Lewill Clan v. Edaruchei Clan, 13 ROP 62 (2006)

LEWIIL CLAN,
Appellant,

v.

EDARUCHEI CLAN,
Appellee.

CIVIL APPEAL NOS. 05-010 and 05-011
LC/R 04-02 and 04-10

Supreme Court, Appellate Division
Republic of Palau

Decided: March 7, 2006[1]

Counsel for Appellant: J. Roman Bedor

Counsel for Appellee: Pro se

BEFORE: LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, Associate Justice; JANET HEALY WEEKS, Part-Time Associate Justice.

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

PER CURIAM:

In this consolidated appeal, Appellant Lewiil Clan appeals from the Land Court's determinations of ownership concerning two parcels of land located in Peleliu State, known as *Ngerungor* and *Tebedall*.[2] After holding ⊥63 hearings, at which Appellant failed to appear, the Land Court determined that Edaruchei Clan owned the lands. Lewill Clan now appeals, urging that Clan representatives did not receive notice of the hearings, and asking that the case be remanded to the Land Court for further ownership hearings.

BACKGROUND

These appeals involve Appellant Lewiil Clan's claims on two parcels of land located in Peleliu State. The first land parcel, commonly known as *Tebedall*, is identified as Lot R-198 and

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[1] The court has concluded that oral argument would not materially assist in the resolution of these appeals. ROP R. App. P. 34(a).

[2] The Determinations of Ownership were set forth in two separate Land Court cases, and give rise to two separate appeals. Because these appeals raise identical legal issues, we have consolidated them pursuant to Rule 3(b) of the ROP Rules of Appellate Procedure. *See Ngirausui v. Baiei*, 3 ROP Intrm. 17, 18 (1991) ("Consolidation is appropriate in instances where the same party is involved in several separate appeals concerning the same question . . .").

R-199 on BLS Worksheet 03 R 011. The second parcel, known as *Ngerungor*, is identified as Tochi Daicho Lot 1470 and depicted as Worksheet Lots R-214 and R-215.

Appellant Lewiil Clan, through its chief Iderrech Mikiwo Gibson, submitted claims on both parcels. On October 11, 2004, the Land Court held a hearing to consider claims to *Tebedall*. Lewiil Clan did not send a representative to present evidence at this hearing. The Land Court rejected the Clan's claim to *Tebedall* on the ground that the Clan had filed its claim six days after the deadline set by the Bureau of Lands and Surveys for filing a claim on this land. The Land Court also noted the Clan's failure to appear and present evidence, despite having received notice of the hearing, and that nothing in the record supported its claim to the land. Ultimately, on the basis of testimony and evidence presented at the hearing, the Land Court awarded title to *Tebedall* to Edaruchei Clan. On February 10, 2005, the Land Court conducted a hearing to determine the ownership of *Ngerungor*. Representatives of Edaruchei Clan were the lone claimants to appear at the hearing. Although the Tochi Daicho listed Umedib, a senior member of Lewiil Clan, as the owner of *Ngerungor*, the Land Court awarded the parcel to Edaruchei Clan on the basis of testimony that the Tochi Daicho listing was a mistake and that Edaruchei Clan owned the land, but allowed Umedib to plant coconut trees on the land.

Lewiil Clan now appeals, asserting that clan representatives received no notice of either the October 11 or February 10 hearings. Regarding the February 10 hearing, Appellants insist that Mikiwo Gibson's signature on the proof of service is not authentic, and that the proof of service form does not identify the name of the Land Court employee who purportedly served Gibson with notice of the hearing. This failure to include the identity of the person who served process, Lewiil Clan maintains, renders the service invalid. Similarly, Lewiil Clan claims that it did not receive notice of the October 11 hearing, though the Clan does not specifically address how service was inadequate. For the following reasons, we affirm in part and dismiss in part.

ANALYSIS

We review the Land Court's findings of fact for clear error. *Aribuk v. Rebluud*, 11 ROP 224 (2003). Conclusions of law are reviewed *de novo*. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001). Findings of fact necessary to the application of procedural rules, including those governing service of process, are reviewed under the clearly erroneous ⊥64 standard. *Grand Entm't Group v. Star Media Sales*, 988 F.2d 476, 481 (3d Cir. 1993).

Procedural due process requires that each claimant be granted notice and an opportunity to be heard. *Ngerketiit Lineage v. Seid*, 8 ROP Intrm. 44, 47 (1999). In the case of a determination of land ownership, 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:

> (A) service in the same manner as a civil summons; or
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> (B) registered air mail, postage prepaid, to the last known address, if outside the Republic; or

> (C) in the case of a clan or lineage, by hand delivery to the senior male title holder, if any, and the senior female title holder, if any; however, if the Registration Office cannot with reasonable diligence locate the senior male or female title holder, then to such representatives of the clan or lineage as the Registration Office shall designate.

35 PNC § 1309(b)(3). In addition, Rule 28 of the Land Court Rules and Regulations requires that proofs of service "shall contain an acknowledgment of service by the person served or a statement certified by the person who made service, of the date, manner of service and names of persons served or location of posting." LC Reg. 28. Appellant Lewiil Clan insists that the Land Court failed to serve notice on Clan representatives prior to the October 11 and February 10 determination of ownership hearings, thus violating their due process rights. We will consider this claim in relation to each of the hearings, in turn.

I. October 11, 2004 Hearing[3]

Appellant Lewiil Clan maintains that it did not receive notice of the October 11, 2004, determination of ownership hearing and that this lack of notice violated its due process rights. The Clan has provided no explanation for its claims that its representatives did not receive notice of the hearing. The Land Court expressly announced in its determination of ownership decision that, despite having failed to file its claim in a timely manner, the Clan's designated representative, Mikiwo Gibson, was served with notice of the determination of ownership hearing. For its part, the Clan has failed to address the Land Court's proof of service of Gibson in this matter in their brief. A copy of the proof of service form, which is part of the Land Court record, was provided by Appellees, and we see nothing on its face to doubt its authenticity.

A signed proof of service form constitutes *prima facie* evidence of valid service that can be overcome only by strong and convincing evidence. *O'Brien v. R.J. O'Brien & Assoc.*, 998 F.2d 1394, 1398 (7th Cir. 1993). In a challenge to the sufficiency of process, the burden of proof lies with the party raising the challenge. *New York ex rel. Spitzer v. Operation Rescue Nat'l*, 69 F. Supp. 2d 408, 416 (W.D.N.Y. 1999), (citing *Bally Export Corp. v. Balicar, Ltd.*, 804 F.2d 398, ⊥65 404 (7th Cir. 1986)). Objections to service must be specific and must identify the manner in which the serving party has failed to satisfy the service provision utilized. *Operation Rescue Nat'l*, 69 F. Supp. 2d at 416 (citing *O'Brien*, 998 F.2d at 1400). Importantly, "[t]he mere denial of receipt of service . . . is insufficient to overcome the presumption of validity of the process server's affidavit." *Operation Rescue Nat'l*, 69 F. Supp. 2d at 416 (quoting *Nolan v. City of Yonkers*, 168 F.R.D. 140, 144 (S.D.N.Y. 1996)). Given the total failure of Appellant to develop this claim with factual evidence or legal argumentation, we cannot conclude that the Land Court's decision regarding the sufficiency of service was erroneous.

Nevertheless, Appellant insists that the Land Court erred in making its determination of ownership without first having heard Lewiil Clan's evidence and testimony. In support of this assertion, Appellant cites *Ngermechesong Lineage v. Children of Oiph*, 11 ROP 196 (2004), for

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[3] Appellant challenges the Land Court's determination of ownership arising out of the October 11, 2004, hearing in Civil Appeal No. 05-011.

the proposition that the Land Court may not make a determination of ownership without first hearing evidence and testimony from all parties with a claim to the land in question, whether or not they appeared at the hearing. This is incorrect. In *Ngermechesong Lineage*, we held that where a party fails to appear, the Land Court may not simply declare that the non-appearing party has abandoned its claim. *Id.* at 197. Rather, the Land Court must hear evidence from all appearing parties, and then make a determination of ownership based on the findings of fact and conclusions of law that follow from that evidence. *Id.* *Ngermechesong Lineage* does not, however, require the Land Court to withhold its determination of ownership until after it has heard evidence from parties that failed to appear at the hearing. Instead, it merely bars the Land Court from simply declaring that a party has abandoned its claim by failing to appear at the hearing, and requires the Land Court to weigh the evidence that has been presented during the hearing, by those parties that chose to appear, before making its determination of ownership.

Nothing the Land Court did here violated the process set forth in *Ngermechesong Lineage*. The Land Court served notice of the October 11 hearing to all parties with valid claims, including Lewiil Clan. After hearing and considering the evidence and testimony presented by all appearing claimants to the land parcel, the Land Court awarded ownership to Edaruchei Clan. In doing so, the court did not consider Lewiil Clan's claim to be waived or abandoned in light of its failure to appear, but rather concluded that its claim lacked evidentiary support. Lewiil Clan now maintains that had it had the opportunity to present evidence at the hearing, it "would have shown that the claim was timely filed and that its claim is superior to that of Edaruchei [C]lan as it is supported by the filing of a war claim to the lots in dispute by appellant Lewiil Clan and the award of war compensation of the damage to the lots in dispute received by Lewiil [C]lan." Appellant's Opening Brief at 4. Perhaps, but Appellant's mere assertion to this effect is not sufficient for us to conclude that the Land Court's decision was erroneous. For this reason, with regard to Civil Appeal No. 05-011, we affirm.

⊥66 **II. February 10, 2005 Hearing**[4]

Appellant Lewiil Clan maintains that its designated representative, Mikiwo Gibson, did not receive notice of the February 10, 2005, determination of ownership hearing. In support of this argument, the Clan cites two inadequacies with the Land Court's proof of service. First, Appellant notes that the purported proof of service form does not indicate the name of the Land Court employee who affected service on the claimants in the instant matter, including Gibson, nor does it contain a signature of the serving agent certifying that process had been personally served on the claimants. Second, Appellant maintains that Gibson's signature and printed name, which appear on the proof of service form, are not authentic. Because we believe these issues can and should be raised before the Trial Division in a collateral attack on the determination, we dismiss.

Gibson attached to his opening brief an affidavit dated August 5, 2005, stating that he did not receive notice of the hearing and that the signatures appearing on the proof of service form are not authentic. Appellee attached a copy of the proof of service form and maintains that the appearance of Gibson's signature on the form demonstrates that he received notice of the hearing. Appellee also attached a number of additional examples of Gibson's signature, appearing on various proof of service forms as proof that the signature on the proof of service form from the Order Setting the February 10 hearing is authentic.

Where factual issues are not in dispute, issues of procedural due process are purely questions of law, reviewed *de novo*. *Renguul v. Elidechedong*, 11 ROP 11, 13 (2003). However, factual issues such as these are matters for the trial court, not the Appellate Division. *Joseph v. Ngerkodolang Lineage*, 8 ROP Intrm. 256, 256 (2000) ("It is for the trial court, not the Appellate Division, to inquire into critical factual issues.") (citing *Uchel v. Deluus*, 8 ROP Intrm. 120, 121 (2000)). Because Gibson's affidavit was not presented to the Land Court, it is not part of the record upon appeal, and therefore not appropriate for consideration by this Court. *Pedro v. Carlos*, 9 ROP 101 (2002) (It is a "well-established principle that the Appellate Division cannot consider new evidence, but is confined to the record below."); *Joseph*, 8 ROP Intrm. at 256 (holding that affidavits not presented to trial court are not part of appellate record and may not be considered by Appellate Division); *see also Ngirachemoi v. Ingais*, Civ. App. No. 04-003 (Opinion dated June 9, 2005) (remanding for further factual finding where "record is devoid of any factual findings" as to legal issue on appeal). Nothing, however, prevents Appellant from bringing its claim to the Trial Division. [5] As ⊥67 we have noted before, the Trial Division has in the past considered challenges to Land Court determinations on the basis of inadequate notice.

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[4] Appellant challenges the Land Court's determination of ownership arising out of the February 10, 2005, hearing in Civil Appeal No. 05-010.

[5] This is, for example, the usual procedure for criminal defendants wishing to appeal on the grounds of ineffective assistance of counsel. In such cases, the key evidence is often not found in the trial record. Thus, instead of raising a direct appeal to the Appellate Division, which has no fact-finding authority, defendants often raise a collateral attack against their conviction in the Trial Division, through a petition for writ of habeas corpus. *See, e.g.*, *Malsol v. ROP*, 8 ROP Intrm. 161, 163 (2000) (holding that "ineffective-assistance-of-counsel claims can be heard on direct appeal only if the record is sufficiently developed to permit meaningful appellate review of the claims") (citing *Saunders v. ROP*, 8 ROP Intrm. 93, 96 (1999)).

Joseph, 8 ROP Intrm. at 256, *citing Adelbai v. Eleu Lineage* , 8 ROP Intrm. 218 (2000); *Uchel*, 8 ROP Intrm. at 121; *Irruul v. Gerbing* , 8 ROP Intrm. 153, 154 (2000). [6] For these reasons, the present appeal (No. 05-010) is dismissed.

CONCLUSION

For the reasons set forth above, we affirm with regard to Civil Appeal No. 05-011 and dismiss Civil Appeal No. 05-010.

[6] Of course, to succeed, a party bringing a collateral attack against a Land Court determination on due process grounds must prove that it was denied due process by clear and convincing evidence. *Ucherremasech v. Wong*, 5 ROP Intrm. 142, 146-47 (1995).