

**TELUNGALEK RA ITABERANG AND
ERELLANG,
Appellant,**

v.

**MARCIANA MIDAR RUBASCH,
Appellee.**

CIVIL APPEAL 10-009
LC/B No. 08-0077

Supreme Court, Appellate Division
Republic of Palau

Decided: February 1, 2011¹

[1] **Land Commission/LCHO/Land
Court: Burden of Proof**

Once the Land Court concluded that one claimant failed to establish a crucial element of its ownership claim, it was obligated to award the property to the only other claimant presenting a colorable claim to the property.

[2] **Appeal and Error: Preserving
Issues**

The Appellate Division may refuse to consider issues that were not raised before the Land Court.

Counsel for Appellant: J. Uduch Sengebau
Senior

Counsel for Appellee: Raynold B. Oilouch

BEFORE: ARTHUR NGIRAKLSONG, Chief

¹ Upon review of the briefs and the record, the panel finds this case appropriate for submission without oral argument pursuant to ROP R. App. P. 34(a).

Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, Associate Judge, presiding.

PER CURIAM:

Telungalek ra Itaberaang and Erellang appeals the Land Court's determination of ownership awarding certain lands in Ngerchemai Hamlet, Koror State, to Marciana Midar Rubasch. For the reasons stated below, we **AFFIRM**.

BACKGROUND

The property at issue is identified as Tochi Daicho Lot No. 370, now shown as Worksheet Lot No. 181-127A on BLS Worksheet No. 2005 B 06, in Ngerchemai Hamlet, Koror State. The Koror Tochi Daicho lists the property as individually owned by Rubasch. Rubasch died intestate in March 1981. Claimants to the property are Telungalek ra Itaberaang and Erellang (also referred to as "the lineage"), represented by Rosita Ngiraului; Marciana Midar Rubasch; and David Sokok Rubasch (for ease of reference, we refer to the claimants by their first names). Telungalek ra Itaberaang and Erellang claims ownership of Lot 370 through Okelang Clan. It contends that because Lot 370 is the property of Okelang, it belongs to the lineage of Rubasch's siblings including Itaberaang. Rosita claims the land for herself and her birth mother Kerngel Odaol, who is the child of Itaberaang. Marciana and David claim ownership of Lot 370 through Rubasch. Rubasch was the grandfather of David and

Marciana, though at the Land Court hearing, Marciana repeatedly referred to Rubasch as her father. Marciana is the daughter of Ilong, who is the only adopted child of Rubasch.

David testified that he filed a claim for the property on September 27, 1995, as a representative of Rubasch. At the hearing, he stated that at the time he filed his claim, he did not realize that the land was a taro patch. Because it is a taro patch, David concluded that it should be in the name of his sister, Marciana. Therefore, David did not pursue a separate claim and is not a party to this appeal.

Marciana testified that Lot 370 was the personal property of Rubasch, and that it was given to her as payment for a debt. According to Marciana, Rubasch's second wife, Otong, had a customary obligation to contribute to her brother's ocheraol. Rubasch approached his sisters, Itaberaang and Erellang, to assist in the obligation based on custom and, at least in part, because of food they had eaten at another event. The sisters, however, had nothing to give. Rubasch then took Marciana's children's Palauan money, and informed his sisters that they had to replace that money. If they did not replace the money, then the land would go to Marciana. Marciana confirmed that the land Rubasch spoke of was Lot 370, and she asserted that Itaberaang and Erellang failed to repay the money before they died.

In contrast, Rosita testified adamantly that Lot 370 was never Rubasch's individual property and that he had no right to give Lot 370 away. She contended that the Tochi Daicho listing is wrong, and that Rubasch was named the administrator of Lot 370 because he held the title Obechad of Okelang Clan. She further testified that Ilong, Marciana's

birth mother, was “taken care of” with land after Rubasch’s wife Iterir died, which ended any property issues concerning Ilong and Marciana. According to Rosita, Rubasch had previously attempted to give away land that he did not individually own, which resulted in arguments with his sisters. Further, no one mentioned to Rosita that any land was given out to Marciana as repayment of her children’s money. Rosita stated that her sister has lived on Lot 370 since 1990 and that no one has interfered with her occupation.

After hearing testimony, the Land Court issued its findings of fact and conclusions of law. It found that Rubasch individually owned Lot 370. At the time of his death on March 21, 1981, Rubasch did not have a will, no cheldechuduch was held, and no discussion regarding the disposition of Lot 370 took place. The court rejected Telungalek ra Itaberang and Erellang’s claim, finding Rosita’s testimony conflicting and incredible. It noted that Rosita failed to overcome the presumption that the Tochi Daicho listing was correct, and that she otherwise failed to articulate the lineage’s ownership interest even assuming Lot 370 was Okelang Clan’s property. It further discounted her testimony that Rubasch and Itaberang fought over Rubasch’s alleged transfers of certain Okelang properties because Lot 370 is not Okelang property and nothing shows that these disputes concerned Lot 370. On the other hand, it found Marciana’s testimony credible, and accepted that Rubasch took Marciana’s children’s Palauan money to fulfill the customary obligations of his wife, and that he informed his sisters that if the money was not repaid, Lot 370 would be given to Marciana. The court then noted that 25 PNC § 301 was the law of inheritance at the time of Rubasch’s

death, and concluded that other than Telungalek ra Itaberang and Erellang, which failed to prove its claim, no paternal or maternal lineage submitted a claim for Lot 370. Because Marciana was the only claimant to substantiate her claim, the Land Court awarded her ownership of Lot 370.

STANDARD OF REVIEW

We review the Land Court’s findings of fact for clear error. *See Ngerungel Clan v. Eriich*, 15 ROP 96, 98 (2008). Under this high standard, we will deem the Land Court’s findings clearly erroneous only if such findings are so lacking in evidentiary support that no reasonable trier of fact could have reached the same conclusion. *See Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161, 165 (2004); *see also Sungino v. Blaluk*, 13 ROP 134, 137 (2006) (“[I]t is not the duty of the appellate court to test the credibility of the witnesses, but rather to defer to a lower court’s credibility determination.” (quoting *Tab Lineage*, 11 ROP at 165)). The Land Court’s determinations of law are reviewed de novo. *See Sechedui Lineage v. Estate of Johnny Reklai*, 14 ROP 169, 170 (2007).

DISCUSSION

On appeal, Telungalek ra Iraberang and Erellang contends that the Land Court committed multiple errors in awarding Lot 370 to Marciana. First, it argues that the Land Court erred in applying 25 PNC § 301(b) to this case. Second, the lineage argues that the Land Court erred in awarding Lot 370 to Marciana because there was no clear and convincing evidence of Palauan custom showing that Iraberang and Erellang were required to replace Marciana’s children’s

money.

[1] Unfortunately, in focusing solely on the Land Court’s analysis of Marciana’s claim, the lineage overlooks a threshold matter—it failed to prove *its* claim of ownership. As noted, the Land Court concluded that Telungalek ra Iraberang and Erellang failed to establish that the Tochi Daicho listing of Lot 370 as Rubasch’s individual property is wrong. Upsetting this finding is critical to the lineage’s ownership claim, which rests entirely on the contention that Rubasch could not assign Lot 370 because it is the property of Okelang and (somehow) belongs to the lineage.² Once the Land Court determined Lot 370 to be Rubasch’s property (as listed in the Tochi Daicho), the lineage’s sole theory of ownership was negated. Further, the Land Court found Marciana’s testimony regarding the conveyance of Lot 370 credible. With this background, the Land Court was obligated to award Lot 370 to the only party (Marciana) presenting a colorable claim to the property. *See Basilius v. Basilius*,

² Rosita’s failure to articulate Telungalek ra Itaberang and Erellang’s theory of ownership was discussed by the Land Court in finding her testimony conflicting and incredible. As noted by the Land Court, Rosita wholeheartedly rejected the contention that Rubasch owned Lot 370, despite the Tochi Daicho listing. Her position was that Lot 370 is the property of Okelang, and somehow belongs to Rubasch’s siblings. However, Rosita failed to specify how the property belonged to Rubasch and his siblings if it was indeed the property of Okelang. Rosita did not claim to represent Okelang’s interest, and she never mentioned how Okelang’s ownership transferred to Telungalek ra Itaberang and Erellang. There may be more to this story, but Rosita failed to make it part of the record.

12 ROP 106, 111 (2005) (affirming the Land Court’s determination of ownership, noting that “it is clear that, after finding that Romana had failed to prove her one and only claim by a preponderance of the evidence, . . . the Land Court awarded the property to the only other claimant with a colorable claim”); *see also Renguul v. Elidechedong*, 11 ROP 11, 14-15 (2003) (finding that because appellant’s sole claim to ownership rested on the inaccuracy of the Tochi Daicho listing, the Land Court was correct to deny her claim once it determined that she had not overcome the Tochi Daicho presumption); *Rengiil v. Otong Clan*, 9 ROP 61, 62 (2002) (“Simply put, once the Land Court concluded that Kuabesngas was not clan land as claimed by Reksid, but rather the individual property of Rengiil, it was bound to award the land to Appellant, as the only party claiming to be the successor of Rengiil’s property in this proceeding.”); *see generally Eterochel v. Children of Rdechor*, 15 ROP 133, 136 (2008) (“[T]he Land Court can, and must, choose among the claimants who appear before it and cannot choose someone who did not, even though his or her claim might be theoretically more sound.”) (citing *Ngirumerang v. Tmakeung*, 8 ROP Intrm. 230, 231 (2000)); *Rusiang Lineage v. Techemang*, 12 ROP 7, 9 (2004) (same).

[2] Because the Land Court’s factual findings that Rubasch individually owned Lot 370 and he gave the property to Marciana are supported by evidence, they will not be disturbed. *See Tab Lineage*, 11 ROP at 165. To the extent that the lineage now contends that Rubasch’s individual ownership of Lot 370 may have somehow passed to Rosita and her mother, that argument is waived because it was never presented to the Land Court. *See Rechucher v. Lomisang*, 13 ROP 143, 149

(2006) (“Having failed to raise[] these issues before the Land Court, however, he is barred from raising them here. This Court has consistently refused to consider issues raised for the first time on appeal.” (citing *Kotaro v. Ngirchechol*, 11 ROP 235, 237 (2004)). With this background, Telungalek ra Iraberang and Erellang’s arguments on appeal fall short.

The lineage’s first argument, that the Land Court erred in relying on 25 PNC § 301(b), would potentially have merit if the Land Court indeed relied on § 301(b) in awarding Lot 370 to Marciana.³ In its decision, the Land Court referred to 25 PNC § 301(b) as the applicable law for determining

³ Section 301(b) states:

If the owner of the fee simple land dies without issue and no will has been made . . . or if such lands were acquired by means other than as a bona fide purchaser for value, then the land in question shall be disposed of in accordance with the desires of the immediate maternal or paternal lineage to whom the deceased was related by birth or adoption and which was actively and primarily responsible for the deceased prior to his death. . . .

The Land Court stated Rubasch died intestate on March 27, 1981, and that at the time of his death 25 PNC § 301 was the law of inheritance. (Land Ct. Order of Feb. 1, 2010 at 8.) This is true to the extent that the relevant language of § 301(b) was in force at the time of Rubasch’s death, though it was found in section 801 of the Palau District Code. *See e.g., Ysaol v. Eriu Family*, 9 ROP 146, 151-52 (2002) (Miller, J., concurring) (discussing the legislative history of 25 PNC § 301).

the proper heir of a deceased person where the decedent dies without a will, without issue, and was not a bona fide purchaser of the individually-owned land at issue. (Land Ct. Order of Feb. 1, 2010 at 7.) If these criteria are met, the authority to dispose of the land lies with the lineage that actively provided for the decedent prior to death. The court found that Rubasch died without a will and that he was not a bona fide purchaser of the land. It further found that Rubasch died without issue, noting that while Marciana referred to Rubasch as her father, he is actually her grandfather, and that Rubasch’s only adopted child was Ilong. The court concluded, however, that § 301(b) is not controlling because, aside from Telungalek ra Itaberang and Erellang, represented by Rosita, which failed to prove its claim, no paternal or maternal lineage of Rubasch submitted a claim, thereby forfeiting any right to Lot 370 under § 301(b).

Telungalek ra Iraberang and Erellang contends that the Land Court erroneously applied § 301(b) because Rubasch died with issue (Ilong), and that the application of § 301(b) led the court to reject its claim. However, even assuming Rubasch died with issue, the Land Court’s reference to § 301(b) does not constitute reversible error. Importantly, § 301(b) (and its predecessors) applies only when, among other things, the land at issue was owned in fee simple by the decedent and was not otherwise distributed at the time of death. Telungalek ra Itaberang and Erellang’s theory of ownership, as discussed by the Land Court, hinges on a finding that

Okelang, not Rubasch, was the owner of Lot 370. The Land Court considered and rejected the lineage's argument on this point. Only after this analysis did the Land Court refer to § 301(b) and conclude that no lineage presented a claim that would make § 301(b) a deciding factor—in essence, the Land Court's reference to § 301(b) is to acknowledge its inapplicability under the circumstances. The court then awarded the property to the only claimant to have established a claim to the land. *See Rusiang Lineage*, 12 ROP at 9. To read the Land Court's decision as rejecting Telungalek ra Itaberang and Erellang's claim solely under § 301(b) ignores the court's analysis of the arguments presented.⁴

Moving on, we reject the lineage's argument that the Land Court erred in awarding the property to Marciana because

⁴ This case is distinguishable from *Marsil v. Telungalkra Iterkerkill*, 15 ROP 33 (2008), which Telungalek ra Iraberang and Erellang cites for support. In *Marsil*, the Appellate Division remanded the case to the Land Court because the Land Court erroneously applied 25 PNC § 301(b) in awarding the property to the decedent's father's lineage (Telungalk ra Iterkerkill). The Court noted that “three separate requirements must always be met before § 301(b) can apply[:]. . . the decedent must die without issue, without a will, and must have acquired his lands other than as a bona fide purchaser for value.” 15 ROP at 36. In that case, one of the decedent's children (appellant Marsil) was a claimant to the land. Because the statute did not apply, the matter was remanded with instructions to award the property to the children of the decedent in accordance with Palauan custom. In this case, neither party's theory of ownership implicates § 301(b), and the Land Court did not apply § 301(b) in awarding the land to appellee.

there was no clear and convincing evidence establishing that under Palauan custom, Marciana would be entitled to Lot 370 if Itaberang and Erellang failed to replace her children's Palauan money. In presenting this argument, appellant seizes on one sentence in the Land Court's decision describing Marciana's testimony:

When they [Rubasch's sisters] could not provide what Otong needed[,] Rubasch took Marciana's children's Palauan money to fulfill his wife's customary obligations and told his sisters that they, in accordance with established Palauan customs, should be the ones to replace the money[;] if not this land would be given to Marciana in place of the monetary payment.

(Land Ct. Order of Feb. 1, 2010 at 7.) However, despite the lineage's contentions, the Land Court did not follow Palauan custom in rejecting its claim and awarding Lot 370 to Marciana. The award was based on evidence (deemed credible by the Land Court) that Rubasch, as owner of the property, gave Lot 370 to Marciana if Itaberang and Erellang failed to replace Marciana's children's Palauan money. It is undisputed that Itaberang and Erellang failed to repay Marciana.⁵ Further, Marciana's testimony reveals that Rubasch told Itaberang and Erellang to replace the money at least in part

⁵ Had the money been replaced, this might be a different case (or no case at all).

because they had eaten food at another event.⁶ As noted, the lineage failed to prove its claim, and without more, it cannot show reversible error on this point.

As a final note, Telungalek ra Itaberang and Erellang contends that Marciana's claim is barred by the statute of frauds. This argument was never presented to the Land Court and is therefore waived. *See Estate of Remeskang v. Eberdong*, 14 ROP 106, 109 (2007) (finding that appellant "failed to raise the statute of frauds argument before the Land Court, thereby waiving the defense." (citing *Hanpa Indus. Corp. v. Black Micro Corp.*, 12 ROP 29, 33 (2004)). Appellate courts generally decline to entertain issues raised for the first time on appeal, and we see no reason to vary from this principle under the circumstances. *See id.*

CONCLUSION

For the reasons stated, the Land Court's determination of ownership is **AFFIRMED**.

⁶ Marciana testified that "the reason my father had said the land would replace my child's money, his sisters could not meet his obligation—their obligation, because his sisters are eating the harvest of his wife. And his wife was in need of money so it was their obligation to meet this need." (Tr. 19.) She further described the nature of conveyance, stating that at one event, Rubasch's sisters ate part of a ngader. Later, when Rubasch was asked to contribute money at a related ocheraol, Rubasch asked his sisters to contribute "because they had eaten the ngader which are food to pay for." (Tr. 29.) Because his sisters "just wave [sic] their hands empty," he took Marciana's children's money and stated that if they do not repay the money, the land will go to Marciana. (Tr. 29–30.)