Rose Kebekol et al.
v.
Koror State Public Lands Authority

Civil Appeal No. 13-020
Appeal from LC/B No. 08-296

Supreme Court, Appellate Division
Republic of Palau

Decided: June 4, 2015

Counsel for Kebekol et al. ..... Siegfried B. Nakamura
Yukiwo P. Dengokl
Counsel for KSPLA ..... Debra B. Lefing

BEFORE: R. ASHBY PATE, Associate Justice
HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem
KATHERINE A. MARAMAN, Part-Time Associate Justice

Appeal from the Land Court, the Honorable Rose Mary Skebong presiding.

[1] **Appeal and Error**: Basis of Appeal

It is the job of the appellant to identify and clearly present the issues on appeal.

[2] **Appeal and Error**: Rehearing

An appellant's failure to properly identify an issue in the briefing does not generally warrant rehearing once an opinion has been issued.

Order Denying Petition for Rehearing

Per Curiam:

Before the Court is Appellant Katey Giraked's petition for rehearing pursuant to ROP. R. App. P. 40. Petitions for rehearing shall be granted exceedingly sparingly, and only where the Court's original decision "obviously and demonstrably contains an error of fact or law that draws into question the result of the appeal." *Rengiil v. Republic of Palau*, 20 ROP 257, 258 (2013) (quoting *W. Caroline Trading Co. v. Phillip*, 13 ROP 89, 89 (2006)). Because Appellant's Petition fails to meet this standard, it will be **DENIED**.

I. The Land Court Did Not Make Findings Based on Speculation

Appellant's first argument is that this Court overlooked the Land Court's alleged reliance on factual speculation. Appellant presented this argument in her original

appeal, and we rejected it then as we do now. This Court did not fail to consider the alleged speculation—in fact, we specifically noted that there was no "indication that the Land Court improperly disregarded admissible evidence, *relied on inadmissible evidence*, [or] came to an unsupportable conclusion." *Kebekol v. Koror State Pub. Lands Auth*, Civ. App. No. 13-020, slip op at *14 (March 6, 2015) (emphasis added). We dismissed Appellant's speculation argument without extensive discussion because the argument was both unconvincing and undeveloped, and did not warrant significant attention. The Land Court's language is exceedingly clear: the hypothetical in question was *not* considered as factual proof, but was used to illustrate the *lack* of affirmative evidence presented by Appellant Giraked, who bore the burden of proof, to explain the presence of the adverse Tochi Daicho listing.

Appellant's own motion belies this point—as she asserts, "such a finding has no factual support in the record." But the Land Court did *not* find that the land was properly acquired, so a lack of evidence to support such a finding is irrelevant. No such finding was made because the Land Court, given that the burden was on the claimants to show that the land was wrongfully taken, did not need to make a finding as to how the land was acquired. *See Palau Pub. Lands Auth. v. Ngiratrang*, 13 ROP 90, 93–94 (2006) ("At all times, the burden of proof remains on the claimants, not the governmental land authority, to establish, by a preponderance of the evidence, that they satisfy all the requirements of [35 PNC § 1304(b)]"). What the Land Court found was that "Katey Giraked failed to prove that her father Ngiraked owned Tochi [Daicho] Lot 247, now 181-12507, and that it[] was taken through force or without compensation." It is a basic maxim of the law that failure to meet a burden of proof does not imply that an alternative or opposite fact is conclusively found. The Land Court found that Giraked had failed to meet her burden of proof—and nothing more.[1]

Second, given that she bore the burden in a return of public lands claim, it was the obligation of the Appellant to put factual support in the record; a land authority, if it so wishes, may stand silent and still prevail on a return of public lands claim if the claimant fails to meet her burden. *See Palau Pub. Lands Auth. v. Ngiratrang*, 13 ROP 90, 96 (2006) ("[P]ublic lands authorities have no obligation to appear or present evidence at a return of public lands hearing[.]"). Appellant asked the Land Court to infer, based on limited evidence presented and the return of adjacent lots in other claims, that this lot should be similarly returned. The Land Court disagreed, and noted that the possibility of lawful acquisition had not been disproven—the only obvious way that wrongful acquisition could be inferred if it was not affirmatively demonstrated. The Land Court weighed the direct and circumstantial evidence available on both sides of a disputed fact and found that Appellant had not met her burden.

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[1] That we eventually held that the Land Court erred in applying a heightened burden to Appellant does not affect the nature of *what* the Land Court did or the invalidity of Appellant's argument as to this issue.

Pressing an appeal based on Appellant's own failure to present evidence is questionable at best; bringing a motion to reconsider lacking any substantive distinction from the initial argument after being told that such "dubious factual challenges and legal arguments . . . amount to little more than conclusory statements about the Land Court's discretionary task of weighing the evidence [and] border on frivolous" all but invites sanction from this Court. Bringing such a motion after successfully appealing the judgment below is similarly sanctionable. Had KSPLA responded to Appellant's motion, we would likely have awarded fees and costs.

II. Res Judicata and Estoppel Were Insufficiently Argued on Appeal

Appellant further argues that this Court ignored her res judicata and estoppel arguments. ROP Rule of Appellate Procedure 28(a)(6) requires that:

> In the body of all briefs shall be a list of the questions presented in the appeal. This list shall set forth, in clear and concise terms, each question the party submitting the brief deems to be presented in the appeal. Each question presented shall be set forth in a separately numbered paragraph. At its option, the Appellate Division may consider a plain error not among the questions presented but evident from the record.

Appellant's opening brief complied with this rule, and we quote directly Appellant's "Statement of Issues on Appeal":

> 1. Did the Land Court err in applying the Tochi Daichio presumption to the instant case and concluding that Appellant had failed to overcome the Tochi Daichio listing by clear and convincing evidence and thus failed to prove the elements of her claim that her father was the prior owner of Tochi Daichio Lot 247 and that the land was taken through force and without compensation?
> 2. Did the Land Court improperly engage in speculation in finding or concluding that the Japanese could have obtained Tochi Daichio Lot 247 in a proper manner?
> 3. Did the Land Court abuse its discretion and thus erred in rejecting Appellant's claim to Lot 12057 where the preponderant weight of the probative evidence and the applicable law show that she met all of the elements of her Article XIII, Section 10 claim to Lot 12057?

Appellant Giraked's Opening Brief at 1. These exact questions presented on appeal are reiterated on page 9.

[1] Nowhere in this list is any mention of preclusion, either res judicata (claim preclusion) or collateral estoppel (issue preclusion). Our opinion addressed the three points of appeal that Appellant identified—we agreed with point one, that the Tochi Daicho presumption does not apply, disagreed with point two, because we found the Land

Court did no such thing, and summarily disposed of point three because it merely disagreed with the Land Court's evaluation of the weight of conflicting evidence, an argument we have repeatedly stated that we will not entertain.

[2] Yet Appellant now argues that, because LC/B 08-0297 found that Tochi Daicho 247 was, in its entirety, wrongfully taken (a finding, we note, that it is not entirely clear was a necessary fact given that only one lot was at issue), the wrongful taking element of her return of public lands claim should have been deemed fulfilled by offensive collateral estoppel because the Cadastral Lot in this case is part of Tochi Daicho 247. Having now further explained this theory in her Petition for Rehearing, it is clear from the lower court record what Appellant was attempting to argue. Unfortunately, it is *far* from clear from the record itself, and even less clear in Appellant's briefing which, as we noted above, does not identify issue preclusion as a question on appeal. Appellant's brief, for example, states that "[p]arts of TD lot 247, described as Cadastral lot No. 021 04 and Cadastral Lot N. 021 B 05, were earlier adjudicated by Associate Judge Salvador Ingereklii in Case LC/B 08-297 to be the rightful property of Appellant." Appellant Giraked's Opening Brief at 6. Yet, as presented in Appellant's brief, this fact appears to be irrelevant, because it discusses a separate case about separate Cadastral lots where, presumably, separate evidence and argument were presented—an argument Appellee KSPLA raised in its opposition. *See* KSPLA Response at 11. Moreover, it obviously implies that parts of Tochi Daicho Lot 247 were *not* adjudicated, thus calling into question how that case could be dispositive here. Appellant's Reply provided almost no clarity because Appellant, despite acknowledging that the Cadastral lots adjudicated in the previous case are separate from, if adjacent to, the lot in this case, argued that "the same land at issue in the instant case is the same land at issue in the prior case. That land is Tochi Daichio Lot No. 247." As separate Cadastral lots were involved, this ambiguous "same land" language failed to adequately articulate Appellant's legal theory.

Such imprecise and confusing language exists throughout Appellant's briefing. Appellant further stated that "TD Lot 247 was taken by force and without payment of adequate consideration," citing to the appeal of the aforementioned case, and argued that "Appellee conceded this element or fact when it did not appeal it and the Land Court's findings and determination regarding the other portions of TD Lot 247 adjudicated in LC/B 08-297 were affirmed in Civ. App. No. 12-035." But Appellee did *not* concede that point simply by not appealing it—that is, **parties should not appeal every disputed factual issue on which they do not prevail at trial.** *See* ROP R. App. P. 38 (Damages for Filing Frivolous Appeal). As we expressly stated in our Opinion in this case, appeal of a factual issue, such as whether a lot was taken by force, is often frivolous and a party is to be commended for *not* appealing such issues when no colorable grounds for appeal exist. But failing to appeal a fact that it is judicially established is *not* a concession, and Appellant's repeated insistence that this fact was on this basis "conceded" rang hollow.

Furthermore, the references to LC/B 08-0297 in Appellant's opening brief and Land Court filings repeatedly cite to the decision as an exhibit that was admitted into evidence or otherwise presented for factual consideration. But moving for the admission of a prior case into evidence is entirely different than arguing that it precludes further consideration of a judicially determined fact. Issue preclusion is a question of law that needs to be raised as such—not hinted or waved at in an exhibit which may very well be considered for entirely different reasons. Issue preclusion as a legal argument does not appear clearly in the Land Court filings or Decision, and is raised only in passing in Appellant's brief, without the citation to the record that is required by ROP R. App. P. 28(a)(7). Appellant simply claims, in the middle of a section about the Tochi Daicho presumption and without explaining how or why they apply, that "[t]he doctrines of res judicata and issue preclusion should have settled this fact issue." Appellant's Brief at 13. So, although Appellant believes she clearly articulated a claim for issue preclusion, she premised it upon the Land Court's refusal to accept her evidence. Further, she tied her issue preclusion argument to the applicability of the Tochi Daicho presumption, which also is not an evidentiary issue, and neither res judicata nor issue preclusion have anything to do with the standard of proof applied—both would actually render the standard of proof irrelevant. *See* Appellant's Giraked's Opening Brief at 13. Nevertheless, Appellant argued that they are somehow related—and that was the entirety of her legal argument on preclusion. Appellant effectively waved at what may have been her best argument on appeal, but sandwiched that argument between irrelevant and unavailing premises and points. This Court cannot be expected to sift through poorly articulated legal arguments in search of a grain of merit.

It is entirely possible, as Appellant now contends, that "this Court has failed to fully apprehend the facts and law underpinning Appellant's arguments." Appellant's Petition for Rehearing at 5. But any such failure was not due to lack of diligence on this Court's behalf—it was due to the lack of clarity in Appellant's legal argument both at trial and on appeal. The law is fundamentally premised on words that have meaning, and clarity of language is of the utmost importance when arguing a nuanced legal issue. Yet, as previously noted, Appellant entirely failed to identify issue preclusion as a question presented for appeal, so for this Court even to have considered recognizing such an error it would have had to have been plain from the face of the record. *See* ROP R. App. P. 28(a)(6). Nothing about Appellant's preclusion argument was plain.

CONCLUSION

Because Appellant Giraked has failed to identify any obvious and demonstrable error of fact or law that draws into question the result of the appeal, her Petition for Rehearing is **DENIED**.