

Seventh Day Adventist Mission of Palau, Inc. v. Eلسau Clan, 11 ROP 191 (2004)
THE SEVENTH DAY ADVENTIST MISSION OF PALAU, INC.,
Appellant,

v.

ELSAU CLAN,
Appellee.

CIVIL APPEAL NO. 02-051
Civil Action No. 01-286

Supreme Court, Appellate Division
Republic of Palau

Argued: March 26, 2004

Decided: July 7, 2004

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Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Clara Kalscheur

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; R. BARRIE MICHELSEN, Associate Justice; KATHLEEN M. SALII, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable LARRY W. MILLER, Associate Justice, presiding.

SALII, Justice:

Appellant Seventh-Day Adventist Church (“the Church”) filed this appeal challenging the trial court’s ruling that the Church had no continuing right to use the land known as Olisukl located in Ngerchol Hamlet in Peleliu (“contested property” or simply “property”). For the reasons set forth below, we affirm the judgment of the trial court.

BACKGROUND

Appellee Eلسau Clan sought to enjoin the Church from constructing a new church on the contested property. It is undisputed that the Clan owned the property in the early 1960s. On February 12, 1961, male and female title holders and other members of the Clan signed a deed conveying property to the Church. However, the deed concerned ⌞193 property that was subsequently determined not to be owned by the Clan. A second deed, dated September 24, 1965, was drafted which sought to convey the contested property. The trial court found the second deed to be deficient as well. Although the 1965 deed contained eight signatures, none of those signatures belonged to a member of the Clan. In light of the patent defects in the deeds, the trial court found that the deeds were not sufficient to divest the Clan of ownership.

Having concluded that the Church could not rely on the deeds to support its claim to the contested property, the trial court determined that the Church's contentions were the equivalent of a claim for adverse possession. However, the claim for adverse possession had its own deficiencies. First, because the use of the land resulted from a request for a use right from a Clan member belonging to the Church, the trial court found that the request defeated an adverse possession claim by negating the element of hostility. Second, the trial court found that the Church did not demonstrate that the permissive use of the property later became hostile to establish a claim for adverse possession.

The trial court determined that Elsau Clan remained the owner of the contested property and requested additional briefing on the issues of whether an injunction should issue barring the Church from further use of the land as well as whether the Clan should be awarded nominal damages for the Church's initial efforts to construct a new church. The evidence submitted to the trial court showed that the Church dismantled the old church building sometime in 1997. From time to time over the next few years, Church members returned to the site to cut the grass, but the acquisition of materials to build a new church building did not begin until October, 2001. Based on that information and the customary evidence presented, the trial court determined that the Church's right to use the land ended with the dismantling of the old church building, and any right to rebuild required renewed permission from the Clan. The Church appealed the judgment of the trial court.

ANALYSIS

Appellants initially claim that the doctrine of adverse possession based on the 20-year statute of limitations bars the Clan's action to recover the contested property from the Church. Title through adverse possession may be established either pursuant to the common law or statutory provisions. *Striefel v. Charles-Keyt-Leaman*, 733 A.2d 984, 989 (Me. 1999). Because there is no Palau statute establishing a claim of title through adverse possession, the common law applies.¹

Common law adverse possession presents a mixed question of law and fact. *Id.* at 989. To gain title by adverse possession, a party must show, by clear and convincing evidence, an actual, open, visible, notorious, continuous, and hostile possession under a claim of right or title for the requisite period of time. *Andres v. Desbedang Lineage*, 8 ROP Intrm. 134, 135 (2000). All elements are equally necessary to establish adverse possession; the claim will fail in the absence of any one element. *Id.* A party claiming title by adverse possession bears the burden to **¶194** affirmatively prove each element of adverse possession. *Striefel*, 733 A.2d at 988. The Church concedes that Ngirangesil, a member of the Church, asked Kelbid, the mother of Louch Keibo Ridep of the Clan, for use of the property as a church site. In addition, the Church acknowledges that four Clan members witnessed the 1965 deed. The four members included the

¹The court is obliged, in the absence of Palauan statutory or decisional law and, in applicable cases, principles of Palauan customary law, to follow the rules of the common law as articulated by the Restatement. 1 PNC § 303; *see also Renguul v. Airai State Pub. Lands Auth.*, 8 ROP Intrm. 282, 284 (2001).

Seventh Day Adventist Mission of Palau, Inc. v. Elsau Clan, 11 ROP 191 (2004) female title bearer of the Clan and three male title bearers. These instances of the Clan's acquiescence to the Church's use of the land indicate that the use was permissive.

The original permissive use of the land raises the presumption that continued use is permissive, rather than hostile, until the contrary is affirmatively shown. *Ilebrang Lineage v. Omtilou Lineage*, 11 ROP 154, 157 (2004); *Anderson v. Worldwide Church of God*, 661 F. Supp. 1401, 1403 (D. Minn. 1987). If the use of the property of another was permissive in the beginning, that use can be changed into hostile and adverse use only by the most unequivocal conduct of the user; evidence of adverse use must be strictly construed against the adverse user, and every reasonable intendment should be made in favor of the true owner. 3 Am. Jur. 2d *Adverse Possession* § 300 (1986). Despite the Clan's clear showing of a permissive use, the Church has failed to come forward with facts to rebut the presumption. As a result, the Church has failed to demonstrate the required hostility to trigger the 20-year statute of limitations under the doctrine of adverse possession. See *Rebluud v. Fumio*, 5 ROP Intrm. 55, 56 (1995) (concluding that occupancy and possession that were not sufficiently hostile or adverse to satisfy requirements of adverse possession did not commence running of 20-year limitations period); *Espangel v. Tirso*, 2 ROP Intrm. 315, 319 (1991) (holding that possession of land was not "hostile" for purposes of adverse possession, inasmuch as a use right had been given to them).

The Church next contends that although Clan members did not execute the 1965 deed, the Clan consented or acquiesced to the execution of the deed. Specifically, the Church argues that the deed conveyed the land to the Church because the Clan's male and female title bearers, including two strong senior Clan members, acquiesced to the conveyance. Thus, although the 1965 deed was invalid at its inception, the Church asserts that because senior strong members of the Clan were aware of the deed, the Clan should be deemed to have authorized and ratified the 1965 deed.

The Church cites to two cases as support for its assertions, *Ngerketiit Lineage v. Ngerukebid Clan*, 7 ROP Intrm. 38 (1998) and *Thomas v. Trust Territory*, 8 TTR 40 (App. Div. 1979). Neither case is on point. In *Ngerketiit Lineage*, this Court recognized that

[t]here is a point where, because of the passage of time since a transfer, and in light of evidence that lineage members were aware of it—either directly or through the open and obvious use of the property by the transferee—the court may assume that the proper consent was given.

Ngerketiit Lineage, 7 ROP Intrm. at 44. Similarly, in *Thomas*, the Trust Territory High Court appellate division held that the chief who signed a deed decades before is presumed to have the consent of the clan where there was no evidence of any attempt by the clan to rescind the transfer. *Thomas*, 8 TTR at 44-45. Neither case cited by Appellant lends support to its argument in the **¶195** instant case, where *no* Clan members signed the deed and where the Clan attempted to rescind the transfer.

In an attempt to bolster its argument that the Clan ratified the 1965 deed, Appellants cite to the principle stated in 23 Am. Jur. 2d *Deeds* § 109 that a grantor in a deed by any course of

Seventh Day Adventist Mission of Palau, Inc. v. Elsau Clan, 11 ROP 191 (2004) dealings by which the grantee is induced to assert ownership and incur obligations estops himself from asserting that the deed was invalid for want of *delivery*. However, this reference is not helpful as neither party has alleged a lack of delivery. As such, there is no basis for holding that a defective deed could be ratified simply because several members of a clan knew of its existence.

Lastly, Appellants argue that the Church should be allowed to use the property until such time as it finds another property on which to relocate the church. In making its determination that any right the Church possessed to use the contested property ended with the dismantling of the old church building, the trial court took into account the clear and consistent tenor of the expert testimony concerning custom. The trial court's findings as to a custom's terms, existence, or nonexistence are reviewed for clear error. *Ngeribongel v. Gulibert*, 8 ROP Intrm. 68, 70 (1999). This Court may not "reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence. The trial judge's analysis and consideration of the facts will not be disturbed on appeal unless clearly erroneous." *Remoket v. Omrekongel Clan*, 5 ROP Intrm. 225, 231 (1996) (quoting *Ngirmang v. Orrukem*, 3 ROP Intrm. 91, 92 (1992)). Thus, "where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Ngiramos v. Dilubech Clan*, 6 ROP Intrm. 264, 266 (1997) (citations and internal quotations omitted). Based as it was on expert testimony, the trial court's finding that Palauan custom in this case dictates that the Clan remained in control of its land is not clearly erroneous.

For the foregoing reasons, we affirm the judgment of the Trial Division.