

**MELII TEMAEL,**  
**represented by Francis Kib,**  
**Appellant,**

v.

**KATHERINE S. TOBIASON,**  
**for the Children of Blaluk,**  
**Appellee.**

CIVIL APPEAL NO. 09-030  
LC/E 07-183

Supreme Court, Appellate Division  
Republic of Palau

Decided: February 2, 2011<sup>1</sup>

[1] **Descent and Distribution:**  
Determination of Heirs

Determination of a proper heir is a question of fact to be established by the parties before the Land Court.

[2] **Land Commission/LCHO/Land Court:** Evidence

The Land Court was entitled to accept one version of events over another conflicting version.

Counsel for Appellant John K. Rechucher  
Counsel for Appellee: Clara Kalscheur

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER,

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<sup>1</sup> 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).

Associate Justice.

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

PER CURIAM:

Appellant, the late Melii Temaël, represented by her son Francis Kib, on behalf of Bedel Lineage, appeals the Land Court's determination of ownership awarding a parcel of land in an area known as *Ngerengchong* to Appellant Katherine Tobiason and the children of Blaluk. For the reasons set forth below, we **AFFIRM**.

### BACKGROUND

The property at issue is identified as Lot No. 009 E 01 on Bureau of Lands and Surveys Cadastral Plat No. 09 E 00, in Elab County, Ngaraard State. It is located in an area commonly referred to as *Ngerengchong*.<sup>2</sup>

Three claimants appeared before the Land Court claiming ownership of Lot 009 E 01. The Ngaraard State Public Lands Authority claimed Lot 009 E 01 as public land. NSPLA's claim was based on a Tochi Daicho listing that Lot 009 E 01 was Japanese government land. The other claimants, Appellant and Appellee, claimed title through a common relative, Blaluk. Both asserted that the land was individually owned by Blaluk and never became public land, or alternatively, that it became public land through wrongful acquisition. Appellant and Appellee differed, however, as to the distribution of Blaluk's

<sup>2</sup> The parties refer to the portions of the property at issue as *Ngerengchong* or *Ngeriteit*. We adopt the language used by the Land Court.

property following his death on July 7, 1989.

To combat NSPLA's assertion that Lot 009 E 01 is public land, Appellant and Appellee introduced evidence that Blaluk individually owned Lot 009 E 01, which he inherited from his adoptive father, Bai. At some point, the Japanese took *Ngerengchong* and built a road across the property. The road divided the property into shorefront property, identified as Lot 009 E 02, and inland property, identified as Lot 009 E 01. Blaluk filed a claim for the entire *Ngerengchong* property in 1980. After a hearing, he was awarded Lot 009 E 02 in 1981, but his claim for Lot 009 E 01 remained unresolved at the time of his death.

The Land Court agreed with Appellant and Appellee that Blaluk was the rightful owner of Lot 009 E 01. It therefore rejected NSPLA's claim. NSPLA did not appeal the Land Court's determination that *Ngerengchong* is not public land. The question then turned to the proper heir to Lot 009 E 01 now that Blaluk is deceased. It is the Land Court's determination on this point that gives rise to the instant appeal.

Blaluk had four siblings: Waldingel, Sermong, Idip, and Saikemal. He also had several children, including three adopted children. Appellant Melii Temaël is the daughter of Blaluk's sister Sermong. She, along with her sister Rikel Tmarsel, filed a claim for Lot 009 E 01 on behalf of Bedel Lineage.<sup>3</sup> In support of Appellant's claim,

<sup>3</sup> Appellant Melii Temaël and Rikel Tmarsel filed their claim for Lot 009 E 01 on July 3, 1989—four days before Blaluk died. Blaluk is also listed as a claimant on that claim, but his signature is not on the document. Blaluk's oldest

Rikel Tmarsel testified that Blaluk is a member Bedel Lineage, and that shortly before his death, Blaluk confided to her and Melii that he wanted his property to pass to Bedel Lineage. She also testified that Blaluk's children did not take good care Blaluk in the years prior to his death.

Appellee Katherine Tobiason (also known as "Sokol") is one of Blaluk's children. Tobiason testified that after her mother, Blaluk's wife, died in 1983, an *eldech duch* was held. At the *eldech duch*, money was given to Blaluk's adopted children, Goretty and Marysis. It was said at this time that because Blaluk was still alive, the other children will be taken care of after his death. And, shortly after Blaluk's death in 1989, Blaluk's brother Idip held a meeting with Blaluk's relatives and Blaluk's children. The meeting took place at Idip's son's house in Medalaii. Melii and Rikel attended this meeting, as did Besebes Blaluk (Blaluk's oldest son) and Tobiason. At the meeting, Idip asked if any of the relatives had Palauan money to give to Blaluk's children. When no one offered money, Idip stated that Blaluk's properties will go to Blaluk's children. No one objected. Tobiason further testified that Blaluk stated that he intended *Ngerengchong* to pass to his children.

After receiving testimony, the Land

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son, Besebes, filed a claim for the property on July 20, 1989, on behalf of the children of Blaluk. Tobiason filed another claim on behalf of the children of Blaluk on July 7, 2005, after Besebes died. The Land Court found that both Appellant's and Appellee's claims relate to Blaluk's 1980 filing for Lot 009 E 01, and are therefore timely under 35 PNC § 1304(b) (requiring claims to be filed no later than January 1, 1989).

Court looked to the statutes in effect at the time of Blaluk's death to determine the proper heir to the property. *See Ngiraswei v. Malsol*, 12 ROP 61, 63 (2005) ("In determining who shall inherit a decedent's property, we apply the statutes in effect at the time of the decedent's death.") (quoting *Wally v. Sukrad*, 6 ROP Intrm. 38, 39 (1996)). The court found that 25 PNC § 301 was applicable. The court then concluded that because Blaluk acquired the land from Bai, he was not a bona fide purchaser, and § 301(a) does not apply. Also, because Blaluk died without a will but with children, § 301(b) does not apply.

The Land Court then considered evidence of custom. *See Marsil v. Telungalk ra Iterkerkill*, 15 ROP 33, 36 (2008) ("Absent an applicable decent and distribution statute, customary law applies."). Two witnesses were called to provide expert testimony as to Palauan custom under the circumstances. The Land Court determined that Idip's declaration at the Medalaii meeting was consistent with custom as established by expert testimony. It therefore concluded that Tobiason and the children of Blaluk are the proper heirs to Lot 009 E 01.

## 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

[1] As noted, the only issue before this Court is whether the Land Court erred in determining that Appellee is the proper heir to Lot 009 E 01. Determination of a proper heir is a question of fact to be established by the parties before the Land Court. See *Children of Dirrabang v. Children of Ngirailild*, 10 ROP 150, 152 (2003). The parties do not contest the Land Court's determination that Blaluk individually owned Lot 009 E 01, and they do not contest the Land Court's finding that customary law is appropriate for determining the proper heir to Blaluk's property.

Appellant first asserts that the Land Court erred in awarding Lot 009 E 01 to Appellee because there was insufficient evidence to show that Idip's statement conveying Blaluk's property to Appellee was consistent with Palauan custom. “The existence of a claimed customary law is a question of fact that must be established by clear and convincing evidence and is reviewed for clear error.” *Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, 34 (2006) (citing *Masters v. Adelbai*, 13 ROP 139, 141 (2006)); see also *Ngiraswei*, 12 ROP at 63 (“The trial court's findings as to a custom's terms, existence, or nonexistence are reviewed for clear error.”).

Here, the Land Court relied on the

testimony of Appellant's expert, Uchelrutechei Wataru Elbelau.<sup>4</sup> Elbelau testified that when a wife passes away before her husband, money and properties may be given to their children at the eldecheduch following her death, or after the death of the husband. If properties are not given out at the eldecheduch following the wife's death, the siblings of the husband will meet and discuss the distribution of the husband's property after his death. The Land Court accepted Tobiason's testimony that at the eldecheduch held after her mother's death, only Blaluk's adopted children received money, and it was explained that the other children would receive money and property after Blaluk's death. With this, the Land Court found that Idip's statement at the Medalaii meeting, that the children of Blaluk shall receive his property, was an effective customary conveyance.

Appellant argues that the Land Court erred because Elbelau testified that it is the decedent's sisters, or the daughters of the decedent's sisters, who are supposed to meet and determine whether the decedent's children receive property. This argument fails, however, because Appellant points to nothing in the record indicating that Blaluk's sisters attempted to discuss or distribute Blaluk's property in accordance with custom.<sup>5</sup> The

<sup>4</sup> Appellee's expert, William Tabelual, testified that if a father individually owns a piece of property, and the father has living children at the time of his death, the property passes to his children under custom. The Land Court did not mention Tabelual's testimony in its decision.

<sup>5</sup> The Court notes that with few exceptions, Appellant has substantially failed to comply with ROP Rule of Appellate Procedure 28(e), which

testimony relied on by Appellant concerns several hypothetical questions that do not appear to line up with the facts of the case. *See Rechebei v. Ngiralmu*, 15 ROP 62, 65 (2008) (finding that an answer to a hypothetical question regarding custom that does not correlate to the facts of the case is not sufficient to overturn the trial court's findings). Because the Land Court's findings as to the terms of a customary distribution under the circumstances are supported by the record, they will not be disturbed. *See Masters*, 13 ROP at 141.

[2] Relatedly, Appellant contends that Blaluk made an "oral will" shortly before he died by telling Rikel and Melii that he wanted his property to pass to Bedel Lineage, and that under Palauan custom, the oral will should have been given effect by Blaluk's relatives. She therefore argues that the Land Court erred by not awarding Lot 009 E 01 to Bedel Lineage. The Land Court was entitled to accept one version of events over another conflicting version. *See generally Saka v. Rubasch*, 11 ROP 137, 141 (2004) ("As to proof of custom no less than other factual matters, 'where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.'" (quoting *Rechucher v. Ngirmeriil*, 9 ROP 206, 211 (2002))). Here, the Land Court determined that Idip's statement that the children of Blaluk shall receive Blaluk's property was effective under customary law as established

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provides that "references to evidence must be followed by a pinpoint citation to the page, transcript line, or recording time in the record." While the Court has independently reviewed the record in this case, it need not accept statements of fact in Appellant's brief that are not supported by citation.

by expert testimony. The argument that Blaluk's siblings should have followed Blaluk's alleged dying instruction to Melii and Rikel and distributed Lot 009 E 01 to Bedel Lineage conflicts with this finding. And, nothing in the record pointed to by Appellant indicates that Idip or anyone else ever knew of Blaluk's instruction to Melii and Rikel.<sup>6</sup> Under these circumstances, there are no grounds for upsetting the Land Court's findings on this point.

Appellant makes two additional arguments that can be rejected summarily. First, Appellant argues that Idip lacked authority to convey Lot 009 E 01 to Blaluk's children because Blaluk did not own that lot at the time of his death. Next, Appellee asserts that Idip's statement distributing Blaluk's property to Blaluk's children is void because

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<sup>6</sup> Moreover, Elbelau's testimony on this point does not necessarily line up with the facts of this case. In testimony pointed to by Appellant, Elbelau answers a hypothetical question confirming that if a landowner informs his sister's children that he wishes his property to go to a certain lineage, that wish should be followed by his relatives, and the landowner's children cannot take the land in violation of that instruction. (Tr. 97.) However, on cross examination, Elbelau testified that if a landowner intends his property to be conveyed in a certain way, he gathers his siblings, including brothers and sisters and children of brothers and sisters, to inform them of his wishes. (Tr. 110–11.) Here, the facts, as found by the Land Court, reveal that Idip disposed of Blaluk's property in accordance with custom. While Appellant contends that there was bad blood between Blaluk and some of his siblings, expert testimony did not necessarily establish that Blaluk's alleged "oral will" to Melii and Rikel was sufficient.

it violates the statute of frauds. However, because Appellant never presented these arguments to the Land Court, they are waived.<sup>7</sup> 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)); *Nakamura v. Sablan*, 12 ROP 81, 82 (2005) (noting that, absent exceptional circumstances, arguments raised for the first time on appeal are deemed waived). In fact, Appellant’s argument that Blaluk did not own Lot 009 E 01 is

completely at odds with her position before the Land Court, and it is not clear how accepting either argument would assist Appellant in this case.

### CONCLUSION

For the reasons stated above, the decision of the Land Court is **AFFIRMED**.

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<sup>7</sup> These arguments were not raised in Appellant’s written closing argument to the Land Court or in any transcript in the record. The record reflects that Appellant filed a motion for reconsideration with the Land Court after the determination of ownership was issued, and that the Land Court denied that motion. Appellant does not identify any error in the Land Court’s rejection of the motion (which is separate from the Land Court’s determination of ownership), and does not reference the motion in her opening brief. See ROP R. App. P. 28(a)(7) (body of the brief shall set forth the nature of the order to be reviewed); ROP R. App. R. 28(a)(10) (requiring that any judgment or order that is the subject of the appeal be appended to any brief). Hence, any issues raised for the first time in the motion for reconsideration are not properly before this Court. See generally *Shmull v. Ngirirs Clan*, 11 ROP 198, 202 n.3 (2004) (noting that motions for reconsideration are not to be used to advance arguments that were available at the time of the original briefing or argument); see also *Ngetchab Lineage v. Klewei*, 16 ROP 219, 221 (2009) (noting that the appellant must point out specifically where the findings are erroneous).