. *Isechal v. ROP*, 15 ROP 78, 79 (2008).

## DISCUSSION

### I. Statutory Interpretation

On appeal, the parties disagree about the proper standard of review.<sup>3</sup> However, the

<sup>3</sup> When a statute mandates the award of attorneys' fees to the prevailing party and no award is given, the standard of review remains *de novo*. However, where the award of fees is discretionary, any award is reviewed under the abuse of discretion standard. *See*

crux of this appeal is the Trial Division's interpretation of 39 PNC § 841(e), specifically the meaning of the phrase "an infringer . . . shall be liable . . . to pay the copyright . . . owner reasonable costs associated with enforcement, including attorneys' fees." Because the issue on appeal is whether the Trial Division erred in interpreting the relevant statutory language—a clear question of law—*de novo* review is the proper standard. *Bandarii v. Ngerusebek Lineage*, 11 ROP 83, 85 (2004) ("[I]ssues of statutory interpretation are reviewed *de novo*["]).

[2][3] Reading the statute, we agree with the Trial Division that the statute is clear on its face—but our agreement ends there. The plain meaning of the statute, which uses the mandatory "shall" instead of the permissive or discretionary "may," clearly requires the Trial Division to award reasonable attorneys' fees. Therefore, the Trial Division erred when it in continued its analysis, consulted a dictionary, and determined that, despite the plain mandatory language of the statute ("shall be liable to pay"), the award of attorneys' fees was, in fact, discretionary ("shall *likely* be liable to pay"). Unlike the U.S. Copyright Act, which has a discretionary fee-shifting statute (17 U.S.C. § 505: "the court may also award a reasonable attorney's fee to the prevailing party"), the OEK has statutorily mandated an award of reasonable costs including attorneys' fees. The language of the statute is unambiguous: "Anyone who violates any of the exclusive rights of the copyright . . . shall be liable . . . to pay the copyright owner . . . reasonable costs associated with enforcement, including attorneys' fees." 39 PNC §841(e). U.S. courts have consistently interpreted the statutory language of "shall be

*Hyde v. Midland Credit Management, Inc.*, 567 F.3d 1137, 1140 (9th Cir. 2009).

liable to” as mandating an award of fees. *Lamonica v. Safe Hurricane Shutters, Inc.* 711 F.3d 1299, 1307 (11th Cir. 2013) (finding that an act which states a person “shall be liable to,” is unequivocal and no court is vested with discretion to deny attorney’s fees); *American Family Mut. Ins. Co. v. Hollander*, 705 F.3d 339, 352 (8th Cir. 2013) (stating that where a party prevails in his suit, the statutory language of “shall be liable to” mandates an award of attorney’s fees).

Our own case law suggests the same result. In *Western Caroline Trading Co. v. Philip*, 13 ROP 28 (2005), we concluded that an attorneys’ fees clause of a contractual agreement did not divest the trial court’s discretion in awarding said fees. But, in reaching our conclusion, we contrasted the facts of the case with the facts of *Singleton v. Frost*, 742 P.2d 1224 (Wash. 1987), where a statute required the award of attorneys’ fees. We emphasized that the *Singleton* court concluded that a trial court *must* award attorneys’ fees where a promissory note *and controlling statute* contain mandatory language providing that the prevailing party “shall be entitled to reasonable attorneys’ fees” *Western Caroline Trading Co.* at 29.

Reduced to its essentials, the Trial Division’s analysis simply focused on the wrong word. That is, the operative word for purposes of determining the existence *vel non* of the Trial Division’s discretion to award attorneys’ fees was not “liable” but “shall.” We can find no common law either in Palau or the U.S. in which a trial court has resorted to a definitional inquiry of the word “liable” in order to determine the existence of discretion to award attorneys fees. We reject the Trial Division’s novel inquiry here. Accordingly, we hold that the Copyright Act mandates an award of “reasonable costs associated with

enforcement, including attorneys’ fees.” 39 PNC § 841(e).

## II. Determination of Reasonable Attorneys’ Fees

In support of its request for attorneys’ fees below, Roll ‘Em Productions submitted detailed invoices that included the date of each entry, a description of work, the hours worked, and the hourly rate. Additionally, the late, esteemed Carlos Salii testified to the reasonableness of Roll ‘Em Production’s attorneys’ fees after reviewing the filings in the case. Despite this, the Trial Division found Roll ‘Em Productions’ evidentiary support insufficient and woefully inadequate.

We do not agree. After a careful review of the invoices, we conclude that they are as detailed—if not more detailed—than the numerous attorneys’ fees invoices the Trial Division routinely reviews and approves for appointed matters. Out of concern for judicial efficiency and economy, and because all necessary evidence is before us, we see no reason to remand this matter when we can easily determine the reasonable fee on the basis of the documentary evidence before us. *Estate of Rechucher v. Seid*, 14 ROP 85 (2007) (reversing the trial court and determining the proper award rather than remanding for a new determination). We reach this conclusion, in part, because the Trial Division found the witness testimony of Mr. Salii to be without evidentiary weight. Consequently, we are on equal footing with the Trial Division to review a purely documentary record.

The Lodestar method is a widely accepted model adopted by the U.S. Supreme Court for computing attorney's fees in which a court multiplies the number of hours reasonably spent by trial counsel by a

reasonable hourly rate. *Hensley v. Eckerhart*, 461 U.S. 424, 433, (1983); *see Fisher v. SJB–P.D., Inc.*, 214 F.3d 1115, 1119 (9th Cir.2000). In performing this calculation, we recognize that this case has lasted over five years, has been appealed twice, addresses novel issues of law in Palau, and requires skilled legal services in the area of copyright law. Roll ‘Em Productions has been successful in proving (1) that it owned the copyright in this matter, and (2) that it is entitled to reasonable attorneys’ fees. Prior to this appeal, counsel for Roll ‘Em Productions billed 450 hours over the course of five years of litigation. This represents an average of only two weeks of legal work per year on a complex case. Viewed as a whole, two weeks per year is a reasonable number of hours to spend on this matter. Moreover, the hourly rate charged by legal counsel of \$125.00 is commensurate to similarly situated counsel in the local market. Counsel’s work product, including her appellate brief in this appeal, is commendable and of a higher quality than most of the briefs we routinely see.

However, we also recognize that counsel has limited legal experience in Palau and has failed to prove significant damages. Like the Trial Division, we have concerns with the overall costs of Roll ‘Em Productions’ counsel’s fees. Her total hours—particularly her appeal preparation, preparation of elective motions such as her motion for recusal, and her research of moral rights—are excessive. Thus, after careful review of counsel’s invoices, we determine that a reasonable fee in this matter amounts to \$37,550.00.<sup>4</sup>

## CONCLUSION

For the reasons stated above, the Trial Division is **REVERSED**.

Pursuant to ROP R. App. P. 32, we modify the Judgment in this matter to include an award of reasonable attorneys’ fees to Roll ‘Em Productions in the amount of \$37,550.00.

---

<sup>4</sup> This calculation credits counsel with 140.9 hours before the Trial Division (rather than the requested 182.95 hours); 87.5 hours for the first appeal (rather

---

than the requested 130 hours); and 72 hours on remand (rather than the requested 126.35 hours).

**MIHAINA MEREB SHIRO and  
CHILDREN OF MEREB,  
Appellants,**

v.

**ESTATE OF MANUEL DELOS REYES  
and CHILDREN OF BLAILES  
Appellees.**

CIVIL APPEAL NO. 13-014  
Civil Action No. 08-209

Supreme Court, Appellate Division  
Republic of Palau

Decided: September 18, 2014

[1] **Property:** Adverse Possession

To acquire title by adverse possession, the claimant must show that the possession is actual, continuous, open, visible, notorious, hostile or adverse, and under a claim of title or right for twenty years.

[2] **Property:** Adverse Possession

A party occupying or using land with the permission of the true land owner is not “hostile or adverse” to the land owner for purposes of adverse possession.

[3] **Property:** Acquisition Limited to Palauans

The Constitution’s prohibition on land acquisition by non-citizens does not prohibit the continued ownership of land by non-citizens who have lawfully and continuously owned the land since before the Constitution’s enactment.

[4] **Appeal and Error:** Fact Finding

Factual findings of a trial court will be overturned only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion.

Counsel for Appellants: Moses Uludong  
Counsel for Appellee Estate of Reyes: Pro se, represented by Anthony Reyes Borja  
Counsel for Appellee Children of Blailes: Oldiais Ngiraikelau

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, Associate Judge, presiding.

PER CURIAM:

This appeal arises from the Land Court’s determination of ownership awarding several lots to the Estate of Manuel Delos Reyes and a single lot to the Children of Blailes. For the following reasons, the decision of the Land Court is affirmed.<sup>1</sup>

## BACKGROUND

This case involves competing claims of ownership to several Tochi Daicho lots in Ngaraard State. The case before the Land Court included a large number of claimants,

<sup>1</sup> Appellant has not requested oral argument, and we determine that oral argument is unnecessary to resolve this matter. *See* ROP R. App. P. 34(a).

both Palauan and Chamorro, as well as numerous lots. This appeal, however, involves only three of those claimants and a handful of lots.

Mihaina Mereb Shiro and the Children of Mereb (hereinafter Mereb Children) claimed Tochi Daicho lots 2101, 2102, 2103, 2104, 2106, 2107, and 2108. The Mereb Children asserted that those Tochi Daicho lots corresponded to Worksheet lots 06E003-019, 06E003-019A, 06E003-019B, 06E003-020, 06E003-022, 06E003-25, 06E003-026, 06E003-027, and 06E003-028 on BLS Worksheet 2006 E 003. They argued that they obtained all of these lots from the listed Tochi Daicho owner, Manuel Aquon Delos Reyes, either by oral conveyance or by adverse possession. They also argued that Manuel's descendants could not claim the lots because only Palauan citizens may own land, and Manuel's heirs are Chamorro.

The Estate of Reyes claimed all of the above-mentioned Tochi Daicho lots under the theory that, although Manuel Aquon Delos Reyes (hereinafter Manuel) permitted the Mereb family to use the land, he never transferred ownership to them. Instead, they argued, Manuel acquired the land in 1923 and never conveyed the land to anyone during his lifetime. The Estate asserted that the land therefore passed to Manuel's estate upon his death in Saipan in 1957.

The Children of Blailes claimed Worksheet Lot 06E003-022 (hereinafter WS Lot 22), which they argued is part of Tochi Daicho Lot 2097 and was therefore not part of Manuel's lands. The Estate of Reyes conceded that WS Lot 22 was not part of their land. The Mereb Children, however, argued that WS Lot 22 was part of the land owned by Manuel and

that it therefore passed to them by oral conveyance or adverse possession.

The Land Court held hearings from June 3, 2013, until June 7, 2013. At the hearings, the Court heard testimony from the Mereb Children, the Children of Blailes, and the representative of the Estate of Reyes, Anthony Reyes Borja. After hearing all of the testimony, the Court awarded ownership of Tochi Daicho Lots 2101, 2102, 2103, 2104, 2106, 2107, and 2108 to the Estate of Reyes. In doing so, the Court found unreliable the testimony concerning an alleged oral conveyance to the Mereb Children. Moreover, the Court found that Manuel permitted the Mereb Children to use the land, so there could be no adverse possession because there was no hostility. Finally, the Court held that the constitutional provision barring land acquisition by non-Palauans did not foreclose the Estate of Reyes' claim because Manuel acquired the land before December 8, 1941 and was therefore entitled to own land. When Manuel passed away, the land became an asset of his estate. The Court also concluded that WS Lot 22 was part of Tochi Daicho Lot 2097 and owned by the Children of Blailes.

The Mereb Children timely appeal.

### **STANDARD OF REVIEW**

We review de novo the lower court's conclusions of law. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001). Factual findings are reviewed for clear error. *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002).

## ANALYSIS

The Mereb Children raise several objections to the Land Court's determination of ownership. As to the Estate of Reyes, they argue that the Mereb Children acquired the land through adverse possession and that Manuel and his heirs cannot acquire or own land because they are not Palauan.<sup>2</sup> As to the Children of Blailes, the Mereb Children argue that insufficient evidence supported the Land Court's determination that they owned Lot 06E003-022.

### I. Estate of Reyes

#### A. Adverse Possession

The Mereb Children argue that the Land Court erred in holding that they did not acquire Manuel's land by adverse possession. The Land Court concluded that the Mereb Children could not demonstrate that their use of the land was hostile to Manuel or his estate, so their adverse possession claim failed. Sufficient evidence supports that conclusion.

[1][2] "To acquire title by adverse possession, the claimant must show that the possession is actual, continuous, open, visible, notorious, hostile or adverse, and under a claim of title or right for twenty years." *Petrus v. Suzuki*, 19 ROP 37, 39 (2011). Moreover, "[a] party claiming title by adverse possession bears the burden to prove affirmatively each element of adverse possession." *Id.* at 39-40. As, to hostility, "mere possession" is not sufficient; instead, there must be "some additional act or circumstance indicating that the use is hostile to the owner's rights." *Id.* Accordingly, if the true owners grant another party permission to use the property, such use cannot form the

<sup>2</sup> On appeal, the Mereb Children appear to have abandoned their argument that they acquired the land through an oral conveyance from Manuel.

basis of a claim of adverse possession. See *Idid Clan v. Demei*, 17 ROP 221, 231 (2010)

Here, it is undisputed that, shortly before Manuel left Palau in 1956, he asked Mereb and his wife to move to the land and help farm it. The Mereb Children further admit in their opening brief that, "from 1956 up until the present, the Mereb family, with the consent of Manuel, occupied and cultivated the land owned by Manuel." Moreover, after the Mereb Children's house was destroyed by Typhoon Bopha in 2012, they sought and obtained authorization from Manuel's representative to reconstruct their house. Thus, ample evidence supported the Land Court's determination that the Mereb Children's use of the land was not hostile, and the Land Court did not clearly err in finding that the Mereb Children failed to demonstrate that they acquired the land by adverse possession.

#### B. Citizenship

The Constitution provides that "[o]nly citizens of Palau . . . may acquire title to land or waters in Palau." ROP Const. art. XIII § 8. The Mereb Children argue that the Land Court erred in awarding the land to Manuel's estate because Manuel and his heirs are not Palauan. They further argue that, even if Manuel owned the land at his death, Manuel's heirs are not eligible to inherit the land under 39 PNC § 309<sup>3</sup> because that provision conflicts with the Constitution.

The Land Court held that Manuel acquired the land in 1923 and owned it

<sup>3</sup> 39 PNC § 301 provides: "Only citizens of the Republic of Palau . . . may hold title to land in the Republic of Palau; provided, that nothing herein shall be construed to divest or impair the right, title, or interest of noncitizens or their heirs or devisees, in lands in the Republic of Palau held by such persons prior to December 8, 1941. . ."

continuously until the time of his death. In doing so, the Court rejected the Mereb Children's arguments that they obtained the land from Manuel either by adverse possession or through an oral conveyance. The Land Court therefore awarded the land to Manuel's estate.

[3] At the time when Manuel acquired the land, the Constitution did not yet exist, so Manuel's 1923 acquisition could not have been unconstitutional. During the Trust Territory period, moreover, non-Trust Territory citizens were allowed to own land that they had acquired before December 8, 1941. *See* 57 TTC § 201; Code 1970, title 57, § 11101; Code 1966, § 900. Accordingly, when Manuel died, he validly owned the land. It therefore became part of his estate upon his death.

The Land Court's decision does nothing more than confirm that Manuel owned the land during his lifetime and that, on his passing, it became an asset of his estate. The Land Court's determination stops there—it does not identify Manuel's heirs or determine which, if any, of them are eligible to inherit the land.<sup>4</sup> That is a matter for an estate proceeding. *C.f. Tengadik v. King*, 17 ROP 35 (2009). Indeed, as it stands, we do not know which of Manuel's heirs wish to claim the land or whether any of them will be eligible to inherit it under 39 PNC § 301 (if, indeed, that provision is valid). If no eligible claimants emerge, the land may escheat to the

<sup>4</sup> On appeal, the Mereb Children assert that the identities of Manuel's heirs were not clearly established before the Land Court. To the extent that this is so, it is immaterial, because the Land Court did not (and did not need to) determine the identity of Manuel's heirs.

state.<sup>5</sup> *See* 3B Am. Jur. *Aliens and Citizens* § 2093 (2005) (noting the possibility of escheat under such circumstances).

Accordingly, as it stands now, no non-Palauan has *acquired* the land since Manuel did so in 1923, long before the Constitution existed. The land belonged to Manuel and, upon his death, became an asset of his estate. Because there has been no recent acquisition, there is no Constitutional violation. If, in the process of determining who should receive Manuel's land, the question arises whether a non-Palauan heir is eligible to acquire title to the land by inheritance, the Court will address the question at that point.

## II. Children of Blailes

Finally, the Mereb Children argue that the Land Court committed clear error when it determined that WS Lot 22 belongs to the Children of Blailes. Their argument is undeveloped at best, but they appear to assert that WS Lot 22 is part of Tochi Daicho lot 2104 and that they acquired that lot through adverse possession at the same time they acquired the rest of Manuel's land.

<sup>5</sup> The Mereb Children appear to believe that, if Manuel's heirs are ineligible to inherit the land because of their non-citizenship, then the land should automatically go to the Mereb Children. They cite no authority for this assertion, and we see no reason why the Mereb Children, who have not established that they acquired the land by adverse possession or otherwise, should nonetheless reap the benefit of Manuel's heirs' potential disqualification. *See Caipot v. Narruhn*, 3 TTR 18, 19 (1965) (“[D]isqualification from holding title to land [because of non-citizenship] is a matter of which only the government can take advantage and that, as against all others than the government, a person subject to this disqualification can continue to exercise all the rights of ownership unless and until the government acts on the matter.”); 3B Am. Jur. *Aliens and Citizens* § 2093 (2005) (“[T]he state alone can question the right of the alien to hold the property.”).

The Land Court concluded that, contrary to the Mereb Children's assertions, WS Lot 22 was not part of the land owned by Manuel. In support of that conclusion, the Land Court pointed to an earlier adjudication finding that WS Lot 22 was part of Tochi Daicho Lot 2097. The Land Court also noted that Manuel's estate did not claim ownership of WS Lot 22 and conceded that the lot was not part of their lands. Moreover, the Land Court pointed out that the Mereb Children failed to monument their claim for WS Lot 22 within the time period set for such monumentation and that they therefore cannot contest that it falls within the boundaries of Tochi Daicho lot 2097, which were set by the Children of Blailes during the monumentation period. Finally, the Land Court observed that there was evidence showing that Blailes allowed the Mereb family to occupy WS Lot 22 because Blailes was related to Mereb's wife, thereby foreclosing any adverse possession claim.

[4] Given the evidence supporting the Children of Blailes' claim, we conclude that the Land Court did not clearly err in determining that the Children of Blailes own WS Lot 22. *See Edaruchei Clan v. Sechedui Lineage*, 17 ROP 127, 128 (2010) (noting that we do not revisit the Land Court's credibility determinations or reweigh the evidence); *Palau Pub. Lands Auth., et al. v. Tab Lineage*, 11 ROP 161, 165 (2004) ("[R]eversal under the clearly erroneous standard is warranted 'only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion.'" (citation omitted)). Here, the Land Court provided reasons for its determination and drew reasonable inferences from the evidence presented.

## CONCLUSION

For the foregoing reasons, the decision of the Land Court is **AFFIRMED**.

**REPUBLIC OF PALAU**  
**Plaintiff,**

v.

**ALFONSO DIAZ, DEBORAH RENGIL,**  
**MARGO LLECHOLCH, SHERRY**  
**TADAO, MARK REMELIHK, SANTORY**  
**BAIEI a.k.a SANTORY NGIRKELAU,**  
**STEVEN KANAI, NGIRAKESOL**  
**MAIDESIL, JULIUS TEMENGIL a.k.a.**  
**JULIUS BLAILES, and SEIKO KING,**  
**Defendants.**

Civil Action No. 13-008

Supreme Court, Trial Division  
Republic of Palau

Decided: November 29, 2013

[1] **Constitutional Law:** Pardon Power

The Executive Clemency Act imposes only procedural requirements and does not infringe upon the president’s substantive pardon power.

[2] **Constitutional Law:** Statutes

One cannot challenge a statute’s constitutionality on the ground that it might injure some hypothetical individual.

[3] **Constitutional Law:** Facial Challenge

A facial challenge to a statute requires a showing that the law always operates unconstitutionally.

[4] **Constitutional Law:** Equal Protection

To establish an equal protection violation based on selective enforcement of a statute, the plaintiff must establish that he was treated differently than others who were similarly situated and that the selective treatment was motivated by an intention to discriminate on the basis of an impermissible consideration or by malice.

Counsel for Plaintiff: AAG Timothy McGillicuddy

Counsel for Defendants: Siegfried Nakamura, Salvador Remoket, Yukiwo Dengokl, William Ridpath

The Honorable R. ASHBY PATE, Associate Justice:

Before the Court is the Republic of Palau’s motion for summary judgment. For the following reasons, the Republic’s motion is hereby **GRANTED**.

**BACKGROUND**

The Constitution gives the President the power to “grant pardons, commutations and reprieves subject to procedures prescribed by law.” Palau Const. art. VIII, § 7(5). The Executive Clemency Act (Act), in turn, establishes the procedures by which the President may exercise that power. 17 PNC § 3201.

Under the Act, any person who has been convicted of a crime may file a petition for executive clemency with the Minister of Justice (Minister). 17 PNC §§ 3201. Alternatively, the President may initiate the

process himself by providing a notice of intent to exercise clemency directly to the Minister. 17 PNC §§ 3201. In either scenario, after the Minister receives the petition, or notice of intent, as the case may be, the Minister must distribute copies to the Attorney General, the Director of the Bureau of Public Safety, and the Parole Board. 17 PNC § 3204. Those entities then have 60 days to review it and submit written recommendations to the Minister. 17 PNC § 3204. Within five days of receiving all of the written recommendations, the Minister must prepare his own recommendation and submit the petition or notice of intent, along with all of the recommendations, to the President. 17 PNC § 3205. “Based on these documents, the President shall decide whether or not to grant executive clemency.” 17 PNC § 3205.

This lawsuit arises out of former President Toribiong’s decision to grant executive clemency to Defendants during the waning days of his administration. In late 2012 and early 2013, Defendants, who have been convicted of a variety of crimes, submitted petitions for executive clemency.<sup>1</sup> Fewer than 60 days after those petitions were filed, former President Toribiong granted them. The Attorney General’s office never issued the required recommendations before the President granted executive clemency to Defendants.

On February 5, 2013, the Republic of Palau (Republic) filed this action seeking a declaratory judgment that Defendants’

<sup>1</sup> The record is unclear whether Defendant Mark Remeliik (Remeliik) submitted a petition for executive clemency or whether his clemency was initiated by former President Toribiong. Because the required procedures for obtaining and considering recommendations are the same under either scenario, the distinction is of no import in this case.

pardons are null and void because the President failed to follow the procedures prescribed by the Executive Clemency Act. Defendants timely filed their Answers.<sup>2</sup> The Republic then moved for summary judgment.

### APPLICABLE STANDARDS

This Court has jurisdiction over “all matters in law and equity.” Palau Const. art. X, § 5. “In a case of actual controversy within its jurisdiction, the court, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” ROP R. Civ. P. 57. Declaratory relief may be “appropriate where it will serve a useful purpose in clarifying the legal relations of the parties or terminate the uncertainty and controversy giving rise to the proceeding.” *Senate v. Nakamura*, 8 ROP Intrm. 190, 193 (2000).

<sup>2</sup> Defendants Remeliik, Julius Temengil, a.k.a. Julius Blailes (Temengil), and Seiko King (King) have not filed answers to the Republic’s complaint. On November 21, 2013, observing that no proofs of service for these Defendants appeared on file and that they had failed to appear in the action, the Court ordered the Republic to show cause by or before November 25, 2013, why the Court should not dismiss the action without prejudice as to these Defendants pursuant to ROP R. Civ. P. 4(l) and (m). In response, the Republic submitted proofs of service for all three Defendants indicating that they were served with the complaint on February 7-8, 2013. Defendants Remeliik, Temengil, and King surprisingly attended the scheduling conference on November 25, 2013, but made no representations as to their failure to file an answer or as to their intentions going forward. The Republic did not serve these Defendants with its motion for summary judgment and these Defendants did not file responses thereto. To date, the Republic has not requested entry of default against these three Defendants pursuant to ROP R. Civ. P. 55(a).

A motion for summary judgment must be granted when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” ROP R. Civ. P. 56(c). A factual dispute is “material” if it must be resolved before the fact-finder can determine whether an element of the claim has been established. *Wolff v. Sugiyama*, 5 ROP Intrm. 105, 110 (1995). Summary judgment is appropriate against the party who fails to make an evidentiary showing sufficient to establish a question as to a material fact on which that party will bear the burden of proof at trial. *Becheserrak v. Eritem Lineage*, 14 ROP 80, 82 (2007). “The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment[.]” *Wolff*, 5 ROP Intrm. at 110.

**DISCUSSION**

The Republic’s position is simple. It is undisputed that former President Toribiong neglected to follow the procedures prescribed by the Executive Clemency Act when he granted Defendants’ pardons without receiving or considering any recommendations from the Attorney General and before the time for submission of those recommendations had expired.<sup>3</sup> Accordingly,

<sup>3</sup> Attorney General R. Victoria Roe’s affidavit, which is attached to the Republic’s reply brief, contains her sworn statement, made with personal knowledge, that the Office of the Attorney General did not issue the required recommendations before former President Toribiong signed each of the Defendants’ orders of pardon and commutation. Defendants have introduced no evidence contradicting Ms. Roe’s affidavit. The Court has afforded Defendants sufficient time to

the Republic asks this Court to declare the pardons to be null and void.

Defendants offer several arguments in response. First, they argue that this Court has no jurisdiction to review a facially valid pardon because the pardon power is entrusted solely to the President’s discretion. Second, they assert that the Executive Clemency Act’s recommendation requirement is unconstitutional because it intrudes on the President’s pardon power. Third, they argue that the Republic is estopped from bringing this lawsuit because other presidents have issued pardons without following the procedures prescribed by the Executive Clemency Act. And, finally, they argue that this suit violates their right to Equal Protection because the Republic has refrained from pursuing similar suits to enforce the Act after other presidents neglected to follow the proper pardon procedures.

**I. Reviewability**

The threshold question is whether this Court may review the grants of executive clemency issued by former President Toribiong to determine whether he followed the statutorily prescribed procedures in the Executive Clemency Act. The Court concludes that it may.

It is clear that decisions committed to the sole discretion of the President are unreviewable as to their merits. This Court could not entertain a claim that the President acted unwisely in granting a particular pardon. *See Kruger v. Doran*, 8 ROP Intrm. 350, 351 (Tr. Div. 2000) (observing that the Constitution “affords the President broad, unreviewable discretion to grant pardons”);

request to file a sur-reply in response to Ms. Roe’s affidavit, but they have not done so.

*United States v. Carpenter*, 526 F.3d 1237, 1242 (9th Cir. 2008) (noting that the Court may not review claims that a member of the executive branch “exercised his discretion poorly”); 59 Am. Jur. 2d *Pardon and Parole* § 43 (2012) (“Even for the grossest abuse of this discretionary power, the law affords no remedy; the courts have no concern with the reasons for the pardon.”).<sup>4</sup> In other words, the merits and wisdom of any presidential pardon are unreviewable by this Court, or any court, save the oldest and least forgiving court of all—the court of public opinion.

It is equally clear, however, that it is “the Court’s province and duty . . . to decide whether another branch of government has exceeded whatever authority has been committed to it by the Constitution.” *Francisco v. Chin*, 10 ROP 44, 49-50 (2003). Thus, even when an action is committed to the absolute discretion of another branch of government, this Court may review whether that entity “exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations.” *Guadamuz v. Bowen*, 859 F.2d 762, (9th Cir. 1988); *see also* *Trinidad y Garcia v. Thomas*, 683 F.3d 952 (9th Cir. 2012) (holding that the Secretary of State’s discretionary immigration decisions may be reviewed for the limited purpose of determining whether the “Secretary compl[ied] with her statutory and regulatory

obligations”); *Jamison v. Flanner*, 116 Kan. 624 (1924) (reviewing an exercise of executive clemency to determine whether it complied with a statutorily prescribed notice requirement); 59 Am. Jur. 2d *Pardon and Parole* § 43 (2012) (“[T]he courts have jurisdiction to determine the validity of a pardon as affected by the question whether the official granting it had the power to do so.”).<sup>5</sup>

Here, the Republic is not asking the Court to inquire into the merits of granting pardons to these Defendants. Instead, the Republic asserts that former President Toribiong exceeded his legal authority by granting pardons without following the procedures prescribed by the Executive Clemency Act. That question falls within the province of the Court.

## II. Constitutionality

Defendants acknowledge that former President Toribiong’s exercise of executive

<sup>4</sup> “In cases before this Court, United States common law principles are the rules of decision in the absence of applicable Palauan statutory or customary law.” *Becheserrak v. ROP*, 7 ROP Intrm. 111 (1998); *see also* 1 PNC § 303 (“The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the Courts of the Republic of Palau . . .”).

<sup>5</sup> Defendants rely heavily on *In re: Hooker*, 87 So.3d 401 (Miss. 2012) for the proposition that this Court lacks jurisdiction to review whether the President complied with the applicable procedural requirements in granting the pardons. That case, which provoked vigorous dissents from several Mississippi Supreme Court Justices, is an outlier. The majority opinion relies on antiquated precedent and “fails to consider decisions of other states; fails to consider legal encyclopedias confirming that conditions precedent to granting a pardon have repeatedly been found reviewable; contradicts learned treatises and encyclopedias on Mississippi law; and fails to consider that the United States Supreme Court has reviewed whether pardons were within the President’s power on numerous occasions.” *Id.* at 421-22 (Randolph, J., dissenting). Moreover, *In re: Hooker* concerned a constitutional provision that itself established procedural requirements for the exercise of the pardon power, not a statutory provision enacted by the legislature, as is the case here. Thus, the separation-of-power concerns in this case are distinguishable from those presented by *In re: Hooker*. This Court is unconvinced that *In re: Hooker* is either correct or analogous to this case.

clemency did not conform to the procedures prescribed by the Executive Clemency Act. They argue, however, that he did not exceed his constitutional authority because the Act itself is unconstitutional. More specifically, they assert that the Act impermissibly intrudes on the President's discretion to exercise the pardon power entrusted to him by the Constitution. Defendants' argument fails.

The Palau Constitution explicitly contemplates the enactment of legislation establishing procedures by which the President must exercise his pardon power. *See* Palau Const. art. VIII, § 7 (providing that the President shall have the power "to grant pardons, commutations and reprieves *subject to procedures prescribed by law.*") emphasis added). And, "[w]here a constitution directs that the pardoning power shall be vested in the [executive], under regulations and restrictions prescribed by law, the legislature may make such regulations and restrictions[.]" 59 Am. Jur. 2d *Pardon and Parole* § 33 (2012). Accordingly, the plain text of the Constitution empowers the legislature to enact laws establishing procedural requirements for the exercise of executive clemency. *See Ucherremasech v. Hiroichi*, 17 ROP 182, 190 (2010) ("The first rule of construing a statute or constitutional provision is that we begin with the express, plain language used by the drafters and, if unambiguous, enforce the provision as written.").

The question, then, is whether the Executive Clemency Act imposes legitimate procedural requirements, as expressly sanctioned by the Constitution, or whether it goes too far by imposing substantive restrictions on the President's pardon power. In answering this question, "[t]his Court presumes that the legislature intended to pass a valid act and construes an act to be

constitutional, if possible." *Nicholas v. Palau Election Comm'n*, 16 ROP 235, 239 (2009).

[1] "The purpose of [the Executive Clemency Act] is to set procedures by which the President may exercise his power pursuant to Article VIII, Section 7(5) of the Palau Constitution." 17 PNC § 1301. The Act requires the President to obtain and consider recommendations from the Attorney General, the Bureau of Public Safety, the Parole Board, and the Minister of Justice. 17 PNC §§ 3204-05. The President need not heed those recommendations; he must simply consider them. *See* 17 PNC § 3205. Nothing prevents the President from issuing a pardon even when all four entities recommend that the pardon be denied. The Act thus imposes no substantive limits on the President's power to grant pardons—indeed, his discretion to pardon any person he pleases for whatever reason remains wholly unfettered. *See Makowski v. Governor*, 299 Mich.App. 166, 175 (App. Ct. 2012) (holding that statutory provisions requiring the governor to consider recommendations from the parole board before granting commutations "in no way limit the Governor's absolute discretion with regard to commutation decisions"). Instead, the Act only requires that the President follow certain procedures to ensure that his decision to grant or deny a pardon is properly informed.

Legislative history supports the conclusion that the Act imposes only procedural requirements and does not substantively infringe upon the President's pardon power. In fact, the first procedural rules governing the exercise of executive clemency were created by former President Haruo I. Remeliik himself, in Executive Order No. 27. The Senate bill that would eventually become the Executive Clemency Act was modeled on former President Remeliik's

Executive Order. *See* Stand. Com. Rep. No. 3-19 (Apr. 11, 1989) (noting that “[t]his bill is very similar in substance and form to Executive Order No. 27”). The Senate Committee on Judiciary and Government Affairs (Committee) recommended that “the procedures set forth in this Executive Order should be statutory, so as to ensure consistency in the application of the pardon authority.” *Id.* Accordingly, the Committee translated the basic requirements established by the Executive Order into a legislative act. In doing so, the Committee observed that “this bill does not restrict the authority of the President to grant pardons.” *Id.* Instead, “[t]hese established procedures will ensure that the President is properly informed regarding any proposed clemency action.” Stand. Com. Rep. No. 21 (Jul. 25, 1989). The legislative history thus confirms that the Olbiil Era Kelulau intended to codify preexisting procedures governing executive clemency and did not intend to substantively restrict the President’s pardon power.

Defendants insist that, although the Act may appear to place only procedural limitations on the exercise of executive clemency, in practice it may substantively limit the President’s pardon power. In particular, Defendants take issue with the fact that the Act allows the Attorney General, Parole Board, and Bureau of Public Safety up to 60 days in which to issue their recommendations after they receive a petition for executive clemency. That provision, Defendants argue, would allow the Attorney General to “effectively suspend the President’s pardon power for at least 60 days, by withholding his or her recommendation until the 60 day period expires.” Defendants worry that individuals sentenced to fewer than 60 days’ imprisonment may thereby be

effectively barred from obtaining commutation of their sentences.

[2][3] The specter raised by Defendants does not haunt the facts of this case. None of the Defendants here was forced to wait 60 days to receive executive clemency, and many of them petitioned for and received their pardons after they had already served their sentences. Defendants cannot challenge the Act’s constitutionality on the ground that it might injure some hypothetical individual. *See* 16 Am. Jur. 2d *Constitutional Law* § 137 (2009) (“As a general rule, no one can obtain a decision as to the invalidity of a law on the ground that it impairs the rights of others.”). Nor can Defendants successfully argue that the Act is unconstitutional on its face simply because Defendants can imagine some scenario in which the Act might operate unfairly—a facial challenge requires a showing that “the law, by its own terms, always operates unconstitutionally.” 16 Am. Jur. 2d *Constitutional Law* § 137 (2009). This Court need not decide whether the Act might infringe upon the constitutional rights of persons sentenced to fewer than 60 days’ imprisonment whose petitions for executive clemency languish until their sentences have been served, because that issue is simply not presented here.<sup>6</sup> *See* *Nebre v. Uludong*, 15 ROP 15, 23 (2008) (observing that this Court may decline “to enter into speculative

<sup>6</sup> Defendants’ hypothetical is highly speculative. A person sentenced to fewer than 60 days’ imprisonment might apply for a commutation while out on bond awaiting the determination of the appeal. Or, the President might request that the Attorney General expedite the recommendation process to ensure that the petition could be decided before the expiration of the sentence. Finally, many of the Defendants here were pardoned after serving their sentence, proving that an individual who has already served his or her sentence can still obtain significant benefits from the exercise of executive clemency.

inquiries of matters that lack concrete factual situations, fully developed and properly presented for determination”) (quotation marks and citation omitted)). It is enough that Defendants have failed to show either that the Act always operates unconstitutionally or that it operates unconstitutionally as applied to them.

Accordingly, the Court holds that the Executive Clemency Act is neither unconstitutional on its face nor unconstitutional as it applies to these Defendants. It is undisputed that former President Toribiong failed to comply with the procedural requirements established by the Act in issuing Defendants’ pardons and commutations. “A pardon or commutation of sentence issued by the [executive] without compliance with the regulations and restrictions prescribed by law is void.” 59 Am. Jur. 2d *Pardon and Parole* § 33 (2012); see also *Jamison v. Flanner*, 116 Kan. 624 (1924) (holding that, when a governor issues a pardon without providing the statutorily required notice, the pardon is void). Defendants’ pardons and commutations are therefore null and void unless Defendants can establish some other affirmative defense.

### III. Estoppel

Defendants argue that the Republic should be equitably estopped from enforcing the Executive Clemency Act with respect to their pardons because other presidents have routinely issued pardons to other convicted criminals in violation of the Act.<sup>7</sup> Defendants’

<sup>7</sup> Defendants Sherry Tadao (Tadao), Margo Llecholch (Llecholch), Alfonso Diaz (Diaz), and Santory Baiei, a.k.a. Santory Ngirkelau (Baiei), were the only Defendants to raise estoppel as an affirmative defense in their answers to the complaint. Accordingly, the remaining Defendants have waived the argument. See 28 Am. Jur. 2d *Estoppel and Waiver* § 149 (2008)

argument is undeveloped and somewhat confusing, but the gist appears to be that the Republic may not seek to enforce strict compliance with the Act when other presidents, including current President Remengesau, have allegedly flouted the procedural requirements with impunity.

“The government may not be estopped on the same terms as any other litigant.”<sup>8</sup> *ROP v. Akiwo*, 6 ROP Intrm. 283, 293 (1996). Indeed, “a private party trying to estop the government has ‘a heavy burden to carry.’” *United States v. Grap*, 368 F.3d 824, 831 (8th Cir. 2004) (citation omitted). “To establish equitable estoppel against the government, a party asserting the affirmative defense must, at a minimum, establish the traditional elements of estoppel and also show (1) affirmative misconduct by the government and (2) that the public’s interest will not suffer undue damage as a result of the application of the doctrine.” *Akiwo*, 6 ROP Intrm. at 293.

Defendants have failed to introduce evidence tending to show affirmative misconduct by the government. “Affirmative misconduct means an affirmative act of misrepresentation or concealment of a material fact.” *Akiwo*, 6 ROP Intrm. at 293 (citation omitted). Mere negligence on the part of the Republic is not enough to establish misconduct. *Id.* Defendants have pointed to no

(equitable estoppel is an affirmative defense that must be raised in the pleadings); *Mesubed v. ROP*, 10 ROP 62, 65 (2003) (“Affirmative defenses are matters for the litigant to raise, or not to raise, and may be waived.”).

<sup>8</sup> Traditional estoppel requires the following elements: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former’s conduct to his injury. *Watkins v. U.S. Army*, 875 F.2d 699, 709 (9th Cir. 1989).

*affirmative* act of misrepresentation committed by the Republic. Moreover, nothing in the record proves that the Republic intentionally failed to enforce the Act in past instances in order to mislead Defendants or for some other improper purpose. *See Cedars-Sinai Medical Center v. Shalala*, 177 F.3d 1126, 1130 (9th Cir. 1999) (holding that estoppel was not warranted where there was “no indication that the government delayed enforcement of this policy for any improper purpose or that the government otherwise engaged in affirmative misconduct”).

More importantly, Defendants have failed to argue or to introduce any evidence tending to show that the public’s interest will not suffer undue damage as a result of the application of the doctrine. To the contrary, application of equitable estoppel in this case would likely damage the public interest a great deal. Defendants’ estoppel argument boils down to the contention that because the Executive Clemency Act has not been strictly enforced before, the Republic is powerless to enforce it now. But there is support in American case law for the position that estoppel may bar the government’s enforcement of a statute in only the rarest of cases. *See Volvo Trucks of North America, Inc. v. United States*, 367 F.3d 204, 211-12 (4th Cir. 2004) (“If equitable estoppel ever applies to prevent the government from enforcing its duly enacted laws, it would only apply in extremely rare circumstances.”); 28 Am. Jur. 2d *Estoppel and Waiver* § 130 (2011) (noting that “a public officer’s failure to enforce a statute correctly” should not “inhibit correct enforcement of the statute or estop more diligent enforcement”). This position makes sense because estopping a government from enforcing a valid statute would violate the public interest in

maintaining the rule of law. *See Heckler v. Cmty. Health Servs.*, 467 U.S. 51, 60 (1984) (observing that, if estoppel bars the government from enforcing a statute, “the interest of the citizenry as a whole in obedience to the rule of law is undermined”); *United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 761 (1st Cir. 1985) (“The possibility of harm to a private party inherent in denying equitable estoppel . . . is often (if not always) grossly outweighed by the pressing public interest in the enforcement of congressionally mandated public policy.”). To hold otherwise would be to support the absurd proposition that, because a law may have been ignored in the past, it must forever be ignored. Accordingly, even viewing the evidence in the light most favorable to them, Defendants have not raised a genuine dispute as to whether equitable estoppel prevents the Republic from seeking to enforce the Executive Clemency Act.

#### IV. Equal Protection

Defendants also argue that the Republic’s decision to enforce the Executive Clemency Act with respect to their pardons and commutations violates their equal protection rights.<sup>9</sup> Although it is undeveloped

<sup>9</sup> Only Defendants Tadao and Baiei raise an equal protection defense in their answers. Defendants Llecholch, Diaz, and Ngrirakesol Maidesil (Maidesil) mention equal protection in their oppositions to summary judgment, but they fail to raise the issue in their answers. Defendants Steven Kanai (Kanai) and Deborah Rengiil (Rengiil) made no equal protection argument. Because Defendants Llecholch, Diaz, Maidesil, Kanai, and Rengiil failed to plead an equal protection violation, they have waived the argument. *See Mesubed*, 10 ROP at 65 (affirmative defenses not raised in pleadings may be waived). Although the Republic may consent to litigating an issue by responding to the merits, *Ngerketiit Lineage v. Seid*, 8 ROP Intrm. 44, 47 (1999), the Republic filed separate replies and never argued the merits of equal protection

at best, Defendants’ equal protection argument essentially arises from the same contentions of unfairness that underlie their estoppel defense. That is, they assert that the Republic has not initiated suits to invalidate other procedurally deficient pardons, and this selective enforcement violates their right to equal protection. Defendants’ argument fails here as well.

[4] To establish an equal protection violation based on selective enforcement of a law, Defendants must show that:

- (1) the person, compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious or bad faith intent to injure the person.

*Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir. 1995); *see also Rubinovitz v. Rogato*, 60 F.3d 906, 909-10 (1st Cir. 1995) (same).

Even assuming that Defendants have raised a question as to whether they have been treated differently from similarly situated persons, they have failed to offer any evidence whatsoever sufficient to raise a genuine issue of fact as to the second prong of the test. *See Zahra*, 48 F.3d at 684 (“The flaw in *Zahra*’s equal protection claim is that *Zahra* assumes that to prevail he need only prove that he was treated differently from others.”); *LeClair v. Saunders*, 627 F.2d 606, 608 (2d Cir. 1980),

*cert. denied*, 450 U.S. 959 (1981) (“Mere failure to prosecute other offenders is not a basis for a finding of denial of equal protection.”). Defendants have neither argued nor provided any evidence that the Republic decided to enforce strict compliance with the Executive Clemency Act in this case because it wishes to discriminate against them on the basis of an impermissible consideration, such as race, social status, gender, or religion. *See Palau Const. art. IV, § 5, cl. 1* (listing impermissible bases for discrimination). Nor have Defendants alleged that the Republic intended to punish or inhibit their exercise of constitutional rights. Finally, the record is entirely lacking in evidence that the Republic has acted with malice or bad faith intent to injure Defendants. *See Zahra*, 48 F.3d at 684 (holding that evidence suggesting an individual “was ‘treated differently’ from others does not, in itself, show malice”); *LeClair v. Saunders*, 627 F.2d at 608 (“[E]qual protection does not require that all evils of the same genus be eradicated or none at all.”). Accordingly, Defendants’ equal protection argument fails as a matter of law.

## V. Equity

The Court feels compelled to consider whether it possesses the equitable power to uphold Defendants’ pardons despite former President Toribiong’s failure to comply with the Executive Clemency Act. That is, can the Court relieve Defendants from the consequences of having received invalid pardons through no fault of their own? After all, Defendants themselves have not violated the Executive Clemency Act. Apart from their underlying crimes, they appear to be guilty of no additional wrongdoing and there is no meaningful suggestion on the record that Defendants failed to comply with the procedures for petitioning for their various

---

as it relates to Defendants Llecholch, Diaz, Maidesil, Kanai, and Rengiil.

pardons. Having submitted their petitions, Defendants waited for the decision of the former President, which ultimately issued in their favor, and, upon receipt of facially valid pardons, likely relied upon them to rebuild their lives.

Even considering the above, it would be inappropriate to rely on equity to uphold Defendants' pardons for two reasons. First, it is a well-established maxim that equity follows the law. To allow Defendants' perceived reliance on legally invalid pardons to render their pardons somehow equitably valid would, at the same time, render the Republic's ability to enforce one of its duly enacted laws essentially toothless. To do so creates a perverse incentive to ignore the Act with impunity, tempting future administrations faced with eleventh-hour pardons to ignore the Act and allow their donees' subsequent reliance to wipe the slate clean. Equity must follow the law, not undermine it.

Second—and most importantly—transforming a legally invalid pardon into an equitably valid one would usurp a role expressly reserved for the President in our Constitution, which delegates the pardon power to the President and the President alone. Having declared at law that the pardons are null and void, the Court cannot then exercise what amounts to its own pardon power to uphold them. *See People v. Erwin*, 212 Mich. App. 55, 63–64 (App. Ct. 1995) (“[J]udicial actions that are the functional equivalent of a pardon or commutation are prohibited.”). To do so would violate the separation-of-powers doctrine at a fundamental level.

A final and important distinction needs to be reiterated regarding the separation-of-powers doctrine. In declaring the pardons to be null and void, the Court does not question

the wisdom or propriety of these pardons. To do so would be to act as an unappointed moral tutor and to superimpose its own discretion onto the discretion expressly reserved for the President by the Constitution. Rather, the Court has conducted a limited review to determine whether former President Toribiong exceeded his lawful authority by issuing pardons without following the procedures required by the Executive Clemency Act. Based on the above, the Court concludes that he exceeded his authority.

## CONCLUSION

The issues presented by this case are of great importance both to the Republic and to Defendants, and swift resolution of the ongoing uncertainty regarding the validity of Defendants' pardons is vital to the rule of law in the Republic. The Court therefore concludes that declaratory relief is appropriate in this case. For the foregoing reasons, the Republic's motion for summary judgment is **GRANTED**. The pardons and commutations issued in favor of Defendants Diaz, Rengiil, Llecholch, Tadao, Baiei, Kanai, and Maidesil are null and void as a matter of law.

**REPUBLIC OF PALAU  
Plaintiff,**

v.

**ALFONSO DIAZ, DEBORAH RENGIL,  
MARGO LLECHOLCH, SHERRY  
TADAO, MARK REMELIHK, SANTORY  
BAIEI a.k.a SANTORY NGIRKELAU,  
STEVEN KANAI, NGIRAKESOL  
MAIDESIL, JULIUS TEMENGIL a.k.a.  
JULIUS BLAILES, and SEIKO KING,**

**Defendants.**

Civil Action No. 13-008

Supreme Court, Trial Division  
Republic of Palau

Decided: December 20, 2013

[1] **Civil Procedure:** Motions to Reconsider

A motion to reconsider is not a vehicle for a party to undo its own procedural failures or present arguments or evidence that could and should have been presented to the trial court prior to judgment.

[2] **Constitutional Law:** Equal Protection

A party alleging an equal protection violation due to selective enforcement must demonstrate that discriminatory intent was a motivating factor in the enforcement decision.

Counsel for Plaintiff: AAG Timothy McGillicuddy  
Counsel for Defendants: Siegfried Nakamura, Salvador Remoket, Yukiwo Dengokl, William Ridpath

The Honorable R. ASHBY PATE, Associate Justice:

On November 29, 2013, this Court granted summary judgment in favor of Plaintiff and against Defendants Sherry Tadao and Santory Baiei, a.k.a. Santory Ngirkelau (Defendants), who have now filed a motion to reconsider and amend the judgment.<sup>1</sup> Defendants argue that the Court erred in granting summary judgment because material issues of fact exist concerning their affirmative defense that the Republic violated their right to equal protection by selectively enforcing the Executive Clemency Act (Act) against them. For the following reasons, Defendants’ motion is **DENIED**.

**A. Defendants fail to carry burden under ROP R. Civ. P. 59(e)**

Under ROP R. Civ. P. 59(e), this Court may alter or amend a judgment if the moving party demonstrates the existence of “newly discovered material evidence or a manifest error of law or fact.” *Dalton v. Borja*, 8 ROP Intrm. 302, 304 (2001). A motion based on newly discovered evidence should be granted only if “(1) the facts discovered are of such a nature that they would probably change the

<sup>1</sup> In its opposition, the Republic correctly points out that Defendants filed their motion prematurely because, although the Court had granted summary judgment, it had not yet entered a final judgment. However, final judgment has now issued and the substantive issues remain unchanged; so, the Court will address the motion on the merits.

outcome; (2) the facts alleged are actually newly discovered and could not have been discovered earlier by proper diligence; and (3) the facts are not merely cumulative or impeaching.” *Infusion Res., Inc. v. Minimed, Inc.*, 351 F.3d 688, 696–97 (5th Cir. 2003). “A manifest error of law “is the ‘wholesale disregard, misapplication, or failure to recognize controlling precedent.” *Dalton*, 8 ROP Intrm. at 304.

Defendants identify no newly discovered evidence that was somehow unavailable to them at the time the Court granted summary judgment, nor do they identify any manifest error of law. Instead, Defendants assert—for the first time—that the decision to enforce the Act against them was based on their “lowly” social status and clan affiliation. At summary judgment, however, Defendants neglected to make this argument, and they failed to introduce any evidence regarding their social status or clan affiliation. They did not even request to file a sur-reply to address any of the issues raised in the Republic’s reply brief, despite the Court providing them ample time to do so. Importantly, Defendants do not suggest that some piece of evidence was unavailable to them until after summary judgment, nor do they explain how the Court’s failure to deny summary judgment on the basis of an argument not presented to the Court can somehow constitute manifest error. Put simply, this Court cannot be expected to divine the premise of Defendants’ equal protection argument when Defendants failed to articulate it at the summary judgment stage.<sup>2</sup>

---

<sup>2</sup> In their opposition to summary judgment, Defendants neglected even to identify the elements of their equal protection defense or cite any applicable law.

[1] Rule 59(e) “does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to . . . advance arguments that could and should have been presented to the [trial] court prior to judgment.” *Id.*; see also *Dale & Selby Superette & Deli v. United States Department of Agric.*, 838 F.Supp. 1346, 1348 (D. Minn. 1993) (noting that Rule 59 motions are “not intended to routinely give litigants a second bite at the apple”). Defendants had ample time for discovery and a full opportunity to respond to the Republic’s motion for summary judgment, but they failed to allege discrimination on the basis of social status or clan affiliation or provide any evidence to that effect. See *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004) (“[A]n unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying a subsequent motion for reconsideration.”). Accordingly, their motion for reconsideration fails for this reason alone.

#### **B. Defendants fail to carry burden under substantive equal protection law**

Even assuming that Defendants had made their equal protection argument in a timely manner, summary judgment is nonetheless proper because Defendants also failed to demonstrate the existence of a genuine dispute regarding either the discriminatory effect or the discriminatory intent of the Republic’s decision to enforce the Executive Clemency Act.

First, the governing law concerning Defendants’ burden to prove discriminatory effect requires them to introduce some evidence showing that they were treated differently than similarly situated individuals. In other words, they must introduce evidence

that other individuals received procedurally suspect pardons and that the Republic knowingly declined to enforce the Act against those individuals. In its summary judgment order, the Court gave Defendants the benefit of the doubt by assuming, without deciding, that Defendants put forth some evidence that similarly situated individuals had been treated differently. However, given Defendants’ discussion of this issue in their motion for reconsideration, the Court notes that, in fact, Defendants’ equal protection claim fails concerning discriminatory effect as well.

Defendants identify two so-called similarly situated individuals whom they allege have been treated differently. Specifically, Defendants identify High Chief Gibbons and Senator Baules, both of whose sentences, Defendants allege, were commuted by President Remengesau prior to his consideration of the required recommendations. Defendants argue that, because the Republic has not yet challenged these allegedly suspect pardons, Defendants have been treated differently than these similarly situated individuals and thus discriminated against.

But Defendants’ very premise—that High Chief Gibbons’ and Senator Baules’ pardons were granted prior to the President’s consideration of the required recommendations—is simply not true. In fact, the only evidence in the record on this point suggests that President Remengesau actually did receive and consider the required recommendations before ultimately issuing the commutations to these two individuals.<sup>3</sup>

<sup>3</sup> The documents demonstrate that President Remengesau issued a temporary reprieve to Senator Baules while awaiting the required recommendations. Regardless of the legality of that action, it remains undisputed that the President did receive and consider

*See* Republic’s Reply in Support of Summary Judgment, Exhibit A at 2 (“[The] constitutional clemency process [for High Chief Gibbons] required opinions on the request for clemency from the Office of the Attorney General, the Parole Board, the Minister of Justice and the Director of the Bureau of Public Safety. These recommendations were received and given due consideration.”); Defendant Tadao’s Opposition to Summary Judgment, Exhibit A at 10-11 (noting that the President “reviewed [Senator Baules’] petition along with the required recommendations of the Bureau of Public Safety, the Parole Board, the Attorney General, and Vice President Antonio Bells, who also serves as the Minister of Justice” and discussing those recommendations in detail). Defendants have offered no evidence whatsoever to refute those documents. Accordingly, Defendants failed to raise a triable dispute as to whether the Republic has treated them differently than similarly situated persons, and, by Defendants own admission, their equal protection argument cannot survive summary judgment. *See* Defendant’s Motion for Reconsideration at 2 n.1 (“Defendants Sherry and Santory would readily concede that their denial of equal protection of laws argument would be defeated if there is evidence that such recommendations were obtained with respect to [Gibbons] and [Baules].”).

[2] Second, and most importantly, the record is also entirely lacking in evidence of

---

the required recommendations before ultimately commuting Senator Baules’ sentence. Neither of these Defendants received a procedurally suspect temporary reprieve that was shortly thereafter supplanted by an apparently valid commutation or pardon, so neither Defendant is similarly situated to Senator Baules in this respect.

discriminatory intent. In criminal cases where selective enforcement in violation of equal protection is offered as a defense, courts require the defendant put forth “some evidence” that discriminatory intent was a “motivating factor in the decision” to enforce the law before the defendant can even obtain discovery, much less proceed to trial. *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir. 2006). This “demanding” standard is justified because a selective enforcement defense “asks a court to exercise judicial power over a ‘special province’ of the Executive,” and judicial review of charging decisions could “chill law enforcement by subjecting the prosecutor’s motives and decision-making to outside inquiry[.]” *United States v. Armstrong*, 517 U.S. 456, 464-65 (1999) (citations omitted). Indeed, prosecutors are entitled to a presumption that they have not violated equal protection. *Id.* at 465. Similarly, in civil cases where an equal protection claim is premised on selective enforcement of a law, evidence of discriminatory intent is necessary for the claim to survive summary judgment. *See Lisa’s Party City, Inc. v. Town of Henrietta*, 185 F.3d 12, 16-17 (2d Cir. 1999) (affirming summary judgment because the plaintiff “failed to show a material issue of fact as to the key issue in an equal protection claim alleging selective enforcement—impermissible motive”).

Here, Defendants point to no evidence that the allegedly selective treatment was actually “motivated by an intention to discriminate on the basis of” social status or clan affiliation. *Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir. 1995). Rather, they simply deposited into the record a couple of pardons, which were issued in favor of some high-profile individuals at various times in the

past twenty years, and which were granted in fewer than 60 days, and asked the Court to connect the dots and imply some form of executive favoritism or animus, or, at the very least, to give Defendants another chance—outside of the procedural boundaries—to figure out how to prove animus at trial. This is just not how the law works in this arena.

In the end, Defendants acknowledge that their equal protection argument is underdeveloped and supported by scant evidence, yet they ask this Court to “grant them an opportunity to have a trial on their affirmative defense of a denial of their right to equal protection so that they can present the evidence they need in order to fully develop and present such a defense.” Defendant’s Motion for Reconsideration at 4. Yet, even now, Defendants do not articulate how they plan to prove their claim at trial. They simply ask for more time to develop their case. Defendants are not entitled to survive summary judgment on the basis of unsubstantiated allegations “coupled with the hope that something can be developed at trial . . . .” *Smith v. Hudson*, 600 F.2d 60, 65 (6th Cir. 1979). The time for clearly articulating the basis of their equal protection argument and providing evidence to raise a triable dispute as to each element was at summary judgment, and that time has passed. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (“[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.”).

For the foregoing reasons, Defendants’ motion is **DENIED**.

**REPUBLIC OF PALAU**  
**Plaintiff,**

v.

**MARY GRACE BACONGA, JERYL**  
**BLAS a.k.a. MAMAMSANG, TEMMY**  
**SHMULL, and HARUO ESANG ,**  
**Defendants.**

Counsel for Plaintiff: Pro Se  
Counsel for Baconga: Rachel Dimitruk  
Counsel for Blas: Siegfried Nakamura  
Counsel for Shmull & Esang: Oldias  
NgiraiKelau

The Honorable R. ASHBY PATE, Associate  
Justice:

Criminal Case No. 13-165

Supreme Court, Trial Division  
Republic of Palau

Before the Court is Defendants Shmull  
and Esang’s motion for severance, and the  
Republic’s response. The Court held oral  
argument on April 11, 2014 at 9:00 a.m.

Decided: April 15, 2014

In their motion, as well as during the  
oral argument, Defendants Shmull and Esang  
ask the Court to sever their trial from the trial  
of their co-defendants, Mary Grace Baconga  
and Jeryl Blas, because, among other things,  
the offenses with which Shmull and Esang  
have been charged are non-jury trial offenses.  
That is, Defendants Shmull and Esang argue  
that the significant delay, financial burden,  
and disparity between the severity of the  
crimes with which they are charged as  
contrasted with the crimes with which their  
co-defendants are charged would unfairly  
prejudice their case. Defendants Shmull and  
Esang request a bench trial, which can be set  
on an expedited basis and which has fewer  
procedural hurdles with which to contend than  
a jury trial. For the reasons outlined below,  
Defendants’ motion is denied.

[1] **Criminal Procedure:** Joinder and  
Severance

Generally, there is a preference for the joint  
trial of defendants who are charged together.

[2] **Criminal Procedure:** Joinder and  
Severance

Severance of the trials of co-defendants is  
appropriate if the risk of prejudice to the  
government or the defendants outweighs the  
public interest in joint trial.

[3] **Criminal Procedure:** Joinder and  
Severance

The primary consideration in determining  
prejudice in cases involving multiple  
defendants is whether or not a jury would be  
able to distinguish each individual defendant  
and the charges against him from that of the  
group.

**CONTROLLING LAW**

It is well settled that the joinder of  
offenses and defendants in the same  
information may be proper under Rule 8 of the  
Rules of Criminal Procedure. Conversely, the  
Court possesses the discretion, under Rule 14  
of the Rules of Criminal Procedure, to order

separate trials of counts, sever the defendants' trials, or provide any other appropriate relief if the joinder of offenses or defendants appears to prejudice a defendant or the government. See ROP R. Crim. P. 8 & 14.

Because there is scant decisional law in the Republic on this issue of severance in criminal cases, the Court looks to the law of other jurisdictions for guidance. *Kazuo v. Republic of Palau*, 1 ROP Intrm. 154, 172 (1984); see also *Mesubed v. Urebau Clan*, 20 ROP 166, 167 & n.1 (2013) (citing 1 PNC § 303, which requires that "[t]he rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases . . .").

Moreover, the Republic's Rules of Criminal Procedure are similar to those of the United States. This similarity lends support to the notion that the Court should now look to United States case law for assistance in developing its own jurisprudence on the issues of joinder and severability. See *Kazuo v. ROP*, 3 ROP Intrm. 343, 346 (1993) (relying on United States case law for guidance where the Palauan constitutional provision was similar to the United States constitution); *Blailles and Wasisang v. ROP*, 5 ROP Intrm. 36, 39 (1994) (finding United States cases helpful in interpreting Palauan statute that is substantially similar to United States' statute).

[1][2] In the United States, "[t]here is a preference in the federal system for joint trials of defendants who are indicted together." *Zafiro v. U.S.*, 506 U.S. 534, 537, (1993); 5 Am. Jur. *Indictments & Informations* §197. However, Federal Rule of

Criminal Procedure 14, like the ROP Rule of Criminal Procedure, recognizes that joinder, even when proper, may prejudice either the defendant or the government. *Zafiro*, 506 U.S. at 538. Ultimately, the United States' rule on severance leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the trial court. *Id.* at 541; *U.S. v. Ginyard*, 65 F. App'x 837, 838 (3d Cir. 2003); 5 Am. Jur. *Indictments and Informations* §215.

[3] In deciding whether to grant a severance motion, "the trial court should balance the public interest in a joint trial against the possibility of prejudice inherent in the joinder of defendants." *U.S. v. Eufrazio*, 935 F.2d 553, 568 (3d Cir. 1991) (citing *U.S. v. De Peri*, 778 F.2d 963, 984 (3d Cir. 1985)). The primary consideration in determining prejudice in cases involving multiple defendants is whether or not a jury would be able to distinguish each individual defendant and the charges against him from that of the group. See *U.S. v. Escalante*, 637 F.2d 1197, 1201 (9th Cir. 1980), cert. denied, 449 U.S. 856 (1980); *U.S. v. De Larosa*, 450 F.2d 1057, 1065 (3d Cir. 1971).

## ANALYSIS

Each of the eighteen counts against the four defendants in the Information here stems from what the Republic alleges is part of a common scheme or plan to carry on a business in the Republic designed, at least in part, to profit from people trafficking and prostitution. Each of the alleged crimes charged in the Information took place at the same establishment over a period of about one year. These charges are of a similar character and are based on the same acts and transactions comprising this common scheme. Thus, the Court finds that joinder of the offenses and

defendants here was appropriate under ROP R. Crim. P. 8.

When joinder is appropriate, there is a strong preference for trying defendants who are indicted together in the same trial in order to achieve the underlying goals of joinder—trial efficiency and the conservation of judicial resources. *U.S. v. Martin*, 567 F.2d 849 (9th Cir. 1977). Joint trials also serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability. *Richardson v. Marsh*, 481 U.S. 200, 210 (1987).

Here, Defendants Baconga and Blas are charged with the same misdemeanor counts of unlawful employee restrictions as is Defendant Esang. And Defendant Esang is the owner of the establishment where Defendants Baconga and Blas are charged with carrying on the scheme alleged by the Republic. Defendant Shmull is alleged to be a regular patron of the establishment owned by Defendant Esang and operated by Defendants Baconga and Blas. Four of the primary witnesses, at least according to the Republic, are the same for all charges and all defendants. They are Maria Lolita Ramirez, Maria Theresa Serapion, Winnielyn Marcelino, and Ellen Amante. These witnesses are currently off-island and, if the Court severed the trial, the witnesses would be required to fly back to the Republic at least two separate times, if not more. Moreover, because all of the offenses arise from the same alleged common scheme at the same establishment, if the Court ordered two, three, or even four separate trials, the Republic would be forced to present—and the Court would be forced to hear—the same or similar evidence from the same or similar witnesses relative, at least in the case of the unlawful employee restrictions, to some of the same or similar charges numerous times. This

would not be an efficient use of judicial resources or the resources of the Republic.

Although joinder is proper under the facts of this case, and a single trial is the best way to conserve judicial resources and streamline the process, the Court must also carefully consider the competing interest of potential prejudice to Defendants. *Zafiro*, 506 U.S. at 538; *Eufrasio* 935 F.2d at 568. It is true that the counts in the Information charge all four of the defendants with offenses of varying degrees of culpability, which is a factor that favors Defendants Shmull and Esang’s severance argument. *See U.S. v. Balter*, 91 F.3d 427, 432–33 (3d Cir. 1996) (citing *Zafiro*, 506 U.S. at 539) (a ‘complex case’ involving ‘many defendants’ with ‘markedly different degrees of culpability,’ may prejudice defendants). Defendants Baconga and Blas are charged with some of the most severe felonies involving people trafficking, which trigger their right to a jury trial under 4 PNC § 602(a), while Defendant Shmull is charged with one felony count of prostitution, and Defendant Esang is charged with two misdemeanor counts of unlawful employee restrictions and aiding and abetting a violation of the requirement of obtaining a foreign investment certificate. As noted above, Defendants Baconga and Blas are also charged with the misdemeanor counts.

Accordingly, Defendants Shmull and Esang make two arguments that merit consideration. First, because Defendants Baconga and Blas are charged with the crimes that carry the most severe punishments and social opprobrium, Defendants Shmull and Esang argue that the “spillover effect,” may prejudice the fact-finder against them. Second, they argue that, because there is only one courtroom in Koror equipped to handle a jury trial (and numerous jury trials are already

scheduled in that courtroom), their right to a speedy trial will be impaired if the Court orders that their trial be joined with the jury trial for Defendants Baconga and Blas, which trial may not be set until the end of this year.

Addressing their arguments in order, the Court first notes that differing levels of culpability do not alone justify severance. *United States v. Chang An-Lo*, 851 F.2d 547, 556-57 (2d Cir. 1988), *cert. denied*, 488 U.S. 966 (1988). “Differing levels of culpability and proof are inevitable in any multi-defendant trial and, standing alone, are insufficient grounds for separate trials.” *United States v. Carson*, 702 F.2d 351, 366-67 (2d Cir. 1983). Furthermore, Defendants Shmull and Esang are not charged with numerous or complex crimes; so, the risk of jury confusion or incurable “spillover effect” is low. And, while Defendants Baconga and Blas are charged with numerous crimes, the crimes with which they are charged are not unduly complex.

Turning to Defendants’ speedy trial concerns, the Court concludes that those concerns are outweighed by other considerations. To limit the inconvenience to off-island witnesses, to minimize the possibility of inconsistent verdicts (which could lead to a miscarriage of justice and erode the public trust), to conserve judicial resources, and to avoid the burden of conducting two or more trials based on a events occurring at the same establishment with the same players in an alleged common scheme, the Court finds that the ends of justice are best served by continuing the matter to the extent necessary to accommodate a single, joint trial. Moreover, there is another jury-equipped courtroom in the Republic in the Capitol complex in Melekeok, and the Court will schedule the jury trial in that location at

the earliest possible date if necessary to avoid excessive delay.

In balancing the public interest in joint trials against the potential prejudice to Defendants Shmull and Esang, the Court in its discretion determines that the best solution, given the particular circumstances of this case, is to deny Defendants Shmull and Esang’s motion and proceed with a joint trial. The Court finds that the primary consideration in cases involving multiple defendants—that is, whether or a jury would be able to distinguish each individual defendant and the charges against him from that of the group—suggests that the potential for prejudice with a joint trial is not significant in this case. *Escalante*, 637 F.2d at 1201; *De Larosa*, 450 F.2d at 1065. Defendants Shmull and Esang’s motion for severance is denied.

**In the matter of the determination of ownership of land known as *Siob* identified as Tochi Daicho 2129 and now depicted as worksheet lots 02E004-019, 02E004-020, 02E004-021, 02E004-022, 02E004-023, 02E004-024, 02E004-030, 02E004-031, 02E004-032, 02E004-033, 02E004-034, 02E004-035, 02E004-036, and 02E004-037 in Ngkeklau County, Ngaraard State**

**BEKURROU RECHEYUNGEL,  
YOSTERU SUNGINO,  
NGARAARD STATE PUBLIC LANDS  
AUTHORITY,**

**Claimants.**

LC/E 01-00713

Land Court  
Republic of Palau

Decided: January 15, 2014

[1] **Property:** Assignment of Interest

One cannot convey or assign a greater interest in property than one holds in the first place.

Counsel for Recheyungel: Asap Bekurow, Pro Se  
Counsel for Sungino: Yukiwo P. Dengokl  
Counsel for NSPLA: William Ridpath

The Honorable C. QUAY POLLOI, Senior Judge:

**Introduction**

This case concerns ownership of the land described in the caption above. The dispute is between Ngaraard State Public Lands Authority and claimants Yosteru Sungino and Bukurrow Recheyungel, both deceased. After hearing from the parties and considering the evidence submitted, and for the reasons stated below, ownership is awarded to Ngaraard State Public Lands Authority.

**Summary of Adjudication**

**Ismael Sungino**

Mr. Ismael Yosiyuki Sungino (“Ismael”),<sup>1</sup> testified that he is 75 years old and the younger brother of the late Claimant Yosteru Sungino who recently died.<sup>2</sup> Ismael testified that the land being claimed is called *Siob*, located at *Iou el Beluu* in Ngkeklau County, Ngaraard State. He explained that the whole of *Iou el Beluu* belongs to the people of Oikull who purchased it from the chief of Ngkeklau a long time ago after they fled from Airai because of warfare. Later, at the request of the Ngiraked of Airai, the people of Oikull returned to Airai but at least one of them, named Ebilklou, remained because of

<sup>1</sup> The Court uses first names to minimize confusion among the three Sungino’s mentioned in this Decision, namely, Yosteru Sungino, Ismael Sungino, and Francisco Sungino.

<sup>2</sup> The Court takes judicial notice of judicial records showing that Yosteru Sungino was born on October 10, 1921 and died on November 14, 2011. He was 90 years old.

marriage to a man from Ngkeklau. Ebilkou had a son named Bekeruul and two daughters named Ereong and Such. Ereong came to be in charge of *Iou el Beluu*. Ereong and her husband Siliang had children including Omlei, Sechedui, and Ngirailemesang. Omlei is the mother of claimant Yosteru Sungino. The people of Oikull who remained merged into Obeketel Lineage which goes into Kermong Clan of Ngkeklau.

When the Japanese came, they allowed people to register lands that they actually used while unused portions, such as forests, were registered as government property. *Iou el Beluu* was among those registered as government property. People were then allowed to enter the government lands and use them, so the descendants of the Oikull people signed up for the *Iou el Beluu* area. These included Lik, the father of Max, and Blesoch, the son of Bekeruul. Both Lik and Blesoch's lots are on either side and adjacent to *Siob*, the land claimed by Yosteru Sungino.

Ereong and Siliang cultivated *Siob* and planted coconut and betelnut trees. Meanwhile, Claimant Yosteru Sungino continually served his grandparents Ereong and Siliang and was like a son to them. Because of Yosteru's good deeds, both Siliang and Ereong, while still living, gave out *Siob* to Yosteru. Finally, Ismael testified that Ngirailemesang, a biological son of Ereong and Siliang and biological uncle of Yosteru, knew of this conveyance. That is why Ngirailemesang never contested Yosteru's decades of cultivation and use of *Siob*.

### **Severino Ikeya**

Mr. Ikeya testified that he was the land registration of Ngaraard State before he retired. He testified that he was involved with the monumentation of *Siob*. He was asked if

he could identify on the map the worksheet lots that together form *Siob*. He explained that it is hard for him to do so because all of the lines appear in black and that it would be best if the aerial photo of *Siob* is printed in one color and the lots resulting from the more recent ground survey of *Siob* are printed in another color. He proceeded to try to identify the specific lot numbers that may constitute *Siob* as per the past ground survey with the claimants. Mr. Ikeya also testified that he associated *Siob* with Tochi Daicho 2129, the largest government lot in southern Ngaraard with over 2 million tsubo and borders neighboring states. As to other claimants of *You el Beluu*, Mr. Ikeya stated that they claimed private Tochi Daicho lots. Finally, he stated that he has no knowledge of a homestead program during the Japanese administration

### **Francisco Sungino**

Mr. Francisco Sungino ("Francisco") testified that he is 67 years old and currently resides at Ngkeklau. He explained that he is the oldest male son of claimant Yosteru Sungino. He further explained that when he became aware of his surroundings, his father Yosteru was already using *Siob* and continued to use it exclusively with his children. As a child, Francisco saw that there were already mature betelnut and coconut trees on the land which they harvested. They would usually go to *Siob* on a bamboo raft when the tide is high in the morning and work on the land all day and then return in the late afternoon when the tide is high again. Over the years, as they harvested on the land, they also planted new seedlings that grew up and from which they have been harvesting up to the present time.

Francisco further testified that his father Yosteru said that Siliang gave *Siob* to him because Yosteru was like a son to Siliang.

Yosteru always provided for his grandparents by giving fruit bats, pigeons, and other provisions so *Siob* was given to Yosteru as an *ulsiungel*. Yosteru also told Francisco that the reason why the land is called *Siob* is because it is derived from a Japanese word that describes the size or area of a land. Siliang's land from the government was 7 chiob.

Francisco went on to testify that *Siob* is in *Iou el Beluu* and that the lands of Belesoch, Moi, and Max are all in *Iou el Beluu* except that the southern part of Max's lot enters into Ngerbesang. During the monumentation of the lots, Max's and Moi's children were present. Finally, Max, Moi, and Belesoch are also from Oikull.

#### **Asap Bukurow**

Mr. Asap Bukurow ("Asap") testified that he is 48 years old and resides at Idid Hamlet. He explained that he is the son of the late Bekurrow Recheyungel who filed a claim to the land at issue. Bekurrow filed his claim to pursue ownership by Obeketel Lineage. Asap testified of the story about the people of Oikull coming to Ngkeklau. He explained that the people of Oikull traveled up the east coast and rested at Ngkeklau. There they asked chief Kloulubak for a place to settle and gave out a piece of money as payment. Kloulubak then took the leader of the group up to a place called *Osisang* and looking south from there, Kloulubak said that the people of Oikull will own the land towards the south all the way to Ngiwal and to Ngardmau. This entire area – which includes the lands at issue in this case – is what Bekurrow claims for Obeketel Lineage.

Be that as it may, Asap clarified that his father's claim is not intended to conflict with what was given out to Yosteru because *Siob* is for Yosteru. His father's claim is

intended for the rest of the land that should belong to Obeketel Lineage through the sale from Kloulubak to the people of Oikull. When asked if the land was taken by force, Asap explained that his father told him that the Japanese had people stake out their lands but then the Japanese would limit people's claims to those that they were settled on or using. The rest of the lands, such as forests, were then registered as government land.

#### **Mario Retamal**

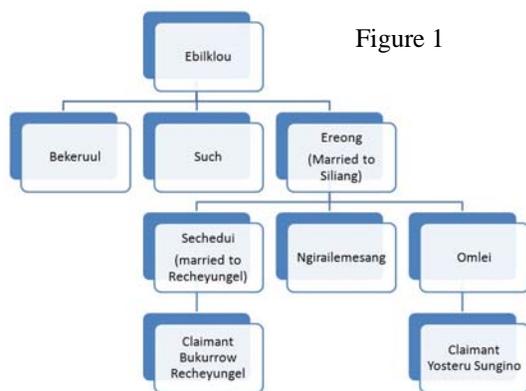
Mr. Retamal testified that he is the national surveyor for Palau. He submitted maps that were labeled and admitted as Court Exhibits 3, 4, 5, 6, 7. On Court Exhibit 3, Mr. Retamal explained that lot 38-2091, bounded by blue lines, is the result of the aerial photo. Court Exhibits 6 and 7 are copies of that aerial photo map. Mr. Retamal further explained that all of the lots that appear on Court Exhibit 3 are the lots at issue in this case except that lot 02E004-025 has been adjudicated.

#### **Findings of Fact**

1. The worksheet lots at issue are lot numbers 02E004-019, 02E004-020, 02E004-021, 02E004-022, 02E004-023, 02E004-024, 02E004-030, 02E004-031, 02E004-032, 02E004-033, 02E004-034, 02E004-035, 02E004-036, and 02E004-037.
2. The late claimant Yosteru Sungino and his witnesses refer to the lots at issue as *Siob*.
3. *Siob* is located within a larger area of Ngkeklau County called *Iou el Beluu*.
4. In the distant past, *Iou el Beluu* was under the jurisdiction of chief Kloulubak of Ngkeklau.
5. In the distant past, the people of Oikull fled their village in Airai and stopped over

at Ngkekklau. There, they gave a piece of money to chief Kloulubak who then gave out *Iou el Beluu* to these people of Oikull.

6. At a later point, some of the Oikull people returned to Oikull while others remained at Ngkekklau including a woman named Ebilkou.
7. Ebilkou gave birth to a son named Bekeruul and two daughters named Such and Ereong. Ereong was married to Siliang and gave birth to Sechedui, Ngirailemesang, and Omlei. Sechedui married Recheyungel and they had a son named Bukurrow Recheyungel who filed a claim in this case, claiming for Obeketel Lineage. Sechedui's sister Omlei gave birth to Claimant Yosteru Sungino. Through their deeds, these people of Oikull gained membership into Obeketel Lineage. Through their membership in Obeketel Lineage, they became members of Kermong Clan of Ngkekklau. See, Figure 1 [] for a graphic depiction of the descendants of Ebilkou.



8. During the Japanese administration of Palau, *Siob* and other lands in *Iou el Beluu* of Ngkekklau became listed as government lands.
9. Through the Japanese government, Ereong

and Siliang took possession of *Siob* and cultivated the land up to World War II.

10. Because of his good deeds to his grandparents, Ereong and Siliang gave out *Siob* to their grandson Yosteru.
11. From the time Ereong and Siliang gave *Siob* to Yosteru, it has been cultivated and utilized by Yosteru and his sons and relatives, a period well over 50 years.
12. Yosteru filed a claim for *Siob* on or about September 8, 1975, the date of a Land Acquisition Record on file.
13. On the 1975 Land Acquisition Record on file, Yosteru indicates that, as to the Tochi Daicho owner, it is a “lease” for Siliang.
14. On the 1975 Land Acquisition Record on file, the sketch shows Siliang’s lease, Recheiungel’s adjacent lease, Alic Max’s adjacent lot, Recheiungel’s adjacent lot, and another adjacent lot listed as government property.
15. On or about 1976, Yosteru’s claim for *Siob* was monumented and photographed during the aerial photo survey and later identified as lot 38-2091 comprised of 22,374 square meters.
16. Yosteru again filed a claim for *Siob* on May 6, 1980, claiming lot 38-2091 and indicated that it is listed in the Tochi Daicho as owned by “Palau chio” and on paragraph 8 of the claim, it is stated that, “The land was leased by Siliang, my father-in-law, when he dead, I continued to lease the land from government.”
17. On August 12, 1980, Yosteru – then 59 years old – appeared before a land registration team and claimed *Siob*, lot 38-2091, as his personal property that was cultivated by his grandfather Siliang and

then him for over 50 years with coconuts planted on it and that the Japanese instructed Siliang to cultivate the land and it would belong to him and that Siliang later gave *Siob* to him, Yosteru, so he has been cultivating it for the last 36 years or since about 1944.

18. Sometime in 2002, *Siob* was again monumented by Yosteru Sungino, Ismael Sungino, Francisco Sungino, and Dulei Subris to include the worksheet lots listed in findings of fact #1 above.
19. Yosteru Sungino passed away on November 14, 2011 at age 90.
20. No one has objected to or interfered with Yosteru and his relatives' use of the land since they began using it.

### **Conclusions of Law**

#### **Claim of Yosteru Sungino**

Yosteru claims through Siliang. Testimony and documentary evidence indicates that Siliang's interest was either through a homestead or a lease. Did Siliang have a homestead? Siliang gained possession of *Siob* during the Japanese administration. Inconclusive evidence was provided to show that Siliang did have a homestead. In fact, the term "homestead" does not appear in any of Yosteru's claims and only came out through the testimony of Yosteru's younger relatives at the hearing. Even then, the testimony about a "homestead" was somewhat tentative and speculative such as Mr. Ismael Sungino's guessing that Siliang's ownership of *Siob* was not registered in the Tochi Daicho perhaps because World War II happened. Thus, there is no reliable basis, and it would be a tenuous stretch, for this Court to find that Siliang had a homestead from the Japanese government.

Even if Siliang did have a homestead, no reliable evidence was submitted to prove the specific conditions of the homestead. Certainly, during the Trust Territory period, a homestead program was established whereby a homesteader could acquire title to government land if he met certain conditions. *See*, 67 TTC §301. But no evidence was submitted to show that a similar legal framework was in effect during the Japanese period when Siliang gained possession of *Siob*. Since the conditions of the purported homestead are unknown, this Court has no basis upon which it can conclude that Siliang met the conditions and thereby acquired title to government land. Accordingly, Yosteru's claim for ownership through Siliang's purported homestead cannot prevail.

Did Siliang have a lease? As stated in findings of fact numbers 13, 14, and 16 above, there are several instances where Yosteru indicates that he is claiming Siliang's lease. The preponderance of that evidence from the clamant himself shows that it is more likely true that Siliang did have a lease. What does this mean for Yosteru?

A lease is defined as a "contract by which a rightful possessor of real property conveys the right to use and occupy the property in exchange for consideration, usu. rent. The lease term can be for life, for a fixed period or for a period terminable at will." *Black's Law Dictionary*, 8<sup>th</sup> ed. (2004). "The rights of a lessee and a lessor in the property that is subject to a lease are divided; the lessee has possessory interest, and the lessor has the reversionary interest." 49 Am. Jur. 2d §1 (2006).

[1] Under a lease, Siliang had the right to occupy and use *Siob*. He had no ownership interest under the lease because ownership

remained with the government. Consequently, when Siliang gave *Siob* to Yosteru, he could only give Yosteru the same right to occupy and use *Siob*. It was impossible for Siliang to grant ownership to Yosteru because one cannot convey interests in land that one does not have in the first place. *See generally, Ngiraidong v. Koror State Gov't*, 18 ROP 217, 219 (2011). Given the foregoing, Yosteru's claim for ownership cannot prevail.

#### **Claim of Bekurrow Recheyungel**

Asap Bekurrow explained at the hearing that *Siob* is for Yosteru and his father's claim is not intended to conflict with Yosteru's claim. Accordingly, as to *Siob*, it is exempted from the claim of Bekurrow Recheyungel.

#### **Claim of Ngaraard State Public Lands Authority**

The private claimants testified that *Siob* became government land during the Japanese administration. As to Bekurrow Recheyungel, minimal evidence was provided to prove a wrongful taking as well as meeting the other statutory elements required for claiming public lands. Mr. Asap Bukurrow also exempted his father's claim as to *Siob* in deference to Yosteru Sungino's claim.

Yosteru Sungino did not raise or otherwise prove a wrongful taking theory. He focused on a homestead claim. That was not adequately proven. On the other hand, as explained above, he had a lease and, as a matter of law, one's possessory interest under a lease cannot rise to an ownership interest. Accordingly, ownership is awarded Ngaraard State Public Lands Authority.

#### **Conclusion**

For all of the reasons stated above, lots 02E004-019, 02E004-020, 02E004-021, 02E004-022, 02E004-023, 02E004-024, 02E004-030, 02E004-031, 02E004-032, 02E004-033, 02E004-034, 02E004-035, 02E004-036, and 02E004-037 are owned by Ngaraard State Public Lands Authority. Appropriate determinations of ownership shall issue forthwith consistent with this Decision.

**In the matter of ownership of land lots in Iyebukel Hamlet, Koror State now depicted as worksheet lots 40308, 40309, 40310, 40311, 40312, 40313, 40314, 40315, 40316, 40317, 40318, and 40318A.**

**GAYLEEN TECHIYAU SAKUMA,  
TOMOMI WATANABE,  
HANAKO NGELTENGAT,  
TEREKIEU CLAN, and  
KSPLA,  
Claimants.**

LC/B 10-0035, -0036, -0037, & -0038

Land Court  
Republic of Palau

Decided: May 29, 2014

Appearances:

Fuana Ngiratechekii, *pro se*, for Hanako Ngeltengat  
John Rechucher, Esq., for Tomomi Watanabe, by Bessie O. Iyar  
Raynold B. Oilouch, Esq. for Terekieu Clan  
Debra Lefing, Esq. for KSPLA

The Honorable C. QUAY POLLOI, Senior Judge:

**Table of Contents**

**I. INTRODUCTION..... 129**

**II. SUMMARY OF CLAIMS ..... 130**

A. Basis for Gayleen Tichiau Sakuma’s Claim 130

B. Basis for Hanako Ngeltengat’s Claim. 130

C. Basis for Tomomi Watanabe’s Claim. 130

D. Basis for Terekeiu Clan’s Claim ..... 131

E. Basis for KSPLA’s Claim ..... 131

**III. FINDINGS OF FACT..... 131**

**IV. CONCLUSIONS OF LAW ..... 137**

A. Legal Framework ..... 137

1. Return-of-Public-Lands Claims ..... 137

2. Superior Title Claims ..... 137

3. Standard of Proof ..... 138

B. Merits of the Claims ..... 138

**V. CONCLUSION ..... 144**

**I. Introduction**

These four cases present competing claims to twelve worksheet lots in Iyebukel Hamlet, Koror State. The twelve lots are generally situated in the area between Mindszenty High School and Tree-D Motel and additional lots further inwards into Iyebukel Hamlet. *See*, Figures 3 and 4 below. The claims were heard before this Court in December of 2013 and February and March of 2014. The Court heard from Sylvia Tangelbad, Miser Rekemesik, Brenda Ngirmeriil, Thomas Techur, Fuana Ngiratechekii, Ignacio Santiago, Chamberlain

Ngiralmu, Sterlina Gabriel, Wataru Elbelau, Bessie Iyar, and Roman Remoket.

Below, the Court first summarizes the basis for each claim. Then, based on the preponderance of the evidence adduced and matters judicially noticed, the Court makes factual findings. The facts are then considered under the applicable legal standards in order to arrive at an adjudicated conclusion.

## II. Summary of Claims

### A. Basis for Gayleen Tichiau Sakuma's Claim

The claim form was filed on January 6, 2003 with the Land Court. It is stated in the form that the lot claimed is worksheet lot 40318 and the basis is that it is owned by Dirchomtilou Dibeck Mariur. Despite notices served, the claimant never appeared at the scheduled hearings.

### B. Basis for Hanako Ngeltengat's Claim

The claim was filed on July 26, 1988 with the Land Claims Hearing Office as a claim for public land. Hanako stated in her claim form that she claims "Osarei" and that it belonged to her father but was taken for "Skenjio". Claimant Hanako died before the hearing and was represented by her sister Fuana Ngiratechekii.

The basis of the claim is that Hanako Ngeltengat filed a *timely claim* for public land. As to the original owner, it is claimed that Telotongang who was Ibedul lived at *Osarei* and was also referred to as Ngirchosarei. He lived on the land because he owned it while married to a woman named Tmikou Petoï who was the mother of Ngirur. In turn, Ngirur was the parent of claimant Hanako Ngeltengat and

her sister Fuana Ngiratechekii. When Ibedul Ngirchosarei Telotongang died, Osarei was given out as *chelbechiil* to Tmikou Petoï. It was Tmikou Petoï who was the *original owner* of the land when it was taken by the Japanese.

As to the *rightful heirs*, it is claimed that Hanako Ngeltengat and Fuana Ngiratechekii are the daughters of Ngiratechekii who was the son or grandson of the original owner Tmikou Petoï. As such, they are rightful heirs of the original owner.

As to *wrongful taking*, Fuana argues in closing that, "[t]he evidence further shows that the land *Osarei* was simply taken without payment of just compensation or adequate consideration or and by force." This evidence includes Hanako's statement in her 1988 claim that the Japanese took the land for a "Skenjio" without any payment or consideration.

For the foregoing reasons, Fuana Ngiratechekii, for her sister Hanako Ngeltengat, asks that *Osarei* be returned.

### C. Basis for Tomomi Watanabe's Claim

There is an unsigned and undated Land Commission claim form filled by Tomomi for Tochi Daicho 584, *Iteliang*. See, Tomomi Watanabe Exhibit B. It is stated in this form that the Tochi Daicho owner is Kloteraol Ngiraungiltekoi.<sup>1</sup> It is further stated that the land belonged to Kliu Beouch who is Tomomi's mother. Tomomi also referred to a statement of Rechuld, dated December 20, 1987, as documentary support for the claim. It is also indicated that the land was earned as *ulsiungel*.

<sup>1</sup> The ownership listing and other details for Tochi Daicho 584 are actually blank.

Tomomi did sign and file a second claim form on May 21, 1990 before the Land Claims Hearing Office. *See*, Tomomi Watanabe Exhibit A. In this claim she again filed for Tochi Daicho 584, called *Iteliang* or *Kedelblai* and stated in the claim that Kloteraol gave the land to Tomomi's mother Kliu Beouch.

At the hearing, Tomomi was represented by her daughter Bessie O. Iyar, whose counsel was John K. Rechucher, Esq. They claim Tochi Daicho 584, *Iteliang*, which they also claim consists of worksheet lots 40313, 40314, 40315, and 40316.

The core basis of the claim is that Tochi Daicho 584 was given by Ngiraungiltekoi as *ulsiungel* to Kliu Beouch because she "took care of him for a long time." *Tomomi Closing* at 2. "Before he died, Ngiraungiltekoi told Rechuld that he had already given his land *Iteliang* as *ulsiungel* because she took care of him." *Id.* The land was then inherited by Kliu's daughter Tomomi Watanabe, the claimant. Tomomi is now deceased, so the land would go to her rightful heir being her daughter Bessie O. Iyar.

It is asserted that the land never became public land. Alternatively, if it did become public land, it was wrongfully taken.

#### D. Basis for Terekeiu Clan's Claim

On November 18, 1974, Imerab Rengiil filled a Land Acquisition Record for *Kedelblai* consisting of various Tochi Daicho numbers including 584. It is stated that the land is a traditional property of Terekeiu Clan.

On November 30, 1988, Wilhelm Rengiil, son of Imerab Rengiil, also filed a claim with the Land Claims Hearing Office. He also stated that the land is a traditional property of Terekeiu Clan.

#### E. Basis for KSPLA's Claim

KSPLA claims that the lands were owned by the Trust Territory Government and then deeded to the Palau Public Lands Authority which deeded the same to KSPLA. KSPLA claims that the lands are public lands which it owns and maintains as evidenced by leases to the several individuals living on lease lots on the land.

#### III. Findings of Fact

1. In 1914, World War I began and on "October 8, 1914, warships of the Japanese Imperial Navy steamed into Palau and took over the islands without a fight."<sup>2</sup> The war ended in 1918 and then "Japanese rule of Micronesia was approved by the new League of Nations in 1920. Two years later, Japan set up a colonial government in Koror."<sup>3</sup> Specifically, "in April 1922, Nan'yo-cho, the Japanese civilian government, was established in Micronesia by formal ordinance."<sup>4</sup>
2. From 1938 to 1941, the Japanese Administration conducted the land survey of Palau to register land ownerships leading to the Tochi Daicho. Tochi

<sup>2</sup> James E. Davis & Diane Hart, *Government of Palau: A Nation that Honors Its Traditions* at 45(2002); *see also*, Elizabeth D. Rechebei & Samuel F. McPhetres, *History of Palau: Heritage of an Emerging Nation*, Ministry of Education at 138 (1997).

<sup>3</sup> Davis & Hart, *Government of Palau*, at 45; *see also*, Francis X. Hezel, S.J., *Strangers in their Own Land: A Century of Colonial rule in the Caroline and Marshall Islands*, at 156, University of Hawaii Press, (1995).

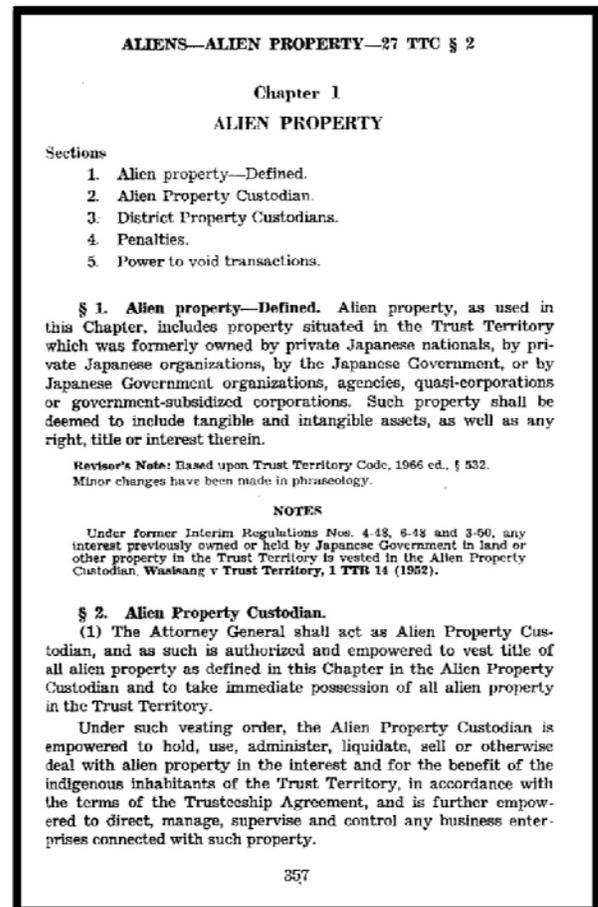
<sup>4</sup> Hezel, *Strangers in their Own Land*, *supra*, at 166.

Daicho 584 was listed but no ownership or other information were registered for the lot.

3. In 1941, the Tochi Daicho was completed. Later in the year, on December 7, Japanese bombers attacked Pearl Harbor causing the United States to declare war on Japan.
4. On September 15, 1944 the Battle of Peleliu began where U.S. forces attacked the entrenched Japanese forces on the island.<sup>5</sup>
5. “On Sept. 5, 1945, one year after the opening attack on Beliliou and Ngeaur, the Japanese commander formally surrendered to the Americans just outside of Irrai. This is the same day the Japanese government surrendered to the Americans on board the *USS Missouri* in Tokyo Bay.”<sup>6</sup>
6. On September 27, 1951, a vesting order was issued and title to real property owned by the Japanese government or Japanese nationals was vested in the Alien Property Custodian of the Trust Territory Government. This vesting order was later codified in 1966 at 27 TTC §1 et seq. *See*, Figure 1.
7. On May 11, 1956, a sketch of *Ngerkeailked* was made showing a total land area of 36,727 square feet. The sketch also shows the name Barau

<sup>5</sup> *See*, James E. Davis & Diane Hart, *Government of Palau: A Nation that Honors Its Traditions*, 48 (2002); Hezel, *Strangers in their Own Land* at 236.

<sup>6</sup> Elizabeth D. Rechebei & Samuel F. McPhetres, *History of Palau: Heritage of an Emerging Nation*, Ministry of Education at 198 (1997).



**Figure 1 Vesting Order**

Tucherur and the number “127”. *See*, Terekieu Exhibit G (7 pages).

8. On August 28, 1956, Barau Tucherur prepared a statement for Claim No. 127. In the statement, Barau Tucherur stated that he claims the tract known as *Itechetii* and that money was paid by a Japanese company for the land but none of the money was received by Terekieu Clan. *See*, Ngeltengat Exhibit B. Claim No. 127 is for the lot that is generally described as the site of the present Harris Elementary School. *See*, Terekieu Exhibit H.

9. On March 27, 1957, the Trust Territory Government filed its claim for lot G-10, *Ngerkeialked* lot #27, for which adjacent land owners were Rechuld, Sasao V.O., Tomomi, and Government. It is further stated in ¶3 of the claim that the land was received from Terekieu Clan. On the same date, the District Land Office gave public notice of a hearing on the claim to the public and personally to Barau Tucherur. *See, Id.*
10. On April 24, 1957, a hearing for lot G-10 was held before D. W. LeGoullon, District Land Title Officer. Barau Tucherur testified that *Ngerkeailked*, lot 127, was owned by Terekieu Clan but was then registered in his name during the land survey of 1938-1939. He then rented the land to Mizungami for 174 yen a year. Later, he sold the land to Hosino on February 15, 1943. Hosino got 3,000 yen from the Nambo Company, kept 1,000, and gave 2,000 to V. O. Sasao who then gave the money to Barau. The Nambo Company then started to use the land and Sasao stopped the company because the land was supposed to belong to Hosino. The company then explained that they furnished the 3,000 yen to buy the land and that they would pay 4,000 yen more. Sasao wanted to see Hosino to straighten out the matter. However, Hosino left on a ship never to return. Thereafter, the company did not use the land. *See, Id.*
11. On or after the April 24, 1957 hearing, D. W. LeGoullon made factual findings including the following: (1) *Ngerkeailked* is known as lot 127<sup>7</sup> that was “recorded in the Japanese Land Register in the name of Barau Tucherur”; (2) the land formerly belonged to Barau Tucherur; and (3) “Tucherur sold the land to the Nambo Company on February 15, 1943 for a stated price of 3000 yen, [yet] he received only 2000 yen.” *See, Id.*
12. On July 3, 1957, District Land Title Officer D. W. LeGoullon, issued Determination of Ownership and Release No. G-10. The land name is listed as *Ngerkeailked* and identified as sketch #G10 on land office map #K2. LeGoullon recommended that the land be registered with the Alien Property Custodian of the Trust Territory. *See, Terekieu Exhibit G and H.*
13. On February 3, 1963, Barau Tucherur, age 98, testified before Chief Justice E. P. Furber in Civil Action No. 257, *Imerab Rengiil v. I. Rudimch* regarding the land *Ituu*. Among other things, Barau Tucherur testified that (1) he bears the title Tucherur

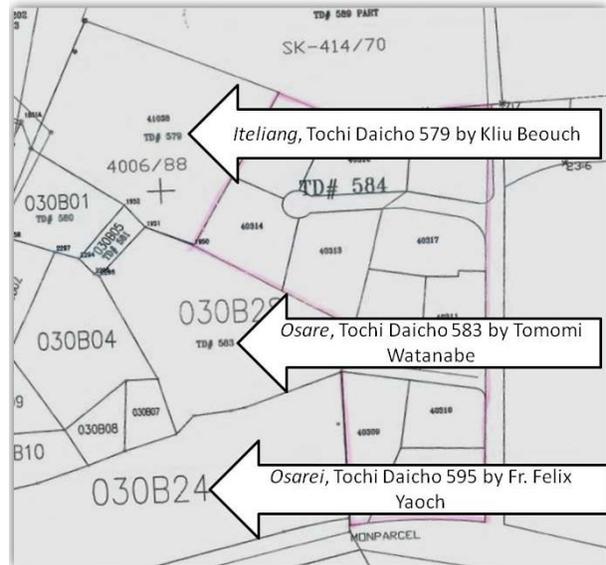
---

<sup>7</sup> The Court takes notice that Tochi Daicho lot 127 is in the name of Ngirchorachel and not Barau. *See, Koror Tochi Daicho*. Barau Tucherur did file a claim for lot 127, *Itechetii*, which is the Harris Elementary School site. *See, Ngeltengat Exhibit B, Statement of Barau Tucherur*. Barau Tucherur also filed a claim for lot G-10, *Ngerkeialked*, the lot at issue in this case. During his 1950’s testimony for G-10, Barau Tucherur mentioned lot 127. *See, Statement of Barau attached to Terekieu Exhibit G*. It is likely the case that the number 127 became confused in the two separate claims for two separate lands by the same claimant before LeGoullon.

- of Terekieu Clan; (2) Terekieu Clan is comprised of Terekieu Lineage, Ituu Lineage, Ikekemongel Lineage, and Iteliang Lineage; (3) the land *Ituu* was wrongfully listed under Rechuld's name; (4) that a Japanese named Ngirachemutii lived on *Kantor*; (5) that Rechuld lived on the land *Kedelblai*; (6) that he told Imerab that Rechuld took *Ituu* by force; (7) Rechuld became Buiktucherur without Barau Tucherur's knowledge; and (8) he was aware that Rechuld was collecting rents for the lands from tenants during the Japanese period. *See*, Tomomi Watanabe Exhibit F.
14. On February 27, 1963, Chief Justice E. P. Furber entered a Pre-Trial Order in Civil Action No. 257, *Imerab Rengiil v. I. Rudimch* regarding the land *Ituu*. In the order, the Chief Justice identified crucial allegations by the parties. For instance, Plaintiff Imerab Rengiil alleged that *Ituu* was administered by Recheluul but that Rechuld stole Recheluul's seal and may have used it to fraudulently transfer ownership of the land to himself. Defendant I. Rudimch, on the other hand, alleged that Recheluul and Obechad<sup>8</sup>, uncles of Rechuld, were present when the survey was made and *Ituu* was registered in Rechuld's name. Chief Justice Furber also listed several important issues for trial. *See*, Tomomi Watanabe Exhibit J.
15. On May 15, 1964, Associate Justice Paul F. Kinnare entered a judgment in Civil Action No. 298, *Barao Tuchurur v. Rechuld*, regarding Tochi Daicho lots 588 and 589, both listed under Rechuld. Justice Kinnare found that the issues in this case were the same as those raised in Civil Action No. 257. Furthermore, Plaintiff Barao Tuchurur was in privity with Plaintiff Imerab Rengiil in the earlier case, while Defendant Rechuld was in privity with Defendant I. Rudimch of the earlier case. Finally, the land in the case before Justice Kinnare is adjacent to the land that was the subject of the earlier case, all of which were listed as owned by Rechuld in the Tochi Daicho. Accordingly, based on the doctrines of *res judicata* and *stare decisis*, the matter was dismissed. *See*, Tomomi Watanabe Exhibit N.
16. On May 10, 1968, in Civil Action No. 405 regarding the land *Iteliang* Tochi Daicho 579, Rechemiich and Barau Tucherur sued Kliu Beouch, mother of Tomomi Watanabe, seeking to evict her from *Iteliang*. *See*, Tomomi Watanabe Exhibit L.
17. On January 13, 1970, Associate Justice Burnett entered judgment in Civil Action No. 405. After noting that Barau had passed away and Rechemiich no longer wished to continue, and that Barau transferred ownership in writing to Kliu, the land *Iteliang*, Tochi Daicho lot 579, belongs to Kliu. *See*, *Id* and Figure 2.

<sup>8</sup> This is likely Kloteraol Ngiraungiltekoi who was Rechuld's uncle who purportedly bore the title *Tucherur* but then became *Obechad* of Okelang Clan.

18. On August 24, 1971, Kliu filed an eviction action against Iblai Sasao, in Civil Action No. 1763. Kliu sought to evict Iblai Sasao from *Iteliang*, the land that was awarded to Kliu in Civil Action No. 405. *See*, Tomomi Watanabe Exhibit M.
19. On February 6, 1974, in the matter of *Kliu v. Iblai Sasao*, Civil Action No. 30-73, judgment was entered declaring Kliu to be the owner of Tochi Daicho 579, *Iteliang*. Later in 1980, Kliu Beouch deeded this land to Lorenza K. Nelson. *See*, Terekieu Clan Exhibit I and Figure 2.



**Figure 2** *Iteliang* by Kliu Beouch, *Osare* by Tomomi Watanabe, and *Osarei* by Fr. Felix, all of which are adjacent and west of the lands claimed before this Court.

Exhibit L and Figure 2 *supra*.

- On November 7, 1974, a Land Acquisition Record was prepared for the Catholic Church by Fr. Felix Yaoch. The land claimed is *Osarei*, Tochi Daicho 595. A sketch of Tochi Daicho 595 in the Land Acquisition Record shows that it is adjacent to the main road on the south and to Tochi Daicho lots 594, 593, and 583 to the north. This land is the present site of Mindszenty High School which runs all the way down to the turn into Iyebukel Hamlet. *See*, Terekieu Clan Exhibit M and Figure 2 *supra*.
20. On November 11, 1974, a Land Acquisition Record was prepared for Tomomi Watanabe Iyar. The land claimed is *Osare*, Tochi Daicho 583 which is listed in the Tochi Daicho under the name of Tomomi. A sketch of Tochi Daicho 583 shows that it is adjacent and north of the present site for Mindszenty High School. To the east of Tochi Daicho 583 is government land. Later on February 16, 1990, Tomomi Watanabe deeded this land to John K. Rechucher. *See*, Terekieu Clan

21. On November 18, 1974, a Land Acquisition Record was prepared by Imerab Rengiil for *Kedelblai* consisting of various Tochi Daicho lots including Tochi Daicho 584. *See*, Terekieu Exhibit A.
22. On August 4, 1978, Imerab Rengiil and several other persons prepared a document regarding Terekieu lands. It is stated in the document that Ngirachewes was a trustee for two of the lands one of which was sold to a Japanese man who was married to Kliu.<sup>9</sup> This land was a principle house site for Terekeiu. Persons

<sup>9</sup> This land that was purportedly sold by Ngirachewes to Kliu’s Japanese husband is possibly *Iteliang*, Tochi Daicho 579. Kliu’s Japanese husband is possibly the one referred to as Ngirachemutii. Tochi Daicho 579, like Tochi Daicho 584, was blank as to ownership and other details.

- signing the document, such as Dirrarekong Lusii Orrukem, were purportedly related to Ngirachewes, and they do not dispute Imerab Rengiil's position that the lands belong to Terekieu Clan. The document then lists the names of those lands that were listed as government land and those that remained with the clan. *See*, Terekieu Exhibit E.
23. On August 13, 1980, Kliu Beouch deeded Tochi Daicho lot 579, *Iteliang*, to Lorenza K. Nelson. *See*, Terekieu Exhibit I.
24. On December 20, 1987, Rechuld, as a nephew of Kloteraol Ngiraungiltekoi, prepared a written statement in support of Tomomi Watanabe's claim that Kloteraol Ngiraungiltekoi bore the title *Tucherur* and gave the land *Iteliang* to Kliu Beouch as *ulsiungel*. *See*, Tomomi Watanabe Exhibit E.
- On or after December 20, 1987, Tomomi Watanabe's claim for Tochi Daicho 584 was prepared on a Land Commission claim form. In this document, Tomomi claims that the Tochi Daicho owner is Kloteraol Ngiraungiltekoi and that the land was given to Kliu as *ulsiungel* and that Rechuld Tucherur was a witness who had a prepared statement. *See*, Tomomi Watanabe Exhibit B.
25. On January 25, 1988, Wilhelm Rengiil, for Terekieu Clan, wrote to Domestic Affairs Director Mr. Daiziro Nakamura requesting assistance in identifying locations and boundaries for 24 land names, presumably in Iyebukel Hamlet. *See*, Terekieu Exhibit F.
26. Before the deadline date of January 1, 1989, Wilhelm Rengiil, for Terekieu Clan, filed claims for *Ngerkeai el Ked*, *Osarei*, *Terekeiu*, *Kedelblai*, *Ituu*, *Iteliang*, *Ingereklii*, *Uchul a Bars*, and *Tmochorosis* with the Land Claims Hearing Office. *See*, Terekieu Exhibits B, C, & D.
27. On February 16, 1990, Tomomi Watanabe deeded Tochi Daicho 583 to John K. Rechucher.
28. On May 21, 1990, Tomomi Watanabe filed her claim for *Iteliang* or *Kedelblai* Tochi Daicho 584 and stated that Kloteraol Obechad<sup>10</sup> owned Tochi Daicho 584 and that Kloteraol Obechad and Kliu, mother of Tomomi, are from the same clan and Kloteraol gave the land to Kliu.
29. On December 30, 1990, John K. Rechucher filed his claim for *Osare* or *Melekei*, Tochi Daicho 583.
30. On May 25, 1994, in Formal Hearing No. 12-20-94, *John K. Rechucher v. Benacio Sasao*, Tomomi Watanabe testified that her father purchased *Osare*, Tochi Daicho 583 from Ngirachewes. That is why it became listed in the Tochi Daicho in Tomomi's name.
31. On November 27, 1995, a Certificate of Title was issued by the Land Commission naming the Catholic Mission as owner of Cadastral Lot 030 B 24, Tochi Daicho 595, called *Osarei*.

<sup>10</sup> This is likely the same person as Kloteraol Ngiraungiltekoi who purportedly held the title *Tucherur* of Terekieu Clan but later became chief *Obechad* of Okelang Clan in Ngerchemai Hamlet.

32. On August 22, 1996, Certificate of Title No. LC-11-96 was issued naming John K. Rechucher as owner of Lot No. 030 B 28, Tochi Daicho 583-part known as *Osare*. See, Terekieu Exhibit L.
33. On October 10, 2006, Tomomi Watanabe signed a Land Claim Monumentation Record acknowledging that *Iteliang/Kedelblai* Tochi Daicho 584 is comprised of worksheet lots 40313, 40314, 40315, and 40316.
34. On November 29, 2010, Land Court Determination of Ownership No. 12-736 was issued naming Terekieu Clan as owner of lot 182-123C measuring six square feet. See, Terekieu Exhibit J.
35. On July 20, 2011, a transcript of Civil Action No. 03-384, *Bilung Gloria Salii v. Terekieu Clan*, was prepared in which Bilung Gloria Salii testified that Terekieu Clan owned most of the land in Iyebukel but gave out much of these lands to other clans including Tmong Clan. See, Terekieu Exhibit K.
36. On January 21, 2011, Associate Justice Alexandra F. Foster issued a judgment along with a Decision in *Terekieu Clan v. Bilung Gloria G. Salii and John C. Gibbons*, Civil Action No. 03-384. Among several findings, Associate Justice Foster found the following: (a) Terekieu was originally divided into three lineages these being Iteliang, Ituu, and Ikekemongel but only Ituu remains; (b) Terekieu Clan's stone platform existed at what is now Hatsuichi Ngirchomlei's

leasehold (lot 40314) and members of Terekieu were buried there long before the land was wrongfully taken during the Japanese period; (c) "the land known as Iteliang, along with its house site, is off the main road into Iyebukel tucked behind Ellen's Laundromat"; (d) Rechuld was not an *ochell* of Terekieu Clan as he was apparently an *ochell* of Okelang Clan; and (e) in the 1950's Rechuld filed a claim for the Harris Elementary School site on behalf of Okelang Clan and not Terekieu Clan. See, Terekieu Clan Exhibit S.

#### IV. Conclusions of Law

##### A. Legal Framework

###### 1. Return-of-Public-Lands Claims

A party who filed a claim for the return-of-public-lands concedes that the land became public land. See, *Palau Pub. Lands Auth. v. Tab Lineage* 11 ROP 161 (2004). To prevail on the claim, the party must then show that: (1) he or she is a citizen who filed a claim by January 1, 1989; (2) that he or she is either the original owner or one of the original owner's proper heir; and (3) the land at issue became public land through a wrongful taking (*i.e.*, force, coercion, fraud, or without just compensation, or adequate consideration). See, 35 PNC §1304(b). Under this legal standard, the government does not have the burden to prove how the land became public land. Instead, the burden is on the private claimant to prove the elements listed above. See, *Masang v. Ngirmang*, 9 ROP 125, 128 (2002).

###### 2. Superior Title Claims

Under the superior title standard, a claimant claims that the land never became

public land. See, *Wasisang v. Palau Pub. Lands Auth.* 16 ROP 83, 84 (2008). Under this standard, both the claimant and the public lands authority stand on equal footing and must prove their claims by a preponderance of the evidence. However, unlike the return-of-public-lands standard, affirmative defenses are available for the government when a claimant makes a claim under the superior title standard. These affirmative defenses include laches, estoppel, waiver, stale demand, and the statute of limitations. See generally, *Espong Lineage v. Airai State Pub. Lands Auth.*, 12 ROP 1, 5, (2004). Finally, although ordinarily both the government and the private claimant stand on equal footing, if there is an adverse Tochi Daicho listing for the land, the claimant has the “added burden of establishing by clear and convincing evidence that [it is] incorrect.” *Wasisang* 16 ROP at 85.

### 3. Standard of Proof

Unless otherwise specified, the Court applies the preponderance of the evidence standard in addressing each claim below. Preponderance of the evidence means, “the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.” *Black’s Law Dictionary*, 7<sup>th</sup> Ed. (2004) at 1220. Phrased briefly, in light of all of the evidence submitted, is it more probable that the ultimate asserted fact is true or not true? The Court does this to make additional findings of fact on highly disputed factual issues that are materially relevant for each claim.

### B. Merits of the Claims<sup>11</sup>

1. Terekieu Clan is comprised of at least three lineages: (1) Ituu; (2) Ikekemongel; and (3) Iteliang. These lineages are also the names of lands or house sites in Iyebukel Hamlet. The house site for Ituu Lineage is located further into Iyebukel north of Kukumai Rudimch’s residence. The site for Ikekemongel Lineage is where Fuana Ngiratechekii resides. The site for Iteliang Lineage is tucked behind Ellen’s Laundromat.
2. The male title of Terekieu Clan is *Tucherur*. The female title is *Uodelchad-ra-Terekieu*. Since the Japanese period, the title *Tucherur* as well as ownership and control of Terekieu Clan’s lands have been in dispute. Because of these unresolved disputes within Terekieu Clan, ownership of some of the lands owned or associated with the clan was not registered in the Tochi Daicho. These include Tochi Daicho lots 584 and 579 which remained blank.
3. Tochi Daicho records show that Barau of Iteliang Lineage held the title *Tucherur* during the Japanese period. Specifically, Tochi Daicho lots 803 and 804 were registered in the name of Barau Tucherur. Tochi Daicho lot 826 was listed as owned by Terekieu with Barau Tucherur as trustee. Tomomi Watanabe Exhibit E, on the other hand, states that Kloteraol

<sup>11</sup> Additional factual findings and inferences are made while discussing the merits of the claims in light of the applicable legal standards for claiming lands.

Ngiraungiltekoi held the title *Tucherur*. His nephew Rechuld, at some point, also bore the title *Tucherur*.

4. Barau Tucherur claimed that Rechuld Tucherur was not a member of Terekieu Clan and that Rechuld Tucherur wrongfully registered clan lands in his name. Rechuld Tucherur was found by Associate Justice Foster to be an *ochell* of Okelang Clan. His uncle Kloteraol Ngiraungiltekoi bore the title *Obechad* of Okelang Clan.
5. All three men, Barao Tucherur, Kloteraol Ngiraungiltekoi, and Rechuld Tucherur, claimed to own or control Terekieu Clan's lands including those in this case, namely, lots 40313, 40314, 40315, and 40316.
6. After Rechuld Tucherur died, Wilheml Rengiil became *Tucherur*. See, Terekeiu Exhibit S. His sister Brenda Ngirmeriil held the title *Uodelchad-ra-Terekieu*. Their titles were challenged by Bilung Gloria Salii and John C. Gibbons, who claimed to be chiefs of Terekieu but lost by a judgment rendered by Associate Justice Foster in 2011.
7. Worksheet lots 40313, 40314, 40315, and 40316 were together claimed by Barau Tucherur in the 1950's as G-10, formerly Tochi Daicho 584<sup>12</sup> called *Ngerkeailked*. On the other hand, Kliu Beouch, mother of claimant Tomomi Watanabe, claimed that



**Figure 3** The lots that are collectively called **Osare** are bounded by the dark boundary line. This image was also scanned from Ngeltengat Exhibit A and software was used by the Court to emphasize the outside boundaries of the claimed lots.

this land is *Iteliang* which she earned as *ulsiungel* from *Tucherur* Kloteraol Ngiraungiltekoi. Rechuld Tucherur prepared a statement on December 20, 1987 in support of Tomomi's claim that *Iteliang* was *ulsiungel* earned by Kliu Beouch from Kloteraol Ngiraungiltekoi. Brenda Ngirmeriil claimed at the hearing before this Court that G-10 is called *Terekieu*, the original house site for Terekieu Clan. Given the conflicting Palauan names, the Court will refer to these four worksheet lots as G-10. See, Figure 3 above.

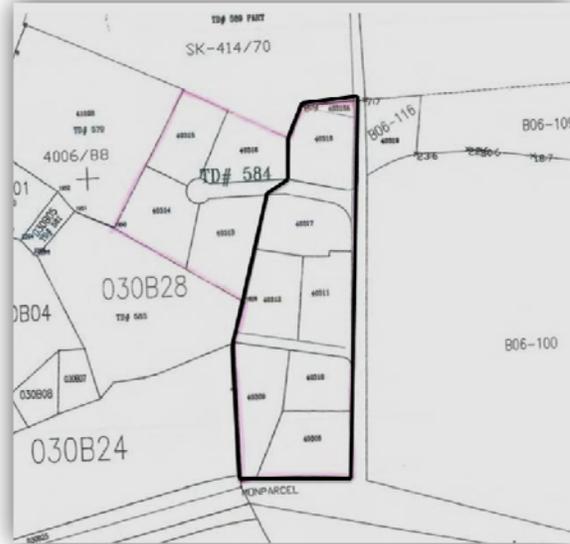
8. Worksheet lots 40308, 40309, 40310, 40311, 40312, 40317, 40318 and 40318A are parts of Public Parcel No. 21 for which

<sup>12</sup> See Tochi Daicho Map admitted as Tomomi Watanabe Exhibit D; Terekieu Clan Exhibit R; and KSPLA Exhibit 25.

no claims were filed with the Palau District Land Office in the 1950's.<sup>13</sup> These lots are part of the area called *Osare* or *Osarei* and may have been registered as part of Tochi Daicho 591 listed under the Nanyo Takushoku Company. Collectively, these worksheet lots will be referred to as *Osare*. See, Figure 4.

9. **Gayleen T. Sakuma**: the claim was filed on January 6, 2003 with the Land Court. It is stated in the form that the lot claimed is worksheet lot 40318 and the basis is that it is owned by Dirchomtilou Dibeche Mariur. Despite notices being served, the claimant never appeared at the scheduled hearings. The claim fails for lack of sufficient proof.
10. **Hanako Ngeltengat**: the claim was filed on July 26, 1988 with the Land Claims Hearing Office as a claim for public land. Hanako stated in her claim form that she claims "Osarei" and that it belonged to her father but was taken for "Skenjio". Claimant Hanako died before the hearing and was represented by her sister Fuana Ngiratechekii.

The basis of the claim is that Telotongang, who was Ibedul, lived at *Osarei* and was also referred to as Ngirchosarei. He lived on the land because he owned it while married to a woman named Tmikou Petoï, the mother of Ngirur. In turn, Ngirur was the parent of Ngiratechekii, the father of claimant Hanako Ngeltengat and her sister



**Figure 4** Worksheet lots 40313, 40314, 40315 and 40316 enclosed by the dark lines and together referred to by the Court as G-10. The image was scanned from Ngeltengat Exhibit A and the boundary lines were emphasized by the Court using software.

Fuana Ngiratechekii. When Ibedul Ngirchosarei Telotongang died, *Osarei* was given out as *chelbechiil* to Tmikou Petoï. It was Tmikou Petoï who was the *original owner* of the land when it was wrongfully taken by the Japanese.

The foregoing claim fails because, even if the land was simply taken for Skenjio without just compensation or adequate consideration, there is inadequate proof that the land belonged to Ibedul Ngirchosarei Telotongang and then went to his wife Tmikou Petoï as *chelbechiil*. The evidence submitted was the testimony of an interested witness, Fuana Ngiratechekii, which was not corroborated. Indeed, it was directly contested by the other claimants such as Terekieu Clan, which claimed that it owned the land since time immemorial and continued to own the land

<sup>13</sup> See, modern worksheet map admitted as Ngeltengat Exhibit A in conjunction with Trust Territory claims map admitted as Terekieu Exhibit H which shows no claims into Public Parcel No. 21.

immediately before it was taken by the government. Given the conflicting claims and the lack of corroboration for Hanako Ngeltengat's claim, there is little upon which this Court can find it more likely than not that Hanako Ngeltengat's predecessors, as opposed to the other claimants, owned the land immediately before it became public land.

11. **Tomomi Watanabe:** The claimant has two claim forms. One is an unsigned, undated, unfiled, and unacknowledged Land Commission form. The Land Commission pre-dated the Land Claims Hearing Office, so it can be assumed that the document was prepared and filed before the deadline date of January 1, 1989. It is then a timely filed claim for public land.

The second claim form was filed with the Land Claims Hearing Office on May 21, 1990. As this was filed after January 1, 1989, it can only be considered as a superior title claim.

The basis of the claim is that worksheet lots 40313, 40314, 40315, and 40316 together comprise Tochi Daicho 584 called *Iteliang*. It is claimed that *Iteliang* was originally owned by Kloteraol Ngiraungiltekoi who bore the title *Tucherur*. Kloteraol Ngiraungiltekoi leased the land to a Japanese national named Nakasone and also gave the land as *ulsiungel* to Kliu Beouch, the mother of claimant Tomomi Watanabe. Finally, it is claimed that the land never became public land and that if it did become public land, it was wrongfully taken.

As both a superior title claim and as a claim for the return of public lands, the claim of Tomomi Watanabe fails for the following reasons. It is asserted that worksheet lots 40313, 40314, 40315, and 40316, together comprise Tochi Daicho 584 owned by Kloteraol Ngiraungiltekoi. This is not the case. Tochi Daicho 584 is blank. Thus, there is little basis to support the claim that the land was originally owned by Kloteraol Ngiraungiltekoi. Kloteraol's claim of ownership also conflicted with Barau Tucherur's claim of ownership to the same lot. It is apparent that, as between the two men, it was disputed as to who owned Tochi Daicho 584. Because there is insufficient proof that Kloteraol Ngiraungiltekoi owned the land or otherwise had sufficient authority to devise the same—as opposed to Barau Tucherur or the other claimants here—there is little basis upon which this Court can find that Kloteraol Ngiraungiltekoi owned the land or otherwise had authority to convey the land as *ulsiungel* to Kliu Beouch.

Additionally, worksheet lots 40313, 40314, 40315, and 40316 were also previously identified as one lot in the 1950's and designated as G-10. Neither Kloteraol Ngiraungiltekoi nor Kliu Beouch staked a claim for G-10 before the Palau District Land Office—only Barau Tucherur did so. Then, in 1971, Kliu Beouch sued Iblai Sasao over *Iteliang*, Tochi Daicho 579. *See*, Figure 2 above. Yet, Kliu did not do anything about G-10 that her daughter Tomomi now claims as *Iteliang*, Tochi Daicho 584. Then in 1974, Tomomi Watanabe herself prepared a Land Acquisition record for *Osare*, Tochi Daicho 583, also adjacent to G-10. She

did not then prepare a claim for neighboring G-10. It is inferred from Kliu and Tomomi's past conducts that they have no valid claim of ownership to G-10.

It is also noted that the statement of Rechuld was submitted to support Tomomi Watanabe's claim. *See*, Tomomi Watanabe Exhibit E. In the statement, Rechuld says that Kloteraol Ngiraungiltekoi was his maternal uncle who bore the title *Tucherur* and that he gave the land *Iteliang* as *ulsiungel* to Kliu Beouch. Even if that were true, Rechuld does not describe or otherwise identify the location of *Iteliang*, while G-10 is claimed by the other claimants as being *Ngerkeialked* or *Terekieu*. Thus, this Court cannot find it more likely true that G-10 is *Iteliang* which was given as *ulsiungel*, particularly when Kliu Beouch had already been determined to own *Iteliang*, Tochi Daicho 579, which is adjacent and west of G-10. *See*, Findings of Fact Nos. 16, 17, 18, and 19 as well as Figure 2 *supra*.

Because there is insufficient evidence to find that Kloteraol Ngiraungiltekoi owned G-10 in the first place, because there is insufficient evidence to find that G-10 is *Iteliang*, because Kliu Beouch and Tomomi Watanabe claimed lands adjacent to G-10 and could have claimed G-10 at that time but did not do so until much later in time, and because Kliu Beouch had already gained ownership to a neighboring lot called *Iteliang*, Tomomi Watanabe's claim through her mother Kliu Beouch fails both as a return-of-public-lands claim and as a superior title claim.

12. **Terekieu Clan**: The first claim for the clan was filed in 1974 with the Land

Commission. A second claim was filed on November 30, 1988 with the Land Claims Hearing Office. Terekieu Clan claims G-10 and *Osare* on separate grounds. As to G-10, it is claimed that it represents Tochi Daicho 584. Although the Tochi Daicho listing for lot 584 is blank, it is claimed that the land truly belongs to Terekieu Clan. As to *Osare*, it is claimed that the land originally belonged to Terekieu Clan but was taken by force and without just compensation and then registered as part of Tochi Daicho 591 under the Japanese Government.

Turning first to G-10, ownership of the land was disputed between people purporting to be chiefs or otherwise having control or authority over Terekieu Clan. Barau Tucherur, Kloteraol Ngiraungiltekoi, and Rechuld Tucherur all claimed to be chief *Tucherur*. They also claimed the G-10 area for themselves and otherwise tried to exert control over the land. During the Tochi Daicho registration from 1938-1941, the G-10 lot was likely identified as Tochi Daicho 584 but ownership and other details remained blank. Although Barau Tucherur, Kloteraol Ngiraungiltekoi, and Rechuld Tucherur were jockeying over ownership and control of the land, they all assert that they own G-10 through Terekieu Clan.

Then, while ownership of G-10 remained unregistered in the Tochi Daicho, in about 1943 or otherwise soon before World War II, G-10 somehow came to be owned by either a Japanese national, a Japanese government corporation, or the Japanese government. This change of ownership notwithstanding, the Tochi Daicho was not

amended to reflect the change.<sup>14</sup> Then, after World War II, that ownership likely vested in the Alien Property Custodian through the September 27, 1951 vesting order.<sup>15</sup> See Findings of Fact No. 6 regarding the vesting order.

The facts show that there are at least two ways that G-10 went from Terekieu Clan to a Japanese entity and then to the Trust Territory Government. First, Rechuld Tucherur purportedly leased the lot to Nakasone. A lessee, however, only has possessory but not ownership interest in property. Consequently, the leasehold interest is not likely the reason why ownership of the land became vested with the Alien Property Custodian.

The second explanation for how the land became public land is that Barau Tucherur purportedly sold the land to Hosino, a Japanese national, for 3,000 yen but only 2,000 yen was received. Hosino may have been acting for himself or for the Nambo Company. Either way, the Court finds that this is likely the reason why after World War II the land became considered public land.

<sup>14</sup> This is not an isolated incident. In at least one other instance, land owner Ngiraked sold his Tochi Daicho lots 870 and 871 before September 3, 1940 but the Tochi Daicho listings were not amended to reflect this change of ownership. See, “Decision” in *Katey O. Giraked, et al v. KSPLA*, LC/B 08-0184, 0187, & 0188 (Land Court 2014).

<sup>15</sup> After World War II, a schedule of lands listing lands owned by the Japanese was given to the United States Department of the Navy by the Japanese Government. See, *Id.* It is likely the case that the foreign ownership of G-10 was on this schedule of lands and that is why its ownership became vested with the Alien Property Custodian of the Trust Territory Government pursuant to the 1951 vesting order.

For the following reasons, the public land G-10 shall be returned to Terekieu Clan. While there is little doubt that Terekieu Clan originally owned the land—even those who were jockeying for control stake their claims through Terekieu Clan—there is reason to doubt whether Barau Tucherur validly sold the land. Ownership and control over the land—and Terekieu Clan in general—was much disputed before and after World War II. Barau Tucherur claimed to have sold G-10 to Hosino. Rechuld Tucherur claimed to have leased G-10 to Nakasone. Kloteraol Ngiraungiltekoi claimed to have given G-10 as *ulsiungel* to Kliu Beouch. Whatever the case may have been, the dispute between these persons was not resolved for a proper ownership registration to be listed in the Tochi Daicho. The only unintended beneficiary of this dysfunctional intra-clan debacle became the Trust Territory government.

In the end, although some compensation was paid by Hosino to Barau Tucherur, and assuming that Barau Tucherur had authority to sell the land in the first place and further assuming that such payment can be considered payment to Terekieu Clan, it was not full payment. The evidence shows that only 2,000 of the 3,000 yen was paid. As that was not payment in full, just compensation was not received by Terekieu Clan. Consequently, the land must be returned.

As to *Osare*, the Court finds it more likely than not that it became part of Tochi Daicho 591 listed under the Nanyo Takushoku Company which later became identified as Public Parcel No. 21. See, Terekieu Exhibit H. During the Japanese period and afterwards, Barau Tucherur,

Kloteraol Ngiraungiltekoi, and Rechuld Tucherur were vying for ownership and control over G-10. They, however, did not act the same regarding neighboring *Osare* which was immediately adjacent to and east of G-10. Additionally, Barau Tucherur and Rechuld Tucherur also made claims in the 1950's to Claim No. 127, the site of what is now Harris Elementary School. They, however, did not also lay claim to *Osare* that was part of Public Parcel No. 21. By the conduct of these earlier members—or claimed members—of Terekieu Clan, the Court finds that said clan does not own *Osare*.

13. **Koror State Public Lands Authority:**

Although KSPLA may have for years maintained lease lots on G-10, the land was, as explained above, previously taken from the original owner Terekieu Clan without just compensation. Accordingly, pursuant to Article XIII, Sec. 10 of the Constitution, G-10 must be returned.

On the other hand, it is more likely than not that *Osare* became part of Tochi Daicho 591, a land listed as owned by the Nanyo Takushoku Company in the Tochi Daicho and later identified as part of Public Parcel No. 21. Barau Tucherur and Rechuld Tucherur disputed ownership of G-10 and Claim No. 127 but did not also file claims for or otherwise fight over *Osare*.

It was only much later in time, in the 1970's and 80's, that claims were filed for *Osare* by Imerab Rengiil and Hanako Ngeltengat. As to Imerab Rengiil for Terekieu Clan, the actions of Barau Tucherur as to *Osare*, or more precisely, the lack thereof, undermines and disproves

Imerab's claim. As to Hanako Ngeltengat, insufficient evidence was provided to prove that Ibedul Telotongang Ngirchosarei owned the land in the first place. Additionally, insufficient evidence was provided to show that *Osare* was taken by force, coercion, or fraud, or without just compensation or adequate consideration. Therefore, *Osare* remains public land owned by KSPLA.

## V. Conclusion

For the reasons stated above, it is hereby determined as follows:

1. Terekieu Clan owns the G-10 lots, namely, worksheet lots 40313, 40314, 40315, and 40316.
2. KSPLA owns the *Osare* lots, namely, worksheet lots 40308, 40309, 40310, 40311, 40312, 40317, 40318, and 40318A.
3. The rest of the claimants, and those claiming through or under them, have no ownership interests in the foregoing lots.
4. Appropriate determinations of ownership shall issue forthwith consistent with this Decision.

**In the matter of ownership of land identified as Tochi Daicho lot 587 listed under Nanyo Takushoku Company, now depicted as worksheet lot 182-12045, called *Ebau* located in Iyebukel Hamlet, Koror State.**

**TROLII KARMELONG,  
TADAO ANDREAS,  
VALERIA TEMENGIL,**

vs.

**KOROR STATE PUBLIC LANDS  
AUTHORITY,**

**Claimants.**

LC/B 10-0032

Land Court  
Republic of Palau

Decided: June 6, 2014

Appearances:

Raynold B. Oilouch, Esq. for Valeria  
Temengil  
Debra Lefing, Esq. for KSPLA

The Honorable C. QUAY POLLOI, Senior  
Judge:

**I. INTRODUCTION**

This matter came to a hearing on May 8, 2014. Two witnesses testified for the claim of Valeria Temengil, these being the claimant herself and her older sister Akemi Anderson.

Four sets of documents were submitted as Temengil Exhibits 1 to 4. KSPLA did not present any witnesses but submitted 10 sets of documents as KSPLA Exhibits 1 to 10. Written closing arguments were due on June 3, 2014 after which the matter came under advisement. Having considered all of the evidence and submissions, the Court makes the following factual findings, conclusions of law, and determination of ownership.

**II. FINDINGS OF FACT**

Based upon the preponderance of the evidence, the following facts are found:

1. The land at issue is now identified as worksheet lot 182-12045. Traditionally, however, the land was called *Ebau* and was the seat of the chief title *Mad-ra-Ebau*, successor to chief *Rangem* of Tmng Clan. *Ebau* was originally owned by Tmng Clan.
2. The chief of Tmng Clan is *Rangem*, and his counterpart is *Uodelchad-ra-Tmng*. During the Japanese period, Miskol was *Rangem* and his sister Omrekongel was *Uodelchad-ra-Tmng*. Omrekongel had a son named Trolii. Together, *Rangem* Miskol and *Uodelchad-ra-Tmng* Omrekongel, as senior strong members of Tmng Clan, gave out the land *Ebau* to Trolii in 1930 as his individual property.<sup>1</sup>
3. From 1938 to 1941, the Tochi Daicho land registration process took place in Palau.

<sup>1</sup> See, Temengil Exhibit 1, Statement of Trolii before D.W. LeGoullon which was witnessed and thus validated by Miskol, Omrekongel, and Barau Tucherur.

4. Before 1940, Trolii leased out *Ebau*. In or before 1940, Japanese nationals<sup>2</sup> sought to purchase *Ebau*. Trolii refused to sell. The Japanese nationals then turned to Trolii's uncle *Rangem Miskol*.
5. *Rangem Miskol*, who was mentally slow and did not have any children, was coerced into agreeing to the sale otherwise the land would be taken without compensation, as was the case for the land *Ollaol* there in Iyebukel. The purchase price for *Ebau* was 500 yen in the form of a Japanese Postal Savings Bond. No direct payment was given to *Rangem Miskol* or his nephew and landowner Trolii. As a result of this transaction, the land became listed as Tochi Daicho 587 owned by the Nanyo Takushoku Company.
6. From 1944 to 1945, World War II directly affected Palau.<sup>3</sup> After the war, Trolii's wife Dirraklei and her relatives farmed on *Ebau*.
7. On September 27, 1951, ownership of all lands previously owned by Japanese nationals, Japanese government corporations, or the Japanese government was vested in Alien Property Custodian of the Trust Territory Government. This is how *Ebau* became considered public land.
8. On July 26, 1954, at age 40, Trolii filed his claim for *Ebau* as Claim No. 40 before the Palau District Land Office.
9. On November 27, 1954, D. W. LeGoullon, District Land Title Officer, issued a Notice of Hearing for *Ebau* and stated that the hearing date would be December 8, 1954.
10. On or after December 8, 1954, D. W. LeGoullon issued his decision in which he found that *Ebau* belonged to Tmng Clan before it was taken by the Japanese government in 1940 after payment of 500 yen in the form of Postal Savings. LeGoullon recommended that *Ebau* be released to the Trust Territory of the Pacific Islands.
11. In the mid to late 1950's, a wooden *bai* was built on *Ebau* at the request of Rechesengel which request was granted by Trolii.
12. On January 8, 1957, LeGoullon issued Determination of Ownership and Release No. 40 awarding *Ebau* to the Trust Territory of the Pacific Islands.
13. In the 1960's or early 1970's the wooden *bai* on *Ebau* had deteriorated. The *bai* was

<sup>2</sup> It is unclear whether the Japanese nationals were private persons or government representatives. The limited evidence suggests that they were government representatives. That is, the payment made was in the form of a Japanese Postal Savings Bond which appears to be a government savings bond. Also, the ownership registration is in the name of Nanyo Takushoku Company which could well be a government corporation. Finally, D. W. LeGoullon's November 27, 1954 Notice of Hearing states that "[t]he tract is on record as land formerly belonging to the Japanese Government."

<sup>3</sup> This fact is found in scholarly publications such as James E. Davis & Diane Hart, *Government of Palau: A Nation that Honors Its Traditions* (2002); see also, Elizabeth D. Rechebei & Samuel F. McPhetres, *History of Palau: Heritage of an Emerging Nation*, Ministry of Education (1997).

dismantled and used as firewood by Trolii. *Ebau* was then vacant and unused for years.

14. On June 12, 1975, 61-year old Trolii filed his claim for *Ebau* before the Land Commission.
15. Before 1980, Trolii authorized his daughter Valeria Temengil to build her house on *Ebau*.
16. On October 9, 1980, John O. Ngiraked, as Chairman of the Palau Public Lands Authority, issued a Land Use Permit for Valeria Andreas to build a dwelling house on *Ebau*. Valeria Andreas is Valeria Temengil.
17. In 1981, Valeria Temengil built her house on *Ebau*.
18. On November 29, 1988, 74-year old Trolii filed his claim for *Ebau* before the Land Claims Hearing Office. In this claim, Trolii stated in paragraph 13 that Valeria Temengil would inherit the land.
19. On November 26, 1989, Trolii died at 75-years old.
20. On August 25, 2006, Valeria Temengil filed her own claim for *Ebau*.
21. On May 8, 2014, over seven years after Valeria Temengil filed her claim and in less than 4 hours, the claims were finally heard before this Court.

### III. CONCLUSIONS OF LAW

1. *Ebau* is considered public land. The only issue is whether this public land should be

returned.<sup>4</sup> A party who filed a claim for the return-of-public-lands concedes that the land became public land. *See, Palau Pub. Lands Auth. v. Tab Lineage* 11 ROP 161 (2004). To prevail on the claim, the party must show that: (1) he or she is a citizen who filed a claim by January 1, 1989; (2) that he or she is either the original owner or one of the original owner's proper heir; and (3) the land at issue became public land through a wrongful taking (*i.e.*, force, coercion, or fraud, or without just compensation, or adequate consideration). *See, 35 PNC §1304(b)*. Under this legal standard, the government does not have the burden to prove how the land became public land. Instead, the burden is on the private claimant to prove the elements listed above. *See, Masang v. Ngirmang*, 9 ROP 125, 128 (2002).

2. Trolii Karmelong filed his claim on November 29, 1988. It is a timely-filed claim. KSPLA did not dispute his citizenship, and the Court finds and concludes that he is a Palauan citizen.
3. Although Tmng Clan previously owned *Ebau*, Trolii was the original owner of the land when it was taken during the Tochi

---

<sup>4</sup> Valeria Temengil's claim that was filed on August 25, 2006 could be considered a superior title claim. However, at the hearing she did not pursue or preserve a superior title claim. Her counsel in his written closing readily admitted that the land is public land. This being the case, the Court will not make any superior title analysis nor will it address any KSPLA defenses against a superior title claim for none was pursued or preserved by Valeria Temengil or her counsel.

Daicho registration process. Specifically, in 1930, *Rangem* Miskol and *Uodelchad-ra-Tmong* Omrekongel, as strong senior members of Tmong Clan, gave *Ebau* to Trolii. Thus, immediately before the Tochi Daicho registration in 1938-1941, Trolii was the original owner of *Ebau*.

4. Trolii did not want to sell *Ebau*. His uncle *Rangem* Miskol was then coerced to sell *Ebau* for 500 yen in the form of a Postal Savings Bond. This is how *Ebau* became registered as Tochi Daicho 587 listed under Nanyo Takushoku Company. Neither Trolii nor his uncle *Rangem* Miskol received actual yen as payment. Any value of the postal savings bond, if it did have value, did not inure to benefit Trolii.
5. Trolii continued to claim *Ebau* in the 1950's before D. W. LeGoullon and in the 1970's before the Land Commission. Trolii also filed a claim for public land with the Land Claims Hearing Office on November 29, 1988. In paragraph 13 of this claim, Trolii stated that Valeria Temengil would inherit the land. The following year, Trolii died.
6. Trolii's daughter Valeria Temengil filed her own claim on August 25, 2006.
7. The phrase "proper heir" is not to be strictly read in the context of intestacy law. It could simply mean that a claimant "show a true relationship to the original landowner." *Markub v. Koror State Pub. Lands Auth.*, 14 ROP 45, 49 (2007). Here, the original landowner is Trolii who stated

that Valeria Temengil would inherit the land. Valeria Temengil, as a daughter of Trolii, has a true relationship to the original landowner Trolii. Therefore, Valeria Temengil is a proper heir for purposes of 35 PNC §1304(b).

8. Because Miskol was coerced to sell *Ebau*, because Miskol was not the actual owner, because the actual owner Trolii did not want to sell and did not receive any payment, and because any value of the Postal Savings Bond did not inure to benefit Trolii, the land must be returned. Because claimant Valeria Temengil is a proper heir of the original owner Trolii, the land shall be awarded to Valeria Temengil.

#### IV. DETERMINATION

For the reasons stated above, Tochi Daicho 587, Worksheet Lot 182-12045, land called *Ebau*, is hereby determined to be owned by Valeria Temengil. An appropriate determination of ownership shall issue forthwith consistent with this Decision.