Kotaro v. Ngirchechol, 11 ROP 235 (2004)

ZACHEUS KOTARO,
Appellant,

v.

APOLONIA NGIRCHECHOL,
Appellee.

CIVIL APPEAL NO. 03-048
Civil Action No. 02-196

Supreme Court, Appellate Division
Republic of Palau

Argued: July 7, 2004
Decided: September 22, 2004

Counsel for Appellant: Mark Doran

Counsel for Appellee: Raynold B. Oilouch

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; ROSE MARY SKEBONG, Associate Justice Pro Tem.

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

MILLER, Justice:

Zacheus Kotaro has appealed an order in aid of the default judgment entered in this case. He now raises issues that his current appellate counsel concedes were not raised below. Because he has thereby forfeited consideration of those issues, we affirm.
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FACTUAL BACKGROUND

Apolonia Ngirchechol, Plaintiff in this case, sued Zacheus Kotaro ("Kotaro") to enforce the terms of an agreement or, alternatively, to obtain a monetary judgment for breach of that agreement. Her complaint alleged that five of the seven children of Kotaro Kubarii granted her a written option to buy specified real property. They received $60,000 as consideration for the option–provided nevertheless that if it turned out that the optioners did not hold good title to that realty, they were obligated to return the option price with an additional sum representing 18 percent interest per annum until repayment. The agreement allowed for a five-year grace period for the return of the funds.

As security to insure repayment of the option money, those five children as well as

another brother[1] also executed a second agreement involving another parcel (Metengal) owned by all seven children of Kubarii. This second agreement, which recited it was a "conditional deed," purported to convey Metengal to Plaintiff but further stated that the conveyance may be voided "if the grantors have performed their duties and obligations to grantee set forth in the option agreement." Plaintiff further alleged that ultimately the children were held not to own the optioned property and that during the five-year grace period they neither returned any of the $60,000 nor paid any interest then due pursuant to the option agreement.

Although five brothers and sisters signed the written option, and six of the seven siblings signed the conditional deed, Plaintiff only sued Kotaro. He failed to respond to the complaint, and the Clerk of Courts noted his default. Plaintiff then moved for default judgment asking that the Court either award Metengal to her, or alternatively to award an amount of approximately $125,300 in compensation for breach of the option agreement. (The damages requested were a combination of the option money, accrued interest, attorney's fees, and costs.) The Court's default judgment only granted Plaintiff's monetary request.

Plaintiff's first motion for an order in aid of judgment was filed in October 2002. She asked that the Court transfer Metengal to her to satisfy the judgment. Kotaro was subpoenaed to the hearing on that motion, which was held in November 2002, but no transcript was made part of this appeal. The Court denied the motion, and ordered the parties "to further explore possible options for satisfaction of the judgment."

Plaintiff renewed the motion in January 2003, and suggested once again that a method of satisfaction of the judgment would be to transfer Metengal to Plaintiff. At the request of Defendant, who was acting *pro se*, the matter was continued through June 2003 to allow Defendant "to make good faith efforts to attempt to sell the property at issue [Metengal] herein in order to satisfy the judgment."

June passed without any payments on the judgment and, in July 2003, Plaintiff reasserted her motion for an order in aid of judgment, stating that "Plaintiff feels that it is now time for the Court to simply transfer title of Metengal land to Plaintiff in lieu of monetary judgment, which Defendant obviously cannot pay. The transfer of ownership of the land is certainly within the ⊥237 Court's power to do so." The hearing was held in October 2003, fourteen months after the default judgment, and nearly nine years after Defendant received the $60,000 at issue. From the resulting order it appears that a contested hearing was held, but no transcript was made for this appeal. Defendant, still acting *pro se*, presented a number of arguments. It can be gleaned from the subsequent court order that among his objections were that Plaintiff "rejected offers from third parties to purchase the property" and "stated his concern about his ability to convey title to the property at issue." These objections were overruled and the Court stated "that Plaintiff is entitled to enforce the terms of the conditional deed in lieu of seeking payment of the default judgment."

This appeal followed. Kotaro, now represented by counsel, offers a series of arguments flowing from the proposition that the conditional deed amounts to a mortgage that is subject to

[1]We are informed that yet another brother, Rockefeller Kotaro, did not sign either document.

the Mortgage Act of 1981, 39 PNC §§ 601 *et seq.*

DISCUSSION

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, even if it concerns a matter of constitutional law. *Tell v. Rengiil*, 4 ROP Intrm. 224 (1994). We have repeatedly stated the general rule that parties cannot seek review of alleged errors of the trial court when they made no objection to the Court's actions at the time. *See, e.g., In re Rengiil, 8 ROP* Intrm. 118 (2000); *Otobed v. Ongrung*, 8 ROP Intrm. 26 (1999); *Ngiraked v. Media Wide Inc*., 6 ROP Intrm. 102 (1997).

Our decision in *Tell* recognized two exceptions to this rule.[2] First, we may address an issue not raised below "to prevent the denial of fundamental rights, especially in criminal cases where the life or liberty of an accused is at stake." 4 ROP Intrm. at 226. Second, "when the general welfare of the people is at stake," we have discretion "to consider the public good over the personal interests of the litigants." *Id*.; *see, e.g., ROP v. Airai State Pub. Lands Auth.*, 9 ROP 201 (2002) (considering waived issue in case involving public funds).

Neither of these exceptions are applicable here. As in *Tell*, Kotaro "appeals as a civil litigant, not a criminal defendant, and neither his life, his liberty, nor any fundamental right is at stake." The question whether Kotaro could have invoked the protections of the Mortgage Act does not implicate any fundamental right, nor does it affect "the general welfare of the people." While we do not question the importance to him of his interest in the land at issue, the ⊥238 forfeiture rule applies equally to land cases and indeed serves broader public interests:

> The importance of the rule, particularly in land litigation, is evident. 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.

Ngerketiit Lineage v. Ngerukebid Clan, 7 ROP Intrm. 38, 43 (1998) (collecting cases). We therefore decline to address Kotaro's arguments concerning the applicability of the Mortgage Act.

Before concluding, however, we note one important limitation on our decision today. We were informed at oral argument that Kotaro's siblings have filed a separate action asserting that

[2]In addition to these exceptions, the strict application of the forfeiture rule is tempered by a number of other considerations that are reflected in this Court's rules. For instance, subject matter jurisdiction of the trial court can never be waived. ROP R. Civ. P. 12(h)(3); *Gibbons v. Seventh Koror State Legislature* , 11 ROP 97, 103 (2004). This Court has also indicated that as part of its obligation to provide plenary review of grants of summary judgment pursuant to ROP R. Civ. P. 56, it will consider a newly raised argument when it concerns purely a matter of law and relies solely upon uncontested facts admitted in the trial court. *ROP v. S.S. Enters., Inc* ., 9 ROP 48 (2002). Here, there is no question of the trial court's subject matter jurisdiction, and, given the absence of any transcript of the proceedings below, we are in no position to assess whether there is a factual foundation for Kotaro's argument, much less to say that it is uncontested.

their interests in the property were improperly extinguished in that they were not named as parties to this case. With that in mind, it is appropriate to emphasize that the issues raised in that litigation are not before us today and that our affirmance of the order below relates solely to the interest of Kotaro, who was named as a party and who, as we have found, has forfeited his challenges to that order by failing to raise them below.

CONCLUSION

For all of the reasons set forth above, the order in aid of judgment is affirmed.

MICHELSEN, Justice, concurring:

All of what my colleagues have said is true, but only after the orders appealed from are correctly characterized as to their jurisdictional limit. In particular, the second order in aid of judgment obtained by Appellee instructs the Land Court to issue a certificate of title to her and purports to extinguish in this litigation the ownership rights of persons who are not parties to this case. By its own terms, such an order is plain error. My colleagues do not suggest otherwise, but believe that since only Kotaro is a party, we need only review the orders as to his rights. I agree, but such a review begins with a consideration of the jurisdictional boundaries of these orders, notwithstanding their expansive language. Plain error is present, and we are not out of line to characterize it as such. Once the permissible scope of the orders has been ascertained, I would then address the question of whether Appellant's appeal of those orders, so construed, has any merit.

In this case, five and six persons respectively signed the option agreement and the conditional deed. Another co-owner of Metengal did not sign either document. Yet the Plaintiff chose to make Kotaro the only defendant in this case, which means that issues concerning the rights and responsibilities of his siblings were not before the Court. "[O]ne becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend." *Murphy Bros. v. Michetti Pipe Stringing*, 119 S. Ct. 1322, 1327 (1999). Failure to effect service in accordance with ROP R. Civ. P. 4 means that the Court has not acquired personal jurisdiction over unserved persons. *Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986).

Comment (a) to Section 34 of the Restatement (Second) of Judgments states in pertinent part:

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> A person becomes a party to an action by being designated as such and becoming subject to the jurisdiction of the court. A plaintiff subjects himself to the jurisdiction of the court by commencing the action. Other parties may subject themselves to the court's jurisdiction by making an appearance or participating in the action in a manner that has the effect of an appearance. In the absence of such a submission to the jurisdiction of the court, to become a party a person must be served with process, or its equivalent, issuing from a court with a valid jurisdictional nexus to the action.

Comment (a) to Section 43 of the same Restatement explains, "[w]hen an action has been brought concerning rights to property, the judgment determines the extent of the property interests of each person whose claims are within the scope of the adjudication *and who is a party to the litigation*" (emphasis added). Because the brothers and sisters of Kotaro have not been served, the Trial Division did not acquire jurisdiction concerning their property rights.

The wording of the statute authorizing orders in aid of judgment affecting land, 14 PNC § 2110, comports with the above principles. In part it provides that "any interest [in land] *owned solely by a judgment debtor, in his own right*, may be ordered sold or transferred under an order in aid of judgment [subject to other findings of fact by the court]" (emphasis added). Here, the only "judgment debtor" is Kotaro, and the only interest "owned solely" by him is an undivided interest in the property known as Metengal.

At oral argument, counsel for Appellee explained that Kotaro was the only one served because he was "representing" the others. Nothing in the record supports this assertion. If the signatures of all the brothers and sisters were needed on the underlying agreements (and, of course, they were), the Plaintiff cannot later unilaterally deem Kotaro as the "representative" of other parties who are co-obligors, thereby relieving her of the obligation to serve them with process and to provide them with formal notice of these proceedings.

In summary, the Court had only acquired *in personam* jurisdiction over Kotaro–not his siblings. Therefore, the Court's orders are limited in scope to his interest in Metengal.

Having determined the scope of the orders, I would then proceed to the analysis presented by the majority and deny the appeal.