In Re Silmai v. Rechucher, 4 ROP Intrm. 55 (1993)

IN THE MATTER OF THE APPEAL FROM THE DECISION OF THE LAND CLAIMS HEARING OFFICE,

SADANG SILMAI, et al.
Appellants,

v.

JOHN K. RECHUCHER,
Appellee.

CIVIL APPEAL NO. 34-91
Civil Action No. 397-90

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: December 9, 1993

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: John K. Rechucher

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice.

PER CURIAM:

Appellants seek to reverse the decision of the trial court upholding the determination of the Land Claims Hearing Office (LCHO) that a parcel of land known as Bai Urdmang in Ngardmau State is the property of appellee.

BACKGROUND

The LCHO made written findings of fact in its decision subsequent to the hearing in this matter; the trial court made no independent factual findings. At issue are the respective rights of the parties regarding a parcel of land known as Bai Urdmang. The parcel is part of a larger piece of property known as Ikrebai, ⊥56 located in the Urdmang hamlet of Ngardmau State. Ikrebai originally belonged to the Ngerkebai Clan.

Sometime during the latter Spanish or early German administration, the Ngerkebai Clan permitted Urdmang's council of chiefs, known as Ngara Urdmang, to build an abai on the land. The property has subsequently been called Bai Urdmang. The abai was destroyed during World War II and was never rebuilt. No evidence was presented as to the original terms of the

understanding by which the clan permitted Ngara Urdmang to build the abai.

There are no existing Tochi Daicho records regarding the lots from the time of the 1938-41 Japanese Land Survey. A 1975 land survey assigned Lot No. 29 H 02 to Bai Urdmang, and Lot No. 29 H 01 to the remainder of Ikrebai.

In 1975 all of the senior members of the clan held an *eldecheduch* (meeting of clan elders), a transcript of which is part of the record. The clan designated Ikrebai as the property of clan member Isaac Echang.

Appellee John Rechucher purchased Ikrebai from Echang in 1976. In 1984 three clan members mortgaged Bai Urdmang to Rechucher, who foreclosed the same year when the payments were not made. The LCHO found that Rechucher had already acquired title to the land prior to the mortgage.

DISCUSSION

Appellants Sadang Silmai, Beketaut Towai, and Itelbang Luii (deceased) are representatives of Ngara Urdmang and claim the land on behalf of the community of Urdmang. Appellants make two legal ⊥57 arguments that are essentially re-arguments of the facts as determined by the LCHO and adopted by the trial court. While we have held that the Trial Division is not bound by the "clearly erroneous" standard in reviewing the LCHO's factual determinations, 14 PNC 604(b), and has the discretion to grant a trial de novo, *Otiwii v. Iyebukel Hamlet*, Civil Appeal No. 28-91 (Sept. 14, 1992), at 10-12, we review the trial court's findings of fact using the clearly erroneous standard. *Ngirchokebai v. Spesungel* , Civil Appeal No. 33-90 (Nov. 11, 1992), at 4-5; *Udui v. Temol*, 2 ROP Intrm. 251, 254-56 (1991). That is, the findings of the Trial Division, including the findings of the LCHO which it adopts or leaves undisturbed, shall be upheld as long as they are supported by reasonable evidence, even if the court could have reasonably made different findings of fact. *Silmai v. Ngardmau* , 1 ROP Intrm. 181, 183 (1984).[1]

The first argument appellants make is that the trial court erred in disregarding the doctrine that title to clan land may not be alienated without the unanimous consent of the strong and senior members of the clan. Appellants contend that the 1984 mortgage to Rechucher was invalid because the chief and male title bearer of the clan, Sadang Silmai, was never consulted and never gave his consent to the transaction.

The problem with appellants' argument is that it is irrelevant in light of the finding below that Rechucher had already acquired ⊥58 title prior to the mortgage. Appellants suggest, as they did below, that the transfer of Ikrebai to Isaac Echang did not include Bai Urdmang. But as the trial court noted, appellants' suggestion was not based on personal knowledge and is contradicted by the tape of the 1975 *eldecheduch* which was part of the LCHO record, and which records the transfer of Ikrebai to Isaac Echang without mention of any exclusion. That tape provides reasonable evidence for the conclusion below that Echang properly acquired the entire property,

[1] Rulings of the trial court on pure questions of law will, of course, be reviewed de novo.

including Bai Urdmang, in 1975 and transferred it to appellee the next year.

Furthermore, even were the 1984 mortgage relevant, appellants' argument regarding the authority of the clan to alienate land without the unanimous consent of all of the strong and senior members is an argument that lies with the clan to make and that, at best, would support a determination in favor of the clan rather than appellants. However, the clan is not a party to these proceedings, having never filed a claim to the land before the LCHO.

Appellants' second argument is that the trial court and the LCHO erred in not recognizing Ngara Urdmang's claimed right to use the land indefinitely until it decided to return it. This argument suffers from two defects. First, no evidence was presented regarding the original agreement whereby Ngara Urdmang was permitted to use the land in question. It is therefore impossible to ascertain the exact nature and intended duration of the council's right. The trial court correctly considered this a ⊥59 "failure of proof". Second, to the extent appellants' argument rests on a purported custom that clan land set aside for public use shall remain so indefinitely, no evidence was presented that such a custom exists. Palauan custom is normally established by expert testimony that traces the historical application of the custom to the facts. *Udui v. Dirrecheteet* , 1 ROP Intrm. 114, 115 (1984). Appellants presented no evidence of the custom on which they seek to rely other than their own self-serving testimony, and certainly not the clear and convincing evidence required by this Court to prove the existence of custom. *See id.* at 116-17.

CONCLUSION

The judgment of the Trial Division upholding the determination of the Land Claims Hearing Office is AFFIRMED.