

*Techur v. Tutuii*, 2 ROP Intrm. 122 (1990)

**KIMIKO TECHUR,**  
**Appellee,**

v.

**ISIDORO TUTII,**  
**Appellant,**

and

**BUTELBAI CLAN, Rep. by IYECHAD RA BUTELBAI INABO KATSUMI**  
**Appellant,**

v.

**KIMIO TECHUR**  
**Appellee.**

CIVIL APPEAL NO. 19-88  
Civil Action No. 366-87

CIVIL APPEAL NO. 11-89  
Civil Action No. 334-89  
(Consolidated)

Supreme Court, Appellate Division  
Republic of Palau

Opinion

Decided: July 20, 1990

Counsel for Appellants: John K. Rechucher

Counsel for Appellees: Johnson Toribiong

BEFORE: MAMORU NAKAMURA, Chief Justice; LOREN A. SUTTON, Associate Justice;  
ALEX R. MUNSON, Associate Justice.

SUTTON, Associate Justice:

These cases are consolidated for the purpose of this appeal.

There is, in Ngruil Hamlet, Ngerchelong State, a parcel of land called Imedebech.

Isidoro Tutii received permission from the senior members of Butelbai Clan to build his house upon this land. When he **¶123** started construction he was contacted by agents of Kimiko

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Techur and told to cease and desist as she claimed ownership of Imedebech. He did not do so and Kimiko Techur filed a complaint in ejectment. *Techur v. Tutii*, CA 366-87.

The complaint was filed December 7, 1987, and alleged ownership in fee simple of Imedebech by Kimiko Techur and trespass and usurpation of Techur's title and interest in the property by Tutii.

An answer was filed in due course alleging that Imedebech was owned by Butelbai Clan and that Tutii occupied the land with permission of the senior members thereof.

The case was tried on August 29, 1988. Prior to the commencement of trial a letter was sent to Inabo Katsumi, Iyechad ra Butelbai Clan, inviting him to intervene on behalf of the clan if the clan claimed an interest in the land. He was in Japan and did not receive the letter. Upon his return, however, he learned of the case and did attend the trial on August 29, 1988.

The trial court heard evidence, presented by the Plaintiff Techur, that Imedebech was given to Ngril Hamlet as tiakl for services rendered by the people of Ngril Hamlet to the people of Mengellang.

Imedebech was awarded to Ebais, Techur's father and the Iyechad ra Butelbai, as his share of the tiakl and as his individual land.

Prior to the death of Ebais he expressed the wish that ¶124 Imedebech be given to Kimiko Techur, his daughter, upon his passing.

After the death of Ebais several persons used and occupied the land after seeking and obtaining permission from Kimiko Techur.

Sometime before WW II, Wasisang, maternal uncle of Techur and trustee of her land under custom, gave Imedebech to Ngerusebek, Ebais's successor as Iyechad ra Butelbai Clan. Imedebech was subsequently listed in the *Tochi Daicho* as the individually owned land of Ngerusebek.

The court took judicial notice of the fact that all other lands listed in the *Tochi Daicho* under Ngerusebek's name were designated as Butelbai Clan land with Ngerusebek as trustee.

Upon the death of Ngerusebek, his widow returned the land to Techur.

Upon this evidence the trial court held that a strong presumption existed in favor of Techur's claim to ownership of Imedebech.

The only evidence received by the court of Butelbai Clan's ownership of Imedebech was testimony of one witness that for all of her 85 years she has known Imedebech as the property of Butelbai.

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The trial court, conceding that Plaintiff's claim was not "perfect," held that it was sufficient to override the claim of Butelbai and that therefore, as between Plaintiff Techur and ¶125 Defendant Tutii, Plaintiff's claim to Imedebech was clear and convincing, and entered judgement for Plaintiff.

The court commented on the "good faith" of both parties and stayed ejectment for ninety (90) days in the "hope" that the parties could work out an accommodation.

Subsequently, on November 13, 1989, the stay was continued pending this appeal and upon the posting of a supersedeas bond by Tutii in the amount of \$5,000.00 plus a house valued at \$7,500.00.

Later, on June 23, 1989, Butelbai Clan by its representative, Inabo Katsumi, filed a complaint against Kimiko Techur to quiet title to Imedebech in Butelbai. *Butelbai Clan v. Techur*, CA 334-89.

In due course Defendant Techur filed a motion to dismiss on res judicata grounds, citing *Techur v. Tutii, supra*, which was granted on September 7, 1989. The trial court, in that decision, held that by virtue of his attendance at the one day trial of *Techur*, Inabo Katsumi was noticed of the claim to Imedebech adverse to Butelbai Clan and that he "should have sought relief in the *Tutii* case". The Court, however, did not explain what process of relief he had available where he was not a party and the trial had been concluded.

The trial court held that *Techur*, was res judicata to Butelbai's claim and dismissed the case.

This matter was likewise appealed and is consolidated with ¶126 *Techur*, for the purpose of our decision on appeal which follows.

Oral argument was heard on July 17, 1990, however, Counsel for Appellee Techur, in *Butelbai*, was foreclosed from arguing due to his failure to file an appellate brief in that case. He was heard, however, on Civ. App. 19-88 (*Techur v. Tutii*).

Appellant Tutii in Civ. App. 19-88, concedes the absence of title in himself to Imedebech and contests the lower court's decision solely on the ground that Plaintiff/Appellee had the burden of establishing title in herself to Imedebech and that she failed to do so.

Appellant Butelbai Clan in Civ. App. 11-89, claims lack of opportunity to be heard as a violation of due process on the ground that Appellant was not a party to *Techur*, and that therefore the doctrine of res judicata does not apply.

Appellant contests the argument that privity exists between Butelbai Clan and Tutii and that therefore the ruling in *Techur*, absent Butelbai's intervention is binding on Butelbai, on the ground that such ruling was a judgement effecting only the rights of the parties and not one in rem, as against all the world. Further, that Appellant was under no obligation to intervene in

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*Techur* and that this fact is supported by the lack of any action pursuant to ROP R. Civ. Pro. 19 by the trial court and the absence of any statutory or constitutional provision that would have allowed or required intervention by Butelbai in *Techur*.

Finally, Appellant, in Civil Appeal 11-89, contests the ¶127 trial court's award to Techur of Attorney fees as a violation of 14 PNC Sec. 702.

We first consider the matter of *Butelbai v. Techur* and hold in favor of Plaintiff/Appellant.

It is conceded by Appellee that Inabo Katsumi received no notice of the proceedings before the commencement of trial in *Techur v. Tutii*.

There is no evidence that Inabo Katsumi is exceptional when compared with other citizens of Palau and the court is therefore compelled to note that, similarly to most non lawyer citizens, Inabo Katsumi may not be held to possess any special knowledge of law or procedure such that he would necessarily be aware, after observing the trial in *Techur*, that any threat existed to Butelbai Clan's claim of ownership of Imedebech or that Butelbai needed to intervene in the case in order to protect its rights. Additionally, what process was available to Inabo Katsumi at that point? It was too late to intervene and as a non party, Butelbai had no standing to appeal. Inabo Katsumi and Butelbai Clan were thus placed in the position of having no remedy against the Court's ruling in *Techur*. The dismissal of *Butelbai*, thus violated the clan's rights to notice and to be heard pursuant to the due process clause of Palau's Constitution.

We hold that the lower court's dismissal of this matter on grounds of res judicata was error and a violation of due process and we remand the case with Orders that the trial court proceed, ¶128 with a full opportunity accorded to Butelbai Clan to establish their claim to title of Imedebech.

As to Appellant's contention that the awarding of Attorney fees to Defendant/Appellee was a violation of 14 PNC Sec. 702 we agree and reverse.

Section 702 of title 14, PNC was amended by RPPL 3-7 on August 2, 1989, the amendment afforded an award of attorney fees to a Plaintiff only where the court finds that a complaint is frivolous or brought in bad faith. It is manifest, upon our decision above, that the complaint here cannot be characterized as such and accordingly 14 PNC Sec. 702, as amended, remains a bar to the award of attorney fees on the facts of this case. Additionally, the complaint herein was filed prior to the amendment of Sec. 702, rendering the section as amended inoperable in this case even if it did apply.

Finally, given the court's reversal of the lower court herein the order on costs also falls in any case.

In *Techur v. Tutii*, *supra*, we affirm the lower court.

We find that the decision is not clearly erroneous, 14 PNC Sec. 604 (b), and decline

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therefore to review the lower court judge's findings of fact.

A complaint in ejectment is a purely possessory action. 25 Am. Jur. 2d *Ejectment*, Sec. 1. To prevail, a Plaintiff in an ejectment action must present proof of title superior to that of Defendant. 25 Am. Jur. 2d, *Ejectment*, Sec. 19.

¶129 In an ejectment action the burden of proof of title falls upon the Plaintiff and Defendant is not required to offer proof of title or right to possession until Plaintiff has made a prima facie case of title sufficient to recover possession. 25 Am. Jur. 2d, *Ejectment*, Sec. 103.

Here, based upon the evidence presented by the Plaintiff the trial court found, that while such proof was insufficient to establish "perfect" title, the Plaintiff had made a prima facie case. Defendant, on the other hand, failed to present evidence sufficient to shoulder his burden.

Upon a review of the evidence before the trial court we cannot say that the findings of the trial court are clearly erroneous and accordingly we affirm the decision below. 14 PNC Sec. 604(b), ROP R. Civ. Pro. 52(a), *ROP v. Ngiraingas*, Crim. App. No. 4-89, slip op. at 4 (App. Div. 6/27/90).

As stated in this opinion the affirmance of the court below in *Techur v. Tutii*, is an affirmance only of Plaintiff/Appellee's right to possession of Imedebech superior to that of Defendant/Appellant Tutii and not a final judgement re title to the land.

In accordance with our reversal of the lower court's decision to dismiss *Butelbai v. Techur*, and to remand this case for trial or other process resulting in a determination of who has title to Imedebech, we stay ejectment of Defendant/Appellee in *Techur*, pending determination of title in *Butelbai*.

¶130 Supersedeas bond shall remain posted. We remand *Techur v. Tutii* to the lower court as well with instructions to either lift the stay or make it permanent depending upon the outcome of the *Butelbai* case and in either case to exonerate the supersedeas bond at that time.