

Kotaro v. Ngotel, 16 ROP 120 (2009)
ZACHEUS KOTARO AND RURUNG EBILRULUKED MOBEL,
Appellants,

v.

YUKIWO NGOTEL,
Appellee.

CIVIL APPEAL NO. 07-052
LC/P 06-204

Supreme Court, Appellate Division
Republic of Palau

Decided: February 3, 2009

Counsel for Mobil: J. Uduch Sengebau Senior,

Counsel for Kotaro: Imelda Bai Nakamura

Counsel for Appellee: Raynold B. Oilouch

BEFORE: LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice; KATHERINE A. MARAMAN, Part-time Associate Justice.

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

PER CURIAM:

This case is an appeal of a Determination of Ownership issued by the land court on October 31, 2007.

BACKGROUND

A. Land Court Determination

In the October 31, 2007, Determination of Ownership, the land court evaluated competing claims to a parcel of land known as “Etchieb,” which consists of Tochi Daicho Lots 909, 910, 911 and 912. The land had belonged to Morwai, who died before the Japanese land registration and survey. When the survey was conducted, between 1938 and 1941, the land was registered in the Tochi Daicho under Loi, Morwai’s younger brother. The land is claimed by several parties: Zacheus Kotaro (hereinafter, “Kotaro”), Morwai’s grandson, on behalf of the Children of Morwai; Jersey Ngirachitei, Loi’s descendent; Rurung Ebilruluked Mobil (“Mobil”), Loi’s maternal niece; and Yukiwo Ngotel (“Yukiwo”), the son of Morwai’s son **p.121**

Ngotel.

Kotaro argued that Etchieb was distributed to Morwai's children at his *eldecheduch*, a conference after one's death at which the decedent's estate is settled, but held by Loi, as a trustee. Under this theory, the land belongs to Idub, Morwai's daughter and Kotaro's mother. However, the Tochi Daicho listing names Loi as the individual owner, not the owner in trust for Morwai's children. The court found that Kotaro had not presented sufficient evidence to overcome the presumption that the Tochi Daicho listing is correct.

Jersey Ngirachitei's claim for ownership was summarily denied because he did not offer any theory that supported his claim, except that Loi was his grandfather. Jersey did not appeal the decision.

Mobel's claim on Etchieb is based on a purported conveyance from Loi, on his deathbed, to Willy, his adopted son and Mobel's biological son. The court made a factual determination that Willy had predeceased Loi and that this conveyance could not have taken place.

Yukiwo claims Etchieb on the theory that the land was given by Loi to Ngotel, Yukiwo's father.

The factual findings made by the land court were that, of Loi's three children, only his stepson, Simol, survived him and that, prior to Loi's death, he transferred ownership of Etchieb to Morwai's son, Ngotel. Based on these factual findings, the land court awarded ownership of the land to the claimant Yukiwo, Morwai's grandson and Ngotel's son.

B. Issues Appealed

Appellant Kotaro argues that the land court erred in its findings as to custom, in that land should be held by paternal, not maternal, relatives. Additionally, Kotaro argues that the land court erred in its application of intestate law. Finally, Kotaro argues that the land court's credibility determination was clearly erroneous.

Appellant Mobel alleges that the land court's factual finding that Simol was the only surviving son of Loi was unsupported by the record and clearly erroneous. Mobel also argues the court erred to the extent it did not find that the property went to Willy, Loi's adopted son, upon Loi's death. Additionally, Mobel argues that the land court's determination that *medal a ngalek*, the giving of land by adoptive parents, constitutes Palauan custom was unsupported by sufficient evidence.

STANDARD OF REVIEW

The Appellate Court reviews land court findings of fact for clear error. *Children of Dirrabong v. Children of Ngirailild*, 10 ROP 150, 151 (2003); *Rechelulk v. Tmichol*, 6 ROP Intrm. 1, 2-3 (1996). In reviewing findings of fact, "[i]t is not the appellate panel's duty to reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence."

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Ebilklou Lineage v. Blesoch, 11 ROP 142, 144 (2004) (citing *ROP v. Ngiraboi*, 2 ROP Intrm. 257, 259 (1991)). Matters of custom are treated as factual matters; findings as to custom which are supported by such relevant evidence that a reasonable trier of fact could have reached the p.122 same conclusion will not be disturbed on appeal unless the appellate court is left with a definite and firm conviction that a mistake was committed. *Dokdok v. Rechellul*, 14 ROP 116, 119 (2007). The land court's legal conclusions are reviewed *de novo*. *Fanna v. Sonsorol State Gov't*, 8 ROP Intrm. 9, 9 (1999).

ANALYSIS

A. Analysis of Kotaro's Claims on Appeal

1. Land Held by Maternal Relatives

Kotaro argues that the land court erred in its finding that a maternal uncle, rather than a paternal uncle, would hold property in trust for minor children, under Palauan custom. He makes this argument in connection with his claim that the registration of the land under Loi was in trust for the Children of Morwai. The land court noted that, under this custom, the land would not be held in trust by Loi, the children's paternal uncle. Land Court Determination ("Det.") at 6-7. As noted above, findings as to custom will stand, if they are supported by relevant evidence so that a reasonable trier of fact could have reached the same conclusion. The land court based its finding on a publication issued by the Palau Society of Historians, in connection with other governmental entities, which explicitly named the maternal uncle as the proper trustee under Palauan custom. *Id.* Kotaro presents ethnographic evidence that property remains in the paternal line, though the evidence does not explicitly refer to trusteeship. Despite Kotaro's evidence, the evidence supporting the land court's finding is relevant and sufficient to defeat allegations of clear error.

Additionally, the land court did not reject the theory that the land was held in trust because of that custom. The court found that Morwai's son, Ngotel, was listed in the Tochi Daicho as the owner of a different plot of land. Thus, Ngotel was not too young to be listed as the owner of Etchieb and there would be no reason for Loi to hold the land in trust for Ngotel and his sister.

2. Application of Intestate Law

Kotaro also argues that the land court improperly disregarded the inheritance law at the time of Morwai's death. He asserts that, according to the traditional rules in effect at that time, individually owned property, like Etchieb, should be passed to the children of the deceased. Appellant's Brief at 5-6. He notes that children receive the land unless it was decided differently at an eldecheduch.

However, Kotaro's argument misunderstands the land court's role. The land court does not second guess a transfer of land made sixty years ago. Instead, it examines the relevant evidence and considers any relevant presumptions to determine who now owns the land. When a party argues that the Tochi Daicho listing is wrong, it is that party's burden to prove the error by clear and convincing evidence. *Taro v. Sungino*, 11 ROP 112, 116 (2004). *See also Rechirikl v.*

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Descendants of Telbadel, 13 ROP 167, 169 (2006) (noting that “when the listing in the Tochi Daicho is for individual ownership..., the rebuttal evidence must be particularly clear and convincing.”) (internal citations omitted). In this case, Kotaro argues that the land was not owned individually by Loi, as listed in the Tochi Daicho, but held by Loi as a trustee. To succeed on this claim, Kotaro bore the burden of proving, by clear and convincing evidence, that Loi indeed held the land in trust only. The land court p.123 determined that Kotaro did not meet this burden.

The land court’s determination is not clearly erroneous; it is based upon relevant evidence and a valid appraisal of credibility. Kotaro’s argument, that the court should infer from contemporary custom that the land should have gone to Morwai’s children, did not meet the clear and convincing evidence standard necessary to overcome the Tochi Daicho listing, and does not establish clear error to succeed here on appeal.

3. Credibility Determination as to Yukiwo

Kotaro notes that the land court found Appellee Yukiwo to be the most credible of all the claimants and urges the Appellate Division to evaluate that appraisal. He alleges that Yukiwo’s testimony was self-serving, unsupported by any extrinsic evidence, and contradictory at times. Additionally, Kotaro notes that Yukiwo also put forth the theory that Loi was holding the land in trust, not as individual property. Not only did the land court reject that theory, but it was inconsistent with Yukiwo’s testimony about his father’s age at the time of the Tochi Daicho registration.

“[T]he trial judge is best situated to make credibility determinations and ...[the Appellate Division] will generally defer to those decisions.” *Sereoch v. Telungalek Ra Alkemim*, 14 ROP 141, 143 (2007) (quoting *Tmiu Clan v. Ngerchelbuchebe Clan*, 12 ROP 152, 154 (2005)). The Appellate Division will only overturn credibility determinations of a trial court in extraordinary circumstances. *Palau Cmty. Coll. v. Ibai Lineage*, 10 ROP 143, 149 (2003).

Kotaro raises valid issues as to the credibility of Yukiwo’s testimony. However, it is within the court’s authority to credit parts of a witness’ testimony and find other parts unpersuasive. See *Pierantozzi v. Ueki*, 12 ROP 169, 170 (2005); *Irikl Clan v. Renguul*, 8 ROP Intrm. 156, 160 n. 9 (2000). Despite flaws in Yukiwo’s testimony, the record does not establish that the testimony is so clearly lacking in credibility to constitute extraordinary circumstances. A lower court’s choice between two permissible views of evidence, including credibility, cannot be clearly erroneous. *Masters v. Adelbai*, 13 ROP 139, 141 (2006). See also *Labarda v. ROP*, 11 ROP 43, 46 (2004) (noting that, even if an appellate court is convinced that it would have decided the case differently, it may not reverse a lower court’s permissible factual finding). As the land court’s reliance of Yukiwo’s testimony is permissible, it will not be disturbed by this Court.

B. Mobil’s Claims on Appeal

1. Factual Determination that Willy Predeceased Loi

Mobil’s claim for the land is based on the theory that Loi gave his land to his adopted son

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(her biological son) Willy, who is now deceased. The land court made a factual finding that Willy predeceased Loi, thus denying that the land was given to Willy. Mobil noted that, in deciding this issue, the court was faced with a choice between her testimony and Yukiwo's testimony, with no extrinsic evidence.

Mobil argues that the court erred in finding Yukiwo's testimony to be more credible p.124 than her own. She notes that her testimony was based on firsthand knowledge, a conversation she had with Loi, while Yukiwo's information was from a conversation he overheard between his parents. She also notes that the land court mischaracterized the source of Yukiwo's knowledge: the court concluded that Kotaro saw his father having a private discussion with Loi, and was told by his father shortly afterwards that Loi had discussed giving him the property Etchieb. Det. at 7. However, the testimony given by Yukiwo establishes that he stayed outside, while his father Ngotel went in the *chebill*¹ to talk to Loi and, when they returned home, he overheard his father tell his mother that Loi described holding the land in trust for Ngotel. Tr. at 84-85.

While Mobil is correct that the land court incorrectly described Yukiwo's testimony in one part of the decision, the court correctly described his claims at the beginning of the decision. See Det. at 4. Additionally, the land court based its determination not only on the content of Yukiwo's testimony, but on the uncontested facts that Loi had obtained the land from Ngotel's father and that Loi's stepson acknowledged Ngotel's ownership of Etchieb. *Id.* at 7-8. A lower court's factual finding that is permissible from the evidence will not be disturbed on appeal, even if the appellate panel would not have made the same finding. See *Labarda*, 11 ROP at 46; *Umedib v. Smau*, 4 ROP Intrm. 257, 260 (1994) (“[I]f the trial court's findings of fact are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion, they will not be set aside unless [the appellate court] is left with a definite and firm conviction that a mistake has been committed.”). The record before the land court allows for the determinations and conclusions made by the court.

Additionally, Mobil, like Kotaro, argues that Yukiwo is not credible because the land court explicitly rejected part of his theory: that Loi was holding the land in trust. However, as described above, a trial court is not required to evaluate testimony as part of a specific theory; nor is the court required to accept a witness' testimony in its entirety or not at all. *Pierantozzi*, 12 ROP at 170.

Mobil has not established that this is an extraordinary case, such as would justify a departure from appellate deference to a trial court's credibility determination.² The decision shows that the land court considered the content and credibility of the testimony of all the

¹*Chebill* refers to a partitioned-off section of a house, where a person is on their deathbed. See Tr. at 31.

²As described above, only in extraordinary circumstances will an appellate court overturn the credibility determinations of a lower court. For example, in *ROP v. Tmetuchl*, 1 ROP Intrm. 443 (1988), an appellate panel found that a witness in a murder case was not credible as a matter of law because she had admitted on several occasions that she fabricated her testimony, altered her story repeatedly and explained why she lied. This case is not as extraordinary as *Tmetuchl*, either in the fundamental rights at issue or in the witness' lack of credibility.

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witnesses and weighed the competing stories, before coming to a conclusion. The court p.125 specifically acknowledged that Yukiwo's testimony was flawed but found that it was still more compelling than the other claimants' accounts. This weighing and evaluating "is precisely the job of the trial judge, who is best situated to make such credibility determinations."

Ngirasechedui v. Whipps, 9 ROP 45, 47 (2001).

2. *Finding as to medal a ngalek*

Mobel criticizes the land court's mention of the practice *medal a ngalek*, in which land is given by adoptive parents to the biological maternal uncle of a deceased adopted child, without proving this custom. See Det. at 7, n.4. Mobel did not address the issue of *medal a ngalek* before the land court; the land court raised the issue *sua sponte*, in a footnote, solely for the purpose of explaining that it is irrelevant to the case at hand.

Mobel requests that the Appellate Division remand the case so the land court can engage in a fuller discussion of *medal a ngalek*, as a possible explanation for the transfer of land from Loi to Mobel. Mobel had an opportunity to address this issue before the land court and did not do so. Parties are obligated to make all of their arguments, and raise all their objections, in one proceeding; any arguments raised for the first time on appeal are deemed to be waived. *Kotaro v. Ngirchechol*, 11 ROP 235, 237 (2004); *Nakamura v. Sablan*, 12 ROP 81, 81-83 (2005). This rule is only relaxed in exceptional circumstances, such as when necessary to prevent the denial of a fundamental right. *Kotaro*, 11 ROP at 237 (noting that two exceptions have been found: "to prevent the denial of fundamental rights, especially in criminal cases, where the life or liberty of an accused is at stake" or "when the general welfare of the people is at stake") (quoting *Tell v. Rengiil*, 4 ROP Intrm. 224, 226 (1994)). No exceptional circumstances are present in this case. The land court's mention of this issue was both perfunctory and *dicta*. Mobel waived any argument related to *medal a ngalek* and her request for remand should not be granted.

CONCLUSION

For the foregoing reasons, the Determination of Ownership issued by the Land Court on October 31, 2007 is **AFFIRMED** in its entirety.