Ngiradilubech v. Timulch, 1 ROP Intrm. 625 (1989)

RUBEANG NGIRADILUBECH,
Appellant,

v.

TMATK TIMULCH,
Appellee.

CIVIL APPEAL NO. 5-86-A
Civil Action No. 124-80

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: May 25, 1989

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Yukiwo P. Dengokl

BEFORE: LOREN A. SUTTON, Associate Justice; ARTHUR NGIRAKLSONG, Associate Justice; FREDERICK J. O'BRIEN, Associate Justice Pro Tem.

O'BRIEN, Associate Justice Pro Tem:

This case requires us to review the correctness of the affirmance by the Trial Division of a decision of the Palau Land Commission [1], which, in turn, leads us to a consideration of the "presumption" that factual findings of trial courts are correct, and the presumption of the correctness of *Tochi Daicho*[2] listings.

⊥626 Regarding the former, the most recent pronouncement of this Court in *Riumd v. Tanaka*, 1 ROP Intrm. 597 (App. Div. April 18, 1989) is to the effect that, as stated in ROP R. Civ. Pro. 52 (a).

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.

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[1] Actually, the findings were made by the Ngatpang Land Registration Team and adopted by the Palau Land Commission, which then issued Determination of Ownership. That Determination was appealed to the Trial Division of this Court pursuant to 35 PNC 933, and from there to the Appellate Division pursuant to 35 PNC 934.

[2] Tochi Daicho is Japanese for "land book," *Ngiruchelbad v. Merii*, 2 TTR 631 (App. Div. 1961), and refers to the recording of ownership of land in Palau resulting from the land survey conducted by the Japanese Government between 1938 and 1941.

The *Riumd* court ruled that the term "clearly erroneous" did not apply to situations in which the record, when viewed in its entirety, might lead to two different but equally plausible conclusions, each of which was internally consistent and uncontradicted by extrinsic evidence. In such a situation, the trial court's choice between these conclusions could never be "clearly erroneous."

Our examination of the record leads us to conclude that, but for the *Tochi Daicho* listing of the land at issue as Appellant's individual property, the evidence before the Ngatpang Land Registration Team could be seen as leading to two equally plausible conclusions, neither of which was internally inconsistent or contradicted by extrinsic evidence. But there was extrinsic evidence to contradict Appellee's claim in the *Tochi Daicho* , which listed Appellant as the individual owner of the land in question.

However, before we can examine the factual basis for the decision below, we must examine and delineate the features of the presumption that *Tochi Daicho* listings are correct, so that we may gauge the impact of the presumption upon the evidence in this case.

⊥627 In a long line of cases from 1953 to 1974 during the Trust Territory days, the Trial Division of the High Court consistently held that, except for Peleliu and Angaur, [3] the Japanese Land Survey listings of the *Tochi Daicho* were entitled to a presumption of accuracy which, while not conclusive, required a "clear showing" of error to be rebutted. These precedents have been followed by the Trial Division of this Court, e.g. *Ngiraingas v. Isechal* , 1 ROP Intrm. 34 (1983), but our Appellate Division has not yet had the occasion to address the issue. There was one appellate decision of the High Court, *Ngiruchelbad v. Merii* , 2 TTR 631 (1961), which implicity recognized the presumption:

> During Japanese times, a land survey was conducted under procedures which included notifying and calling the members of the clan together to decide how pertinent lands were to be registered in the Tochi Daicho "land book". In accordance with these procedures, the two pieces of land in dispute . . . were listed, without objection, under decedent's name as individual property. It should be noted here that the "land book" listed properties as lineage owned land, as land owned by a clan, and as individually owned land, making clear distinction between the different categories. *Id.* at 633.
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> . . . the Japanese Administration, in its land survey of 1938-40, confirmed individual title to land, free from lineage control. In this survey, the administration made careful provision for proof that the clan or lineage involved had consented to the transfer of particular lands to individual ownership in the manner required by custom for transfer to another group. *Id.* at 636.

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[3] See, *Louch v. Mengelil*, 2 TTR 121 (Tr. Div. 1960), and *Ngerdelolk Village v. Ngerchol Village*, 2 TTR 398 (Tr. Div. 1963). Because the accuracy of the *Tochi Daicho* for Peleliu and Angaur has not yet been established, and because we are not called upon in this case to rule upon that issue, we expressly decline to do so.

Six years earlier, Chief Justice Furber, in *Baab v. Klerang*, 1 TTR 284 (Tr. Div. 1955), had stated the basis for the presumption and the burden to be shouldered by one who sought to overcome it:

> The Court takes notice that the official Japanese land survey in the Palau Islands which was completed in 1941 was carried on with considerable care and publicity, and that those engaged in it were given broad powers. The court holds that the presumption determinations made in this survey were correct is strong in the case of issues which were a matter of controversy at the time. To overcome this presumption in the case of such issues, there must be a clear showing that the determination in question is wrong. This is especially true where the listing made in the survey was not in the individual name of one who was the head of a group which he would ordinarily represent in dealing with outsiders and which now claims an interest in the land. *Id.* at 286.

We acknowledge the unbroken chain of consistent, well-reasoned, and factually supported trial court decisions in this jurisdiction over the past 36 years concerning the presumption, and its tacit recognition by the Appellate Division of the High Court. We also note that the *Tochi Daicho* resulted from a program conducted 50 years ago "with considerable care and publicity"[4 sic] "under procedures which included notifying and calling the members of the clan together to decide how pertinent lands were to be registered", which made "careful provision for proof that the clan or lineage involved had consented to the transfer of particular lands to individual ownership" and which listed properties as "lineage owned land, as land owned by a clan, and as ⊥629 individually owned land, making clear distinction between the different categories"[5 sic]. We feel no hesitation in holding, therefore, in accord ance with that wealth of precedent, that except for Peleliu and Angaur, the *Tochi Daicho* is presumed to be correct, and that the burden is on the party contesting a *Tochi Daicho* listing to show by clear and convincing evidence that it is wrong.

Applying the law to the facts here leads us to conclude that the Ngatpang Land Registration Team, the Palau Land Commission, and the Trial Division failed to accord the *Tochi Daicho* presumption the significance it deserved. The case otherwise is typical of land contests in Palau, where the witnesses for one side are barely more persuasive than the witnesses for the other side, and neither side has any documentary evidence or a significantly superior number of witnesses to support his position. In such a circumstance, the import ance of extrinsic evidence cannot be overstated. When, as here, a case boils down to a "swearing contest" between an approximately equal number of witnesses, and the evidence on each side is internally consistent, the party challenging the presumption has not rebutted the presumption by clear and convincing evidence.

We hold, therefore, that Appellee failed to rebut the presumption that the *Tochi Daicho* correctly listed Appellant as the individual ⊥630 owner of the land in question. Accordingly, we reverse the Trial Division's affirmance of the Land Commission's Determination of Ownership and remand the matter for the issuance of a new Determination of Ownership that Appellant is

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[4] *Baab v. Klerang*, 1 TTR 284 (Tr. Div. 1955).

[5] *Ngiruchelbad v. Merii*, 2 TTR 631 (App. Div. 1961).

the owner of the land.

REVERSED AND REMANDED.