

*Markub v. Koror State Pub. Lands Auth.*, 14 ROP 45 (2007)

**LALII MARKUB,  
Appellant,**

v.

**KOROR STATE PUBLIC LANDS AUTHORITY,  
Appellee.**

CIVIL APPEAL NO. 06-020  
LC/B 04-127, 04-128 & 04-129

Supreme Court, Appellate Division  
Republic of Palau

Argued: January 3, 2007

Decided: January 16, 2007

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Counsel for Appellant: Raynold B. Oilouch

Counsel for Appellee: Keith Peterson

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice

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

SALII, Justice:

Appellant Lalii Markub challenges the Land Court's determination awarding to Appellee Koror State Public Lands Authority ("KSPLA") ownership of the land known as *Motekoi*, comprised of Tochi Daicho Lot 460, parts as depicted as Lots 40430, 40431, and 40432, in Ngerkesoal Hamlet of Koror State. Having considered the arguments of the parties, we reverse the determination of the Land Court.

### **BACKGROUND**

Silvester owned *Motekoi* as individual property until 1942 when he sold it to a Japanese citizen named Fukushima for 900 yen to be used as a power plant by the Japanese Government. Fukushima only paid 400 yen, which the Land Court held constituted insufficient consideration or inadequate compensation resulting in the government wrongfully taking *Motekoi*. When Silvester died in 1965, his oldest living son who survived him was Tekereng. Markub is Silvester's daughter and the only non-government claimant to *Motekoi*. Markub claims that the Land Court erred when it found that she was not the "proper heir" of Silvester.

### **STANDARD OF REVIEW**

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We review the Land Court's findings of fact under the clearly erroneous standard, under which the factual determinations of the lower court will be set aside only if they lack evidentiary support in the record such that no reasonable trier of fact could have reached the same conclusion. *Tmiu Clan v. Hesus*, 12 ROP 156, 157 (2005). The Land Court's conclusions of law are reviewed *de novo*. *Id.*

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## DISCUSSION

Article XIII, Section 10 of the Palau Constitution states that "The national government shall . . . provide for the return to the original owners or their heirs of any land which became part of the public lands as a result of the acquisition by previous occupying powers or their nationals through force, coercion, fraud, or without just compensation or adequate "consideration" consideration." The enabling statute, 35 PNC § 1304(b), requires a claimant to demonstrate that: (1) the claimant is a citizen who has filed a timely claim; (2) the claimant is either the original owner of the claimed property, or one of "the proper heirs"; and (3) the claimed property is public land which became public land by a government taking that involved force or fraud, or was not supported by either just compensation or adequate consideration.<sup>1</sup> *Estate of Ngiramechelbang v. Ngardmau State Pub. Lands Auth.*, 12 ROP 148, 150 (2005). There was no dispute that Markub filed a timely public land claim<sup>2</sup> or that *Motekoi* was wrongfully taken by the government.

In the absence of a valid will, a court looks next to the intestacy statute in force at the time of the decedent's death. *Diaz v. Children of Merep*, 11 ROP 28, 30 (2003). At the time of Silvester's death inheritance was governed by section 801 of the Palau District Code. Subsection (c) of that statute provided that in the absence of a will:

lands held in fee simple by an individual shall, upon the death of the owner, be inherited by the owner's oldest living male child of sound mind, natural or adopted, or, if male heirs are lacking, the oldest living female child of sound mind, natural or adopted, or, in the absence of any issue, by the spouse of the deceased . . . .

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<sup>1</sup> Section 1304(b) provides in pertinent part:

The Land Court shall award ownership of public land, or land claimed as public land, to any citizen or citizens of the Republic who prove:

(1) that the land became part of the public land, or became claimed as part of the public land, as a result of the acquisition by previous occupying powers or their nationals prior to January 1, 1981, through force, coercion, fraud, or without just compensation or adequate consideration, and

(2) that prior to that acquisition the land was owned by the citizen or citizens or that the citizen or citizens are the proper heirs to the land. . . . All claims for public land by citizens of the Republic must have been filed on or before January 1, 1989. . . .

<sup>2</sup>Markub argued in the alternative that the Land Court erred when it found that *Motekoi* was public land. However, Markub failed to prove that the Land Court's determination was clearly erroneous.

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PDC § 801(c) (1959). It is undisputed that Tekereng was the oldest, living male child of Silvester at the time of Silvester's death in 1965. Under § 801(c), Tekereng was the proper heir but forfeited his claim by not filing a timely claim to the land. See **L48** *Ucherremasch v. Rechucher*, 9 ROP 89, 92 (2002). As the daughter of Silvester, Markub is an heir, but under a strict application of § 801(c) she is not the "proper heir" and would not receive *Motekoi*.

The Land Court held that *Masang v. Ngirmang*, 9 ROP 125 (2002), requires the land to remain public land. *Masang* held that a claim for the return of public lands by a relative or relatives of a deceased landowner must be rejected if it could be shown that some other relative who did not file a claim would have had a better claim under Palau's intestacy statute:

in cases where the evidence shows that the "proper heirs" did not file a claim, other claimants do not simply move up in the queue and prevail on the basis of being the most closely related persons who filed a timely claim. Rather, the burden remains on the claimants to demonstrate that they satisfy all the requirements of the statute which includes proof not that they are related to the original owner in some way, but rather are the "proper heirs to the land."

*Id.* at 129. The *Masang* decision held that:

Thus, cases brought under 35 PNC § 1304(b) are distinguishable from the on-going land registration program conducted pursuant to 35 PNC § 1304(a). In land registration proceedings, the objective is to "make determinations with respect to the ownership of all land within the Republic" 35 PNC § 1304(a), and there the court "can, and must, choose among the claimants who appear before it . . . ." *Ngirumerang v. Tellames*, 8 ROP Intrm. 230, 231 (2000). In contrast, § 1304(b) establishes specific elements peculiar to the return of public lands (i.e., proof that the filing deadline of January 1989 was met, that the claimant is the original owner or is the owner's "proper heir," that the transfer of title to the government occurred by one of the specified methods). If no claimant proves these necessary elements, title cannot be transferred pursuant to section 1304(b), and the property remains public land.

*Id.* at 129 n.3. As Markub was not the proper heir and Tekereng did not file a claim, under *Masang* the Land Court properly ruled that the land should remain public land. However, for the following reasons we overrule our holding in *Masang*.<sup>3</sup>

First and foremost, *Masang* runs contrary to the policy embodied in Article XIII, Section 10, of the Constitution. Article XIII, Section 10, is a command to the national government to act swiftly to undo past **L49** injustice. Where land was wrongfully taken by a foreign power, the government has the duty to find the "original owners or their heirs" and give it back. The rule

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<sup>3</sup>We note that Justice Miller recently discussed overruling *Masang* in his concurrence in *KSPLA v. Ngirmang*, Civil Appeal No. 05-031, *slip op.* (Nov. 28, 2006) (Miller, J., concurring). We agree with his reasoning why *Masang* should be overruled and incorporate it into our decision.

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announced in *Masang* runs directly contrary to the intent of this provision. *Masang* is applied *only* where it has already been determined that a land was wrongfully taken, and then, through the introduction of a legal technicality, serves to thwart the constitutional purpose by leaving the land in the hands of the government. There is no reason to believe that the framers of the Constitution, faced with the choice of returning the land to “the most closely related persons who filed a timely claim” and doing nothing, would have chosen the latter.

*Masang* also does not reflect the intentions of the legislatures that enacted §1304(b) implementing the constitutional directive. To accept the holding in *Masang* is to believe that the OEK meant to lay a trap for unsuspecting citizens by combining a strict time limit for the filing of claims with an equally strict limit on the persons eligible to file such claims. Under *Masang*, if only the “wrong” claimants filed a timely claim and even if the “right” claimant acted belatedly, everyone except the government loses. There is no reason to believe that the OEK that originally enacted the statute, or the later legislatures that re-enacted it, had such a purpose.

Looking at §1304(b), the language of the statute does not compel us to put aside other indicators of legislative intent and public policy and enforce the statute as written. While it is possible to read the words “proper heirs” to mean only the exact persons dictated by the intestacy statute, it is not the lone interpretation. The addition of the word “proper” could have been meant simply to ensure that a claimant show a true relationship to the original landowner, or, as between competing claimants, to ensure that the Court choose the one with the strongest claim. As the *Masang* opinion recognized, in all other land matters, we have directed the Land Court to “choose among the claimants who appear before it” even if, as sometimes happens, there is another person whose claim “might be theoretically more sound” but who failed to file a claim. *Ngirumerang v. Tellames*, 8 ROP Intrm. 230, 231 (2000); see *Masang*, 9 ROP at 128 n.3. There is thus nothing extraordinary in finding that “the most closely related persons failed to file claim” are “proper heirs” within the meaning of §1304(b).<sup>4</sup>

Overruling *Masang* will align all return of public land cases with other land cases that apply intestacy statutes.<sup>5</sup> In land **L50** registration proceedings, land disputes, and some return of public lands cases, when there is no proper heir under the inheritance statute, the Court turns to

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Although neither party addressed whether *Masang* should be overruled in their briefs, both parties addressed the issue at oral argument.

<sup>5</sup>In general, courts try not to overrule recent precedent. “[A]dhering to precedent ‘is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.’” *Becheserrak v. ROP*, 7 ROP Intrm. 111, 118 (1998) (Miller, J., concurring in part and dissenting in part), quoting *Burnet v. Coronado Oil & Gas Co.*, 52 S. Ct. 443, 447 (1932) (Brandeis, J., dissenting). However, *Masang* is problematic because it announced a new rule of law that was not raised, much less advocated, by the parties before it, and that benefitted a non-party who could have raised the issue, but had failed to do so. That, in itself, does not mean that the new rule is wrong, but it does suggest that its entitlement to *stare decisis* treatment is weak, and that it should not be immune from re-examination. In addition, overruling *Masang* will not cause any special unfairness to either the public lands authorities or claimants. *Masang* was decided more than a decade after the deadline for filing claims had passed. No one has filed or failed to file a claim on the basis of its holding, and undoing that holding will only undo the unfairness of adopting it in the first place.

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customary law to determine the proper heir of the deceased. *See Delbirt v. Ruluked*, 10 ROP 41, 43 (2003) (where 25 PNC § 301(b) does not apply, the Court “must turn to customary law to determine the proper heir of the deceased.”); *Bandarii v. Ngerusebek Lineage*, 11 ROP 83, 87 (2004) (“where [the inheritance] statute does not apply, custom fills the gap.”); *KSPLA v. Ngirmang*, Civil Appeal No. 05-031, *slip op.* (Nov. 28, 2006) (“In a return of public lands case, when no heir exists under the inheritance statutes among the claimants and nonclaimants, then custom should be applied to decide which claimant owns the land.”). Accordingly, in a return of public lands case, when none of the claimants qualifies as a proper heir under the inheritance statutes, then custom should be applied to decide which claimant is the proper heir under § 1304(b).

## CONCLUSION

Due to its reliance on *Masang*, we reverse the determination of the Land Court. As the Land did not have the opportunity to conduct any fact finding related to which claimant is the proper heir to the land under custom, we remand the case for further proceedings consistent with this opinion.

NGIRAKLSONG, Chief Justice, concurring:

I concur with the majority in overruling *Masang*. The constitutional mandate in *Masang* is to return to “the original owners or their heirs” lands wrongfully taken by a foreign power and converted to public lands. Palau Const. Article XIII, § 10. When lands are found to have been wrongfully taken, they must be returned to the “original owners or their heirs.” The Constitution does not say how the “original owners or their heirs” are going to be determined nor does it specify a particular law by which the “original owners and their heirs” are going to be determined. Further, the constitutional mandate is self-executing with respect to the “original owners or their heirs.” *Gibbons v. Etpison*, 4 ROP Intrm. 1, 4 (1993). This means the constitutional provision does not need legislation to define the “original owners or their heirs” or how they are going to be determined. To the extent an implementing legislation is enacted, as here with 35 PNC 1304(b), such legislation cannot conflict with the constitutional provision. In case of a conflict, the Constitution prevails. *Yalap v. ROP*, 3 ROP Intrm. 61, 64 (1992). Article XIII § 10 mandates the court to find the “original owners or their heirs” by the most appropriate law. 1 PNC 301, 302 and 303. Applying the statute in effect at the time of decedent’s death when deciding who shall inherit a decedent’s property is one way of determining the “original owners or their heirs” (See *Wally v. Sukrad*, 6 ROP Intrm. 38, 39 (1996)), but if such statute does not apply under Article XIII § 10, we do not amend the statute. We move on to customary law.

It was a grievous error in *Masang* (this justice was a member of the panel) to give the lands to a public entity when the lands qualified under the Constitution as lands that must be returned to the “original owners or their heirs.” Once the lands were found to have been originally and individually owned and such lands were taken wrongfully, that should close the door for any public claim. There simply was no ground for this part of **L51** the decision in law or equity. *Masang’s* decision was a self-inflicted wound from which it has taken 10 years to recover.