

**PETER MIKEL,
Appellant,**

v.

**ISEBONG SAITO,
Appellee.**

CIVIL APPEAL NO. 11-041
Civil Action No. 11-041

Supreme Court, Appellate Division
Republic of Palau

Decided: May 15 , 2012

[1] Appeal and Error: Clear Error

A court's reliance on un rebutted expert testimony cannot be clear error.

[2] Appeal and Error: Abuse of Discretion; Appeal and Error: Standard of Review

Decisions regarding the ordering of witnesses and presentation of evidence are matters left to the determination of the Trial Division and are reviewed for abuse of discretion.

[3] Appeal and Error: Standard of Review

Our deference to the trial court with respect to fact-finding presumes that the court applied the correct burden of proof. Evaluating the facts under the incorrect burden amounts to legal error, which is reviewed de novo.

[4] Custom: Appellate Review; Custom: Judicial Notice

Sometimes it may be appropriate for this Court to affirm a lower court, even in the absence of clear and convincing evidence, under certain circumstances. We have upheld the Land Court's judicial notice of particular unchallenged customs. Additionally, some customs are so well-known and well-established that it is unnecessary to waste judicial resources establishing the practices in every case. The ranking and meaning of ochell and ulechell clan membership, for example, are so well-established by precedent and practice that they need not be proved in every case.

[5] Custom: Expert Testimony

Although custom is normally established through expert evidence, we have stated that a trial court is not *obliged* to accept un rebutted testimony as true.

Counsel for Appellant: Clara Kalscheur
Counsel for Appellee: Yukiwo P. Dengokl

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

Appellant Peter Mikel appeals the trial court's decision awarding Appellee Isebong Saito title to land known as *Metuker* located in

Ngermechau Hamlet in Ngiwal. He contends (1) the Trial Division clearly erred in finding that, under Palauan custom, dry land is awarded to male children, and (2) the Trial Division abused its discretion with respect to its treatment of various procedural issues. We affirm in part and reverse in part.

BACKGROUND

After a hearing considering various claims to *Metuker*, a Land Claims Hearing Officer determined that the land belonged to Ongalk ra Techeboet. A certificate of title in the name of "Ongalk ra Techeboet" later issued. Techeboet was deceased at the time of the Land Court hearing, but she was survived by her eight children, among them Mikel's mother, Maria Paulis. The Land Court did not explicitly define the term "Ongalk" but at times referred to the claim of Techeboet's "children."

On February 23, 2010, Saito purchased the interest in *Metuker* held by Techeboet's sons or their heirs, and the interest of one of Techeboet's daughters, Kelau Gabriel. Saito does not claim that she purchased Paulis' share or that of Techeboet's other three daughters or their heirs.

Saito filed the action below to quiet title to the property. Mikel, proceeding pro se, filed an objection, claiming that his mother and her sisters were co-owners of the land as part of Ongalk ra Techeboet. Saito filed a pretrial statement raising several responses to Mikel's objection. However, neither in her pretrial statement nor in any other filing or notice before trial did Saito contend that, under custom, females generally do not inherit

dry land. The pretrial statement also failed to list Moses Uludong as a potential witness.

At trial, Saito presented Uludong as an expert on Palauan custom, specifically with respect to adoption. When Uludong was unavailable to testify at the beginning of trial as part of Saito's case-in-chief, the trial court had Mikel proceed with his case and later allowed Uludong to testify out of turn. According to Mikel, the Trial Division never notified him that he could put on a rebuttal expert witness to testify regarding custom. The court did, however, explain to Mikel the purpose of a customary expert witness.

Uludong testified that, although "ongalk" means "children," in the context of *Metuker*, which is dry land as opposed to a mesei, the term likely refers to *male* children. He explained that, while females have input into how dry land is used, it is generally males who have actual ownership.

The Trial Division found in favor of Saito, citing Uludong's unrebutted testimony on Palauan custom. Mikel appeals, arguing that the Trial Division's finding was clearly erroneous and that the court's handling of various procedures was "unusual" and "detriment[al]" to him.

STANDARD OF REVIEW

[1] "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). We will not set aside factual findings of the Trial Division "as long as they are supported by such relevant evidence that a

reasonable trier of fact could have reached the same conclusion." *Delbirt v. Ruluked*, 13 ROP 10, 12 (2005) (citation omitted). The court's reliance on unrebutted expert testimony cannot be clear error. *Id.* Conclusions of law, however, are reviewed de novo. *Wong v. Obichang*, 16 ROP 209, 212 (2009).

[2] Decisions regarding the ordering of witnesses and presentation of evidence are matters left to the determination of the Trial Division and are reviewed for abuse of discretion. *See W. Caroline Trading Co. v. Leonard*, 16 ROP 110, 113 (2009).

ANALYSIS

I. Application of Custom

Mikel argues on appeal that the trial court erred in its determination that dry land may only be inherited by males under Palauan custom. He points to evidence that contradicts the Trial Division's finding. First, Mikel argues that Uludong suggested that ongalk is a term that can mean all children — not just male children. Second, the Land Court, in the proceedings giving rise to the certificate of title, frequently used the phrase "all children" to refer to the group of Techeboet's children who ultimately received a certificate of title. Finally, Mikel points out that Techeboet herself inherited the land, which suggests that the norm against women inheriting dry land is not without exception.

[3] The mere presence of evidence in tension with the Trial Division's conclusion is not sufficient basis for us to reverse its finding regarding a custom. Our clearly erroneous standard of review leaves such balancing for

the trial court. *See Ngirmang*, 14 ROP at 34-35. However, our deference to the trial court with respect to fact-finding presumes that the court applied the correct burden of proof. Evaluating the facts under the incorrect burden amounts to legal error, which is reviewed de novo. *See Wong*, 16 ROP at 212.¹

[5] In this case, Saito had the burden to show, by clear and convincing evidence, the substance of the customary practice. *See Ngirmang*, 14 ROP at 34. However, the Trial Division concluded its discussion of custom by stating, “Uludong testified that under Palauan custom, dry land (such as *Metuker*) is owned by the male children. His testimony was not refuted. That ends the inquiry.” This is a misstatement of the law. First, although custom is normally established through expert evidence, we have stated that a trial court is not *obliged* to accept un rebutted testimony as true. *Idid Clan v. Olngebang Lineage*, 12 ROP 111, 124 (2005). Thus, unrefuted expert testimony does not end the inquiry. Instead, the court must determine that the expert

¹[4] Sometimes it may be appropriate for this Court to affirm the Trial Division or Land Court, even in the absence of clear and convincing evidence, under certain circumstances. We have upheld the Land Court’s judicial notice of particular unchallenged customs. *See, e.g., Tellames v. Isechal*, 15 ROP 66, 68 (2008); *Ramarui v. Eteet Clan*, 13 ROP 7, 8-9 (2005). Additionally, some customs are so well-known and well-established that it is unnecessary to waste judicial resources establishing the practices in every case. The ranking and meaning of ochell and ulechell clan membership, for example, are so well-established by precedent and practice that they need not be proved in every case. However, neither of these exceptions to the rule apply in this case.

testimony is sufficient, in light of all the evidence before it, to overcome the evidence, if any, offered by the opposing party and establish the custom by clear and convincing evidence. Second, the Trial Division’s statement appears to shift the burden of proof to the party that did not invoke the custom by implying that Mikel had to present evidence to dispute the expert. This burden-shifting is inapposite in cases involving customs; the burden always remains on the party invoking the content of the practice.

Because the Trial Division applied the wrong standard in evaluating the evidence, we must remand this case to that court for consideration of the evidence under the correct standard.

II. Procedural Rulings

Mikel complains that several of the Trial Division’s procedural rulings and practices were improper. He argues that the court erred by (1) permitting Uludong to testify out of order after Mikel had already presented his case and allowing Uludong to be added as a witness although he was not listed in the pretrial pleadings; (2) allowing Saito, well into the trial, to raise several new issues; and (3) expressing favoritism toward Saito.

As an initial matter, we note that this section of Mikel’s argument is entirely unsupported by citation to case law. We have stated that we will not consider arguments unsupported by legal citations. *See Aimeliik State Pub. Lands Auth. v. Rengchol*, 17 ROP 276, 282 (2010). “Litigants may not, without proper support, recite a laundry list of alleged defects in a lower court’s opinion and leave it to [us] to undertake the research.” *Id.*

Further, none of Mikel's complaints about the Trial Division's procedures are so clearly meritorious that research and citation could be forgone. Upon our review of the proceedings below, we discern no abuse of discretion in the court's handling of the trial.

CONCLUSION

For the foregoing reasons, we **REVERSE** the trial court's conclusion regarding the inheritance of dry land and **REMAND** for proceedings consistent with this opinion. We **AFFIRM** the trial court's procedural decisions.