

Orak v. Tamael, 10 ROP 105 (2003)
JAMES ORAK,
Appellant,

v.

**HARRY TEMAEL and TELUNGALK
RA EBILTULIK YAISANG NGIRCHORACHEL,
Appellees.**

**TELUNGALK RA EBILTULIK YAISANG NGIRCHORACHEL,
Appellee/Appellant,**

v.

**HARRY TEMAEL,
Appellee.**

CIVIL APPEAL NO. 02-16
LC/B 01-521

Supreme Court, Appellate Division
Republic of Palau

Decided: May 6, 2003¹

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Counsel for Orak: David J. Kirschenheiter

Counsel for Tamael: No appearance

Counsel for Telungalk ra Ngirchorachel: J. Roman Bedor, T.C.

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; KATHLEEN M. SALII, Associate Justice.

Appeal from the Land Court, the Honorable J. UDUCH SENGEBAU SENIOR, Associate Judge, presiding.

PER CURIAM:

This appeal arises from a determination-of-ownership proceeding concerning Tochi Daicho Lot 177, a land known as Ngeruek, located in Ngermid Hamlet, Koror State.² The lot is

¹Upon reviewing the briefs and record, the panel finds this case appropriate for submission without oral argument pursuant to ROP R. App. Pro. 34(a).

²Cadastral Lot No. 011 B 11 as shown on BLS Worksheet Map No. 011 B 01.

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listed under the name of Mengesbuuch, who died intestate in either 1944 or 1945. The Land Court awarded ownership of Ngeruek to “Telungalk ra Ebiltulik Yaisang Ngirchorachel and Harry Tamael.” We affirm.

BACKGROUND

The land known as Ngeruek came before the Land Court for a determination-of-ownership hearing on December 18, 2001. Three claimants made appearances at the hearing. Chief Recheyungel James Orak entered an appearance on behalf of Yungel Lineage. Orak testified that Ngermid Hamlet, where the land Ngeruek is located, has historically been divided into two villages, Ngermelei and Uchelkeyukl. He claimed that the land Ngeruek is located in Uchelkeyukl village and has always belonged to Yungel Lineage which is part of Uchelkeyukl Clan. Orak contended that Mengesbuuch, the person listed in the Tochi Daicho as the owner of the parcel, could not have owned this land because she was from Badureang Clan on the Ngermelei village side of Ngermid Hamlet. He maintained that Mengesbuuch was listed as the owner in the Tochi Daicho only because the people of Yungel Lineage did not know she had put her name on the land.

Alfonso Diaz entered an appearance on behalf of the children of Yaisang, the daughter of Mengesbuuch. Diaz maintained that the Tochi Daicho correctly listed Mengesbuuch, his maternal grandmother by way of adoption, as the owner of the land. He asserted that Mengesbuuch had two adopted children, his mother Yaisang and Ngirturong. Diaz contended that Ngirturong passed away before Yaisang, which left Yaisang as the only surviving child of Mengesbuuch. Accordingly, ownership of the land passed to her alone.

Harry Tamael entered an appearance ¶107 on his own behalf, claiming the land Ngeruek as his individual property. He asserted that his father, Tamael Ngirchorachel, was the son of Yaisang but had been adopted by Mengesbuuch. As a result of the adoption, although Tamael was Yaisang’s natural son, he was considered her brother. Harry asserted that the land was his father Tamael’s and passed to him upon Tamael’s death.

The Land Court found that the Tochi Daicho listed Mengesbuuch as the individual owner of the land and that Orak failed to prove by clear and convincing evidence that the listing was incorrect. The court found that Mengesbuuch adopted Yaisang, Ngirturong, and Yaisang’s natural son Tamael. The court determined that Mengesbuuch died intestate in 1944 or 1945, prior to the enactment of an intestacy statute, and that there was no evidence of an eldecheduch for Mengesbuuch. The court concluded that in the absence of an applicable intestacy statute and in the absence of contrary evidence regarding custom, a decedent’s land passes to the decedent’s children. Representatives of Mengesbuuch’s children Yaisang and Tamael made claims, and the Court granted the property to the Telungalk ra Ebiltulik Yaisang Ngirchorachel and to Tamael’s son, Harry Tamael. Alfonso Diaz, representing Telungalk ra Ebiltulik, and Orak appeal separately.

DISCUSSION

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1. Appeal of Orak

Orak raises two claims of error. His first claim is that the Land Court denied him due process by refusing to allow him additional time to present witnesses. This claim is based on the following colloquy:

The Court: [D]o you have any witnesses that can explain that this was actually Yungel property and Mengesbuuch just used it to farm on and then it ended up being listed under her name in the Tochi Daicho?

Orak: Yes, but today I can't guarantee that I can bring them here.

The Court: [Y]ou've know about this hearing since September 6.³ That's when you filed your claim. Uh, you know, this is a new Court. I don't, uh, when you show up, I don't say, oh, never mind, let's postpone it. When you come to court, you're ready with your witnesses, with your documents. If you want a fast resolution, you should come prepared to proceed. So, if you're not going to present your witnesses today, I'm not going to allow you to bring them at another time.

Orak does not maintain that the Land Court failed to notify him of the hearing, nor does he maintain that he was denied a meaningful opportunity to be heard. See *Ngerketiit Lineage v. Seid*, 8 ROP Intrm. 44, 47 (1999) ("Procedural due process always guarantees notice and an opportunity to be heard."). Rather, his claim is premised on the fact that he failed to take full advantage of that opportunity by neglecting to bring all the evidence he wanted to present in the hearing with him. Orak was not due any more process than what was provided him.

¶108 Orak's second claim of error is that the Land Court erred in finding he failed to establish that the Tochi Daicho listing of Mengesbuuch as the owner of the land Ngeruek was incorrect. Orak maintains that he presented evidence that Mengesbuuch was from Badureang Lineage on the Ngermelei village side of Ngermid Hamlet, but that the land at issue is located on the opposite side of Ngermid Hamlet, in Uchelkeyukl village. He asserts that there was no explanation of how a member of a clan from a different village could come to own land located in Uchelkeyukl village. Diaz acknowledged that Mengesbuuch was from Badureang Lineage in Ngermelei. He testified that Mengesbuuch's mother, Dum, married a man who bore the title Recheyungel from Uchelkeyukl Clan and that was how the land came into Mengesbuuch's possession.

Given the quantum of proof necessary to rebut a Tochi Daicho listing and the standard we apply in reviewing a lower court ruling that a litigant failed to rebut the Tochi Daicho, Orak has a very steep hill to climb in order to convince us to overturn the Land Court's finding. A listing of ownership in the Tochi Daicho is presumed to be accurate, and a party seeing to rebut that listing must present the Land Court with "especially clear and convincing evidence." *Llecholch v. Lawrence*, 8 ROP Intrm. 24, 24 (1999). Land Court findings are reviewed for clear error.

³The determination-of-ownership hearing was held on December 18, 2001.

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Rurcherudel v. PPLA, 8 ROP Intrm. 14, 15 (1999). We do not believe Orak has carried this heavy burden.

Essentially, Orak asserts that the other claimants failed to establish that Mengesbuuch was the individual owner after he had raised questions about her ability to own land in a village other than the village of her clan. However, raising a question about how Mengesbuuch came to own Ngeruek is not the same as establishing by especially clear and convincing evidence that she did not in fact own it. The other claimants were not responsible for proving the accuracy of the Tochi Daicho; the burden to rebut the Tochi Daicho was Orak's responsibility to shoulder. While it is not clear precisely how Mengesbuuch came to own the land, Orak did not establish by especially clear and convincing evidence that she did not own it, nor did he establish that she could not have owned it. For instance, Orak did not submit any direct evidence indicating that the land was given to someone other than Mengesbuuch, nor did Orak submit any expert evidence establishing Mengesbuuch could not have come to own the land under law or custom. The Land Court's finding that Orak failed to rebut the Tochi Daicho is not clearly erroneous.

2. Appeal of Diaz

Diaz appeals, representing the claims of Telungalk ra Ebiltulik Yaisang Ngirchorachel. Diaz maintains that the Land Court erred in naming Temael's son, Harry Temael, as co-owner of the land with him. Although Diaz appears not to challenge the Land Court's conclusion that upon Mengesbuuch's death in 1944 or 1945 the land passed to her three surviving children, Temael, Yaisang, and Ngirtuorng,⁴ he does question the conclusion that the land subsequently passed to the heirs of both 109 Temael and Yaisang.

Diaz raises a number of arguments on appeal, none of which were presented to the Land Court, and the principal one of which—that the intestate succession statute does not apply to jointly-owned land—is simply wrong. *See Wally v. Sukrad*, 6 ROP Intrm. 38, 40 (1996). Most fundamentally, he offers no legal theory as to why this Court, or the Land Court on remand, should ignore Temael's interest in the land and award the land solely to the heirs of Yaisang. Since Diaz and Harry Temael were the only claimants to the respective interests of Yaisang and Temael, the Land Court decision to award the land to both of them appears to us inevitable. *See Temaungil v. Ulechong*, 9 ROP 31, 34 (2001).⁵ Accordingly, the Land Court's Adjudication and Determination is affirmed.

⁴At the hearing before the Land Court, Diaz contended that the court should not award ownership to Harry Temael because Mengesbuuch had not adopted his father, Temael. The Land Court disagreed, finding that Mengesbuuch did adopt Temael and, thus, Temael succeeded to ownership of the land along with Mengesbuuch's other children upon her death. Diaz has not argued that this finding is clearly erroneous.

⁵Likewise, the Land Court was correct in concluding that the failure of any person to file a claim as Ngirtuorng's heir constituted a waiver of his interest in the land. *See Temaungil*, 9 ROP at 34 n.6.