

*Eklbai Clan v. Imeong*, 12 ROP 17 (2004)  
**EKLBAI CLAN,**  
**Appellant,**

v.

**BEVOLI IMEONG and ISIDORO TAKISANG,**  
**Appellees.**

**ELIA YOBECH,**  
**Appellant,**

v.

**KALISTO JOSEPH and the OURROT OF EKLBAI CLAN, represented by VALENTINA  
SUKRAD,**  
**Appellees.**

**JOB KIKUO,**  
**Appellant,**

v.

**KALISTO JOSEPH and the OURROT OF EKLBAI CLAN, represented by VALENTINA  
SUKRAD,**  
**Appellees.**

CIVIL APPEAL NO. 02-33  
Civil Action Nos. 99-261, 01-179, & 01-180

Supreme Court, Appellate Division  
Republic of Palau

Argued: March 29, 2004  
Decided: November 22, 2004

Counsel for Appellants: Douglas F. Cushnie

Counsel for Appellees: Kevin N. Kirk

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice;  
J. UDUCH SENIOR, Associate Justice Pro Tem.

Appeal from the Supreme Court, Trial Division, the Honorable R. BARRIE MICHELSEN,  
Associate Justice, presiding.

PER CURIAM:

### **BACKGROUND**

This appeal is comprised of three civil actions consolidated for trial. Civil Action No. 99-261, *Eklbai Clan v. Bevoli Imeong and Isidoro Takisang*, was initiated by a complaint filed on September 10, 1999. It is an action for trespass and ejectment of the defendants from Tochi Daicho Lot No. 553, known as Eklbai, owned by Eklbai Clan, and located in **118** Ngerchemai Hamlet. The suit was initiated by Iyechaderchemai Kikuo Remeskang, then the undisputed chief of Eklbai Clan. Following his death, Plaintiff Eklbai Clan filed a motion for leave to amend the complaint to reflect that Elia Yobech had been appointed Iyechaderchemai, and that he did not approve of the Defendants' presence on Eklbai Clan property.

On July 30, 2001, Kalisto Joseph and the purported ourrot of Eklbai Clan, represented by Dirramowai Valentina Sukrad, filed Civil Action No. 01-179, *Joseph v. Yobech*, a complaint for declaratory and injunctive relief. Joseph alleged that on June 1, 2001, the ourrot of Eklbai Clan conferred the title of Iyechaderchemai on him and that, on that date, the council of chiefs of Ngerchemai Hamlet consented to his appointment. Joseph requested that the trial court declare him the male title holder of Eklbai Clan and enjoin Elia Yobech from acting on Eklbai Clan's behalf. Elia Yobech filed an answer and counterclaim alleging that he was appointed senior title holder by the ourrot of Eklbai Clan, including the senior female title holder, Uchelbil ra Kumer Ibau Oiterong, on January 15, 2001, and that a blengur was held by the council chiefs on May 5, 2001, at which the council consented to his appointment. The counterclaim also sought declaratory judgment prohibiting the supporters of Joseph from representing themselves as the ourrot of Eklbai Clan.

On August 1, 2001, Joseph and Sukrad filed Civil Action No. 01-180, *Joseph v. Kikuo*, a complaint seeking to enjoin the activities of defendant Job Kikuo on Cadastral Lot No 024 B 07, a land known as Iosch and owned by Eklbai Clan. Joseph claimed that neither he, as Iyechaderchemai of Eklbai Clan, nor the ourrot of Eklbai Clan approved of Kikuo's earth moving and other activities on the land. Kikuo answered that he had the permission of former Iyechaderchemai Kikuo Remeskang and continued to have the permission of the current senior title holder, Yobech, and the other senior strong members of Eklbai Clan.

The court consolidated the cases for trial. In its Findings of Fact and Conclusions of Law, the court declined to issue a judgment in Civil Action No. 01-179 stating, "there seems to be no confusion in this case. Kalisto Joseph is recognized as the Iyechaderchemai by the appropriate councils." Despite its refusal to grant declaratory judgment in Civil Action No. 01-179, the trial court nonetheless stated that Joseph proved by a preponderance of the evidence that he held the title of Iyechaderchemai. As a result of this finding, the court concluded that Defendants Imeong and Takisang were not trespassing because they had the permission of Eklbai Clan through Joseph. The court also concluded that Job Kikuo was trespassing because he claimed permission to be on Clan land from Yobech, who was not Iyechaderchemai. In an amended judgment, the court enjoined Kikuo from any further activities on Iosch and required Kikuo to remove any structures on the land and restore it to its original condition.

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Eklbai Clan, Elia Yobech, and Job Kikuo appealed from the judgment. Appellants argued that they represented the true *ourrot* of Eklbai Clan and that the trial court had erred in finding that Joseph was Iyechaderchemai and in basing those findings solely on his purported acceptance by the councils of chiefs. Appellees argued in response that the findings of the trial court were not clearly erroneous because evidence was presented that *they* were the true *ourrot* of the Eklbai Clan, and that their appointment of Joseph had been accepted by the respective councils. In our October 14, 2003 opinion, ¶19 this Court noted that the “vast majority of the evidence before the trial court concerned the customs surrounding the selection of a senior title-holder and subsidiary factual issues as who the proper *ourrot* of Eklbai Clan were, which person had been selected by them, and which person had been validly accepted by the council.” However, the trial court’s finding that Joseph established by a preponderance of the evidence that he is Iyechaderchemai was not specific enough for an adequate review. Although it was apparent that the trial court accepted Joseph’s evidence, this Court was uncertain as to how the trial court reached that conclusion. We further stated:

One reading of the trial court’s decision is that it found that Joseph’s supporters were the true *ourrot* of Eklbai Clan, that they had validly selected him as Iyechaderchemai, and that the Ngerchemai council of chiefs had validly accepted him under Palauan custom. It is also possible to read the trial court’s opinion, however, as bypassing any resolution of who the *ourrot* of Eklbai were and concluding that as a matter of Palauan custom the current acceptance of Joseph by the council of chiefs was in itself a sufficient basis to find that he holds the title of Iyechaderchemai. We do not mean to suggest that these are the only alternatives; we note simply that our review of the trial court’s judgment would be assisted by a fuller explanation of how its findings were reached.

The case was then remanded to the trial court with instructions that it state its findings with greater specificity.

On December 4, 2003, the trial court issued its Response on Remand. With respect to Civil Action No. 99-261, the trial court found it dispositive that Elia Yobech was not, at the time of the ejectment action, recognized as Iyechaderchemai by Ngiraibelau, the council of chiefs of Ngerchemai. The trial court concluded that the questions raised as to the membership of Eklbai were ultimately irrelevant to this action, because Yobech’s burden in an ejectment action was to establish that he held the title, and given the evidence that the council of chiefs had accepted Joseph, Yobech could not be said to bear the title. The trial court left open the possibility of Yobech directly suing the council of chiefs in order to establish his standing as Iyechaderchemai, but stressed at some length its view that it was improper for Yobech to take issue with the council’s actions, or for the court to rule any such challenge, without the council being joined as a party.

With respect to Civil Action No. 01-179, the trial court noted simply that while Yobech may have requested the Appellate Division to reverse “the Trial Division’s determination as to the holder of the Iyechaderchemai title,” it had never made a determination to that effect, and

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that any ruling in Yobech's favor would have been improper in any event given its earlier observations with respect to No. 99-261.

With respect to Civil Action No. 01-180, the trial court discounted defendant's contention that Yobech is the true Iyechaderchemai because neither Yobech nor the council of chiefs were made parties in Civil Action No. 01-180. On the other hand, the trial court explained that, again given his **¶20** acceptance by the councils of chiefs, Joseph had shown by a preponderance of the evidence that he held the title. As such, Joseph met his burden in the ejectment action.

This Court then invited the parties to reevaluate their arguments in light of the trial court's augmented analysis in the Response to Remand. Appellants filed a supplemental brief arguing that the trial court misapprehended the pleadings and proof and failed to address the case presented to it. Appellants profess that the trial court's determination that they could not attack the seating of Joseph by the council of chiefs because the council of chiefs was not a party to the proceedings did not address the actual arguments pleaded before the court. The actual argument pressed by Appellants in Civil Action No. 99-261 is that they are the true members of Eklbai Clan and thus had a right to evict the defendants in that action from Clan land. Appellants assert that their primary concern is the determination of clan membership, from which the determination of Iyechaderchemai will naturally stem.

Appellees filed a supplemental brief, painting Civil Action No. 99-261 as a straightforward ejectment case, and not a clan membership case. As an ejectment case, Appellants had to meet its prima facie burden of proof that Yobech was Iyechaderchemai. Appellees contend that Appellants could not meet this burden because Yobech was not recognized by the council of chiefs. Likewise, Appellees characterize Civil Action No. 01-180 as an ejectment case wherein Joseph met his burden of showing a prima facie case that he was the title holder. Appellants contend that the trial court's judgment is supported by relevant evidence and was not clearly erroneous. Furthermore, Kikuo never plead or testified that the strong female and male members of the clan consented to his use of the property, as required by custom.

## **DISCUSSION**

In remanding this case to the trial court, we asked whether its initial decision rested on a finding "that Joseph's supporters were the true ourrot of Eklbai Clan" or whether it had "bypass[ed] any resolution of who the ourrot of Eklbai were and conclud[ed] that . . . the current acceptance of Joseph by the council of chiefs was in itself a sufficient basis to find that he holds the title of Iyechaderchemai." Although the Response to Remand never addresses the issue directly, it is now fair to say that the trial court's initial judgment, as further elucidated by the Response, rested on the latter finding. In summarizing the evidence presented by Joseph in Civil Action No. 01-180, the trial court stated:

He submitted Exhibit M signed by the chiefs acknowledging his title, he had one of the chiefs testify in support of his position, and Ibedul Gibbons testified that because the Ngiraibelau recognized Mr. Joseph as chief, he was also accepted by

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the Koror Traditional Council of Chiefs. In a trespass case, where no members of either council testified in contradiction of Plaintiff's allegations, such evidence should be sufficient to prove Mr. Joseph's authority to exercise the prerogatives of his title.

This, we believe, was error. As we explain below, while we understand the reasoning 121 underlying the trial court's determination to bypass the membership issue in Civil Action No. 99-261, we are unsure that it was correct and, even accepting that reasoning, we conclude that its determination to grant relief in Civil Action No. 01-180 in the absence of any findings as to the true membership of Eklbai Clan cannot stand.

In explaining its determination to deny any relief in Civil Action No. 99-261, the trial court makes the point that traditional titles belong half to the clans that appoint them and half to the public, which is represented by the klobak, which, in turn, "has the right to refuse a choice of the ourrot no matter how carefully the proper formalities are observed." "One-half of the title of Iyechaderchemai is held by the public, and it is the responsibility of the Ngiraibelau to grant or withhold it." Since the court found that Yobech had not made a sufficient showing that he had been properly accepted as Iyechaderchemai by the Ngiraibelau (or improperly divested of that title), it deemed it unnecessary to address whether his supporters were the true ourrot of Eklbai. In other words, as we understand the trial court's rationale, since Yobech had failed to prove that he had the public half of the title, it was irrelevant whether he could be said to hold the private half. As a result, the effort to evict the defendants in that case was doomed to failure.

We are unsure of the correctness of that conclusion, because it appears to rest on the unstated premise that only the chief of a clan is empowered to evict purported non-members from using clan land. Appellants' expert testified, however, that although the decision that someone should move off clan land would ordinarily be communicated by a messenger sent by the chief, the decision to do so would be made by the strong, senior members of the clan.<sup>1</sup> To that extent, it is unclear to us that proof of Yobech's title was necessary to obtain relief in this case.<sup>2</sup>

But even assuming the correctness of that analysis, we cannot uphold the trial court's conclusion in Civil Action No. 01-180, where the court granted the relief sought by Joseph and evicted Job Kikuo from clan land. Although the trial court again took issue with the proof

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<sup>1</sup>We note in this regard that in Civil Action 99-261, the named plaintiff is "Eklbai Clan," and the Second Amended Complaint alleges that the Clan "through its senior, strong members, has duly determined to request defendants to vacate the premises," but that "defendants have remained on the premises without the consent and against the will of the senior, strong members of plaintiff." Moreover, in responding to Appellants' motion for summary judgment, Appellees argued, "The problem the court is faced with in this case is that there is a dispute as to who constitutes the strong senior members of Ekelbai Clan and therefore as to *whom has the authority to deal with the property in question and to seek to evict the defendants therefrom.*" (emphasis added).

<sup>2</sup>The trial court's analysis relied on the general rule that in an action in ejectment, the plaintiff must recover on the strength of his own title and not on the weakness of his adversary's title. 25 Am. Jur. 2d *Ejectment* § 40 (1996). Here, however, there was no question that title to the *land* was in the name of Eklbai Clan, but rather whether the people who brought the action had the right to act on its behalf.

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presented by Kikuo concerning Yobech's ascendancy to the title, the logic of the court's prior analysis required that Joseph make an affirmative showing that *he* was the title bearer. Although the trial court found that he had met that burden, it is now clear as we have said that the sole basis for that conclusion was the fact that he had been accepted as chief by the Ngiraibelau and the **122** Koror Traditional Council of Chiefs. The trial court made no finding that the women who presented his name to the Ngiraibelau were the true ourrot of Eklbai Clan. In so doing, we believe the court erroneously focused on the public half of his title to the exclusion of any consideration whether he was entitled to the private half belonging to the Clan.

It bears emphasis in this regard that it was the contention of those who sided with Yobech that the women who nominated Joseph were not members of Eklbai at all, and certainly not those with the customary authority to select its chief. Joseph's supporters contended the opposite. We are in no position to make findings on this issue, and we decline Appellants' invitation to do so. But we agree with Appellants that some finding in this regard was crucial: a finding that one or the other of Joseph or Yobech was Iyechaderchemai (or that they had presented sufficient proof to warrant the granting of relief on that basis)<sup>3</sup> cannot stand without some finding that the people who nominated him are true members of the Clan.<sup>4</sup>

We left open on remand the possibility that the evidence in this case supported a finding that, as a matter of custom, the acceptance by the klobak of one nominee or the other was determinative of the issue of the membership of a clan. Neither in its original opinion nor its Response to Remand did the trial court make such a finding, and we do not believe there is clear and convincing customary evidence to that effect.<sup>5</sup>

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<sup>3</sup>The trial court noted in its opinion on remand that its decision did not "resolve who is the 'true' Iyechaderchemai" in that Yobech was not a party to Civil Action No. 01-180. Nevertheless, it was the trial court's view that Joseph had presented sufficient evidence in that regard to allow him to evict Kikuo from the land he had been occupying.

<sup>4</sup>*Cf.* Palau Const. art. VIII, § 6 ("No person shall be a member of the Council of Chiefs unless he has been appointed and accepted as a chief in a traditional manner, *and* is recognized as such by the traditional council of chiefs of his state.") (emphasis added).

<sup>5</sup>While there was clear testimony that the decision of a klobak to reject a proposed titleholder is unchallengeable, the question of who are the ourrot entitled to propose a chief was touched upon only in passing. On cross-examination of Appellees' expert witness, she was asked, "Who makes, who decides who the ourrot of the clan are?" She responded, "The members of the clan themselves." The trial court then interjected:

THE COURT: Well, ultimately there's a role for the klobak. The klobak has to decide 'yes' it was the proper ourrot that presented this person . . .

A: Yes.

On redirect examination, Appellees' counsel followed up on this point:

Q: I have a situation here . . . where you get two competing groups of people who both claim to be the ourrot of the clan and both of which have sent their candidates if you will for this chief's seat to the klobak. . . . In such a situation where the klobak picks one of the candidates over the other, is that not by implication also an indication that they agree

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A variant of this argument, which was advanced by Joseph in his closing argument before the trial court, is that the decision of a klobak to accept a proposed title bearer is significant not (or not only) as a matter of custom, but as an evidentiary matter – that, as between the klobak and a court, the former is better suited to determine who are the true members of a clan entitled to select its title bearer.<sup>6</sup> We do not question that the klobak’s choice may have some evidentiary value. But, for at least two reasons, we are also unprepared to hold that a klobak’s actions in choosing to accept a proposed title bearer as its friend should yield an essentially un rebuttable presumption that the persons who nominated him are true members of the Clan. In the first place, as a factual matter, and even accepting the trial court’s finding that Joseph had garnered the unanimous approval of all of its members, it is at best unclear whether the Ngirabelau even purported to be resolving the instant dispute as to the underlying membership of the Clan.<sup>7</sup>

More importantly, as the procedural history of this case highlights, we are concerned that the adoption of such a presumption raises a significant potential for arbitrary and unfair results, particularly when those results have real-life consequences for people occupying or wishing to occupy clan lands. When this case was first brought in 1999, Iyechaderchemai Kikuo Remeskang was still alive and had borne that title for more than two decades. In September 2000, Remeskang’s counsel filed a motion for summary judgment at that time on the claims against the defendants in No. 99-261 which, after being fully briefed, was set for oral argument on January 10, 2001.<sup>8</sup> That 124 argument was postponed, however, because of Remeskang’s

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that the people appointing that person are the true ourrot of the clan?

A: Yes.

Transcript, Volume II, pp. 183, 186.

<sup>6</sup>See Closing Argument at 13: “The klobak, being the representatives of the relatively small close-knit community to which these titles run, are in a far better position to judge who are the true members or the ourrot of a clan.” The opinion in *Matlab v. Melimarang*, 9 ROP 93 (2002), has language to the same effect and also contains the broad statement that “in Palauan custom, a decision of a council of chiefs to accept or reject the ourrot’s choice of title holder is final and not subject to outside review.” *Id.* at 98. Taken at face value, and as acknowledging that the courts have no role in determining “whether the nominee of the ourrot is an appropriate choice to assume a community leadership role in the council,” *id.*, that statement is unexceptionable. To the extent it portends the broader suggestion that, under custom, the klobak not only decide to “accept or reject the ourrot’s choice,” but also have some unreviewable authority to “choose” the ourrot, we believe it is not the proper subject of a legal rule, *see, e.g., Arbedul v. Emaudiong*, 7 ROP Intrm. 108, 110 (noting “our longstanding determination to treat the existence and substance of custom as a matter of fact”), and would be dicta in any event given the much narrower holding in that case. *See id.* at 99 (holding that “when parties seek a declaratory judgment that asks the Court only to review a decision of a traditional council to seat a person, this Court should decline when the resulting judgment does not clarify the issues or terminate the controversy”).

<sup>7</sup>Indeed, although the trial court declined to rule on the matter, there was evidence presented that several members of the Ngirabelau had agreed to accept Yobech before ultimately accepting Joseph. As far as the Koror House of Traditional Leaders was concerned, it seems clear that it would have accepted either Joseph or Yobech. As Ibedul testified, “if there is no Kalisto [Joseph] and [Elia Yobech’s] name will come up, we probably would accept him for this title.”

<sup>8</sup>Actually, the trial court initially granted the motion in the absence of any opposition, but apparently set

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death on January 8, and the motion was apparently superseded by the Second Amended Complaint later filed by Appellants. If the court had addressed the motion before Remeskang's death, however, and a rule of deference to the klobak was in place, then presumably summary judgment would have been granted since there appears to be no dispute that Remeskang was recognized as Iyechaderchemai by both the Ngiraibelau and the Koror Traditional Council of Chiefs.<sup>9</sup> As a result, Isidoro Takisang would have been evicted from the land he had occupied for more than 20 years, and any attempt to evict Job Kikuo or to prevent him from developing the land he occupied would have been doomed to failure.

As it turns out, of course, by the time the case was tried in 2002, Kalisto Joseph had been accepted (or so the trial court found) as the new Iyechaderchemai. Applying the same presumption, as the trial court apparently did, now led to the entirely opposite result contained in the judgment below: Takisang is permitted to stay, and it is Kikuo who is being kicked off the land he has used for years. The facts about the history and membership of Eklbai Clan -- as difficult as they may be for a court to discern -- were the same in 1999 and 2000 as they were in 2001 and 2002; that the application of the same legal rule over the passage of a few years' -- or conceivably a few months' -- time would nevertheless lead to such opposite results should give great pause as to whether that rule is a sensible or fair one.

For all of these reasons, we are unprepared to say that a court must accept the klobak's action not only as the final word as to whether a rubak has been accepted as its friend, but also as determining the membership of a clan. We leave to another day the appropriate deference due where there is evidence that a klobak expressly considered the issue as part of its decisionmaking process. In the absence of such evidence, which we believe describes the current record, the trial court may weigh the klobak's acceptance in the mix, but it must also consider all other evidence that the parties have presented on that score.

We address finally the trial court's concern that the proper parties were not before it. In its Response to Remand, the trial court places great emphasis on the fact that Joseph was not a party to Civil Action No. 99-261, that Yobech was not a party to Civil Action No. 01-180, and, most significantly, that the members of the Ngiraibelau were not parties at all. We share the trial court's concerns to the extent that it would have been inappropriate for it to grant relief directed at the Ngiraibelau without their having been made parties and given notice and an opportunity to be heard. But the trial court also emphasized that the relief sought in both of these actions concerned the use of the clan's lands, a matter as to which the Ngiraibelau has no direct interest.<sup>10</sup> As the **125** trial court itself noted, Civil Action No. 01-180 was "a trespass case" and

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aside its order after being informed of an agreement by counsel to extend the time for the filing of Appellees' response.

<sup>9</sup>To be sure, Appellees submitted numerous affidavits in opposition to the motion urging that although Remeskang has been holding himself out as Iyechaderchemai, he had never been given that title by the ourrot of Eklbai Clan. But if acceptance by the klobak were the last word in the matter, then those protestations (like the similar protestations made by Appellants concerning Joseph today) would have fallen on deaf ears.

<sup>10</sup>Neither the Second Amended Complaint in No. 99-261 nor the Complaint or Counterclaim in No. 01-180 seeks a declaration as to the bearer of the title Iyechaderchemai, much less do they seek any relief against the Ngiraibelau directly.

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“not a title dispute case.” Thus, we do not believe that Yobech’s failure to join the Ngiraibelau in No. 99-261 or Joseph’s failure to join the Ngiraibelau in No. 01-180 prevented the trial court from reaching the membership issue that we deem to be crucial to these cases.

In summary, in our view, a determination of which clan faction -- the faction represented by Yobech or the faction represented by Joseph -- should be recognized as being the strong senior members of the Clan and thus empowered to appoint its title holders and make decisions on behalf of the Clan was the principal issue before the trial court. In finding that the proper parties were not before it, and in holding that the recognition of the council of chiefs was dispositive of who could bring an action in ejectment on behalf of the Clan, the trial court bypassed this fundamental determination. We therefore vacate and remand for further proceedings in accordance with the views expressed herein.