In re Estate of Kloulubak, 1 ROP Intrm. 701 (1989)
IN THE MATTER OF THE ESTATE OF
OBAK KLOULUBAK,
Deceased.

CIVIL APPEAL NO. 8-84
Civil Action NO. 35-77

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: September 27, 1989

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Randy K.R. Schmidt

BEFORE: MAMORU NAKAMURA, Chief Justice; LOREN A. SUTTON, Associate Justice; ROBERT WARREN GIBSON,[1] Associate Justice.

PER CURIAM:

Kud Lineage of Peleliu filed a Motion to Consider Claims after reversal on appeal of the decision in *Ngikleb v. Ngirakelbid*, CA No. 1-84. The trial judge herein had entered a Decree of Distribution awarding the real properties and Title II War Claims money associated therewith, with the qualification that if the decision in *Ngikleb, supra* , were reversed on appeal such distribution could be challenged and reopened to consider the claims of Kud Lineage.

Trial or hearing was had on the Kud Lineage claims against the Estate of Kloulubak and an amended Decree of Distribution was entered as a result on March 21, 1984, in favor of Kud Lineage.

Before us now is the appeal of that decision which awarded seven (7) lots in Peleliu and a war claims payment of $14,139.00 to the Kud Lineage.

⊥702 The primary issue presented is whether the established rebuttable presumption in law in favor of the accuracy of *Tochi Daicho* listings which exists re land in [Babelthaup, sic] and Koror may be applied with the same effect and with an equivalent burden of rebuttal where land in Peleliu is concerned.

In the former case it is a matter of record that the surveys and determinations of ownership were carried out by personnel of the South Seas Bureau, an agency of the then occupying Japanese Government, and were performed in a manner which our courts have

[1] Associate Justice Gibson was a member of the decision panel, but is no longer with the Supreme Court of Palau.

recognized entitles the listings in the *Tochi Daicho* to credibility and the presumption of accuracy.

In the case of Peleliu, however, this work and the resultant listings were accomplished by agents or employees of Japanese mining companies operating in Peleliu and not with the same care, completeness and formality as existed in the work product of the South Seas Bureau. *Ngerdelolk Village v. Ngerchol Lineage* , 2 TTR 398, 403 (Tr. Div. High Ct. 1963), cited for that proposition in *Ngiraingas et al., v. Isechal & Bank of Hawaii, et al.* , 1 ROP Intrm. 36, 41 (Tr. Div. July 1982). *See Ngikleb v. Ngirakelbid, supra* ; *Ngiradilubech v. Timulch* , Civ. App. No. 5-86-A, 3, 5 (App. Div. Feb. 22, 1989). Moreover, at the time the Peleliu *Tochi Daicho* was compiled, it was common practice in Peleliu for the heads of clans or lineages to have their names listed as owners. Since Kloulubak was " *Obak*," it can be surmised that his name might have been inserted in the *Tochi Daicho* as owner. *Ngiraingas, et al, v. Isechal and Bank of Hawaii, et al.*, 1 ROP Intrm. at 41.

⊥703 We hold, based upon the above cited cases, that the rebuttable presumption which exists in favor of the accuracy of the *Tochi Daicho* re land in Babelthaup and Koror and which places the burden of rebuttal by clear and convincing evidence on the party contesting such, is not a viable evidentiary tool in the case of real property located on the island of Peleliu. In cases involving Peleliu land claims, such as this, the *Tochi Daicho* listing may come before the Court to be considered along with, and without necessarily being accorded any greater or lesser weight than, any other evidence presented. By this holding, we affirm the ruling of the Trial Court on this issue.

Having disposed of the primary issue we are now asked to determine that the Trial Court was wrong in its weighing of the evidence before it, and in its determination of factual matters when it held that: (1) no probative evidence was presented by the Estate which established the circumstances under which Kloulubak allegedly acquired personal ownership of the lands in question; (2) Kloulubak acted as representative and trustee of the Kud Lineage when the lands were listed in the *Tochi Daicho*, and that he filed the war claims under his name as representative and trustee of the Kud Lineage.

We are also urged to overturn the Trial Court's finding that the seven (7) lots in question belong to the Kud Lineage and the judgment that title to such lands and the Title II War ⊥704 Claims money associated with them be vested in the senior male representative of the Kud Lineage, Renguul Soalablai Umedib.

It is a long established rule of law that,

> an Appellate Court shall not set aside findings of fact made by the Trial Court if reasonable evidence exists in support of the Trial Court's findings and in the absence of manifest error. *Lador v. Rais*, (1968) 4 TTR 169; *Calvo v. T.T.*, (1969) 4 TTR 506; *Helgenberger v. T.T.*, (1969) 4 TTR 530; *Arriola v. Arriola*, (1969) 4 TTR 486.

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Silmai. et al. v. Magistrate of Ngardmau Municipality, Kumangai et al. , 1 ROP Intrm. 181, 183 (App. Div. Dec. 1984).

We are not convinced that the findings of fact issued by the Trial Court in its Memorandum Opinion, and the Amended Decree of Distribution resulting therefrom, are unreasonable, and we find no showing of an insufficiency of evidence, of manifest error, or of an abuse of discretion.

The transcript of trial proceedings contains many witness statements which if believed support the decision below. We were not present to listen to and to watch the witnesses and to assess their credibility and cannot now gainsay the assessments of the trial judge who was present, or his findings based thereupon. Accordingly, we decline to overturn the Trial Court's findings of fact.

Appellant also claims that the Trial Court erred by requiring appellant to show how the decedent acquired individual ownership in fee of the lots in controversy. Since ⊥705 the listing in the Peleliu *Tochi Daicho* was considered as evidence only, and not as a presumption, the Trial Court, after it was presented with evidence of the lineage's earlier ownership of the lots, appropriately shifted the burden of proof on this question over to the Estate. Having made a prima facie case that the lineage had remained the owner of the lots, it became the burden of plaintiff/appellant to show how and when the decedent acquired the lots in fee. "[I]t has been [well]-established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact [here, that Obak Kloulubak obtained possession of the lands in fee] which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant." *Fleming v. Harrison*, 162 F.2d 789, 792 (8th Cir. 1947); *Selma, R. & D. R. Co. v. United States*, 11 S.Ct. 638, 648 (1891); 29 Am. Jur. 2d Evidence § 131 (1967).

Finally, we assess appellant's estoppel claim. Appellee asserts that appellant cannot claim estoppel against appellee because appellant raised the issue only in a cursory and vague fashion, "in passing," in the Trial Court, and so cannot raise it for what is essentially the first time here, at the appellate level. Since appellant did impliedly raise an equitable estoppel issue in the Court below, we will consider it here, but this will not help appellant.

Appellant has not proved that appellee has engaged in ⊥706 conduct amounting to false representation or concealment in order to influence appellant. Appellant has not demonstrated the existence of the material elements required for estoppel. If even one such element is lacking, an estoppel will not be granted. *See* 28 Am. Jur. 2d Estoppel and Waiver at § 35.

"[M]ere silence or inaction will not work an estoppel. There must be some element of turpitude or negligence connected with the injury or inaction by which the . . . party is misled to his injury." *Id.* at § 53.

The appellee took time to press his claim to ownership of the lots in question, and his explanation, that he was waiting for the testator to fulfill his obligations as head of the clan (while he lived), is a reasonable one for the Trial Court to have accepted. *See* 28 Am. Jur. 2d

Estoppel and Waiver at § 58.

Courts are somewhat more reluctant to grant estoppel when it affects title to real property. *Id.* at § 81. "As a general rule, . . . the party attempting to raise [estoppel] must show an actual fraud or misrepresentation, concealment, or such conduct or negligence as will amount to a fraud in law . . . ." [when attempting to work an estoppel affecting title to real property]. *Id.* This would require, as fraud generally does, a very strong evidentiary showing. The Trial Court found no substantial evidence to establish an estoppel against appellee, and this Court also finds none.

⊥707 The judgment of the Trial Court is AFFIRMED.