

Silmai v. Sadang, 5 ROP Intrm. 222 (1996)
SADANG SILMAI, et al.
Appellant

v.

OLIKONG SADANG, et al.
Appellees.

CIVIL APPEAL NO. 24-95
Civil Action Nos. 473-92, 480-92

Supreme Court, Appellate Division
Republic of Palau

Opinion

Decided: May 29, 1996

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice, JEFFREY L. BEATTIE, Justice; and
PETER T. HOFFMAN, Justice.

BEATTIE, Justice:

This is an appeal from a trial division decision which affirmed a Land Claims Hearing Office ("LCHO") determination that appellees owned certain property in Choll Hamlet, State of Ngararrd. We Affirm.

I.

This case involves thirteen lots of land. Six lots were registered in the Tochi Daicho as the individual property of Ngiralbong. The LCHO held that these lots were inherited by Appellee Olikong Sadang and, at his request, awarded the lots to **L223** him as trustee for Ngiralbong's family. The other seven lots were registered in the Tochi Daicho as the individual property of Madracheluib, also known as Maui. The LCHO held that these lots were inherited by Maui's children, Appellees Jonathan Samuel and Wilhelm Maui.

Appellant claims that the Tochi Daicho listings are erroneous, and that these lots were in fact owned by the Idis and Ngereblong Clans. The LCHO found that appellant did not overcome the presumption of accuracy attached to the Tochi Daicho listings of ownership, and the trial division affirmed. On appeal, appellant urges the Court to abandon the presumption of accuracy attached to the Tochi Daicho listings of ownership.

II.

The Trust Territory Courts, and later the Supreme Court of Palau, adopted a presumption¹ that the information concerning the identity of landowners contained in the Tochi Daicho is accurate². This places the burden on the party who disputes that information to establish that the information is inaccurate. We have adopted clear and convincing evidence as the standard of proof which must be met in order to establish that the listing in the Tochi Daicho is erroneous insofar as the identity of the owner of a parcel of land. The burden is placed on the party disputing the Tochi Daicho information due to both historical and policy considerations.

The Tochi Daicho is a product of the Japanese Land Survey which commenced in 1938 and concluded in 1941. Regarding the history behind the Japanese Land Survey, we noted in *Ngiradilubech v. Timulch*, 1 ROP Intrm. 625, 628 (1989) that:

[T]he Tochi Daicho resulted from a program conducted 50 years ago "with considerable care and publicity . . . under procedures which included notifying and calling the members of the clan 1224 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 individually owned land, making clear distinction between the different categories".³

The historical background of the Tochi Daicho gave rise to an "unbroken chain of consistent, well-reasoned, and factually supported trial court decisions in this jurisdiction over the past 36 [now 43] years" giving the presumption of accuracy to the Tochi Daicho. *Id.* As time passes, the presumption gains importance for policy reasons as well. The Japanese had the benefit of the testimony of people who had knowledge of the facts and circumstances surrounding the question of ownership of the lands at the time of the Japanese hearings. Today, almost sixty years later, most often we have to resort to hearsay testimony consisting of stories told by ancestors of the testifying witness, ancestors who were often alive and available to testify at the time of the Japanese hearings, or perhaps testimony of a witness who was of such a young age during the Japanese survey that he was not included in discussions concerning land transactions. From these circumstances sprung policy reasons for deferring to the determinations of ownership made by those who had the benefit of evidence of a higher quality than we have today, recognizing that the death of those with knowledge, passage of time, and fading memories

¹ Although loosely labeled as a "presumption" before the adoption of Rule 301 of the Palau Rules of Evidence, it is more accurately described as an allocation of the burden of persuasion to the party who disputes the Tochi Daicho to show that the identity of the landowner listed therein is erroneous.

² The presumption applies only to Tochi Daicho listings regarding land located in Koror and Babeldaob, and not to land in Angaur and Peleliu. See *Ngiradilubech v. Timulch*, 1 ROP Intrm. 625, 628 (1989).

³ The language within quotation marks is from *Ngiruhelbad v. Merii*, 2 TTR 631 (App. Div. 1961).

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have had a negative impact on the quality of evidence available to courts at the present time when dealing with events of sixty years ago or more.

Appellant contends on appeal that the historical underpinnings of the presumption are flawed and should be reexamined and abandoned in light of some studies prepared after the presumption was adopted. Appellant did not, however, raise this argument below. Therefore, there was no development of the facts concerning the studies appellant relies upon--the record does not reflect the depth or quality of the studies, the qualifications of those performing them, or even the complete content of the studies, nor were appellees given the opportunity to present contrary evidence which supports the conclusions drawn by the courts over the past four decades concerning the manner in which the Japanese Land Survey was conducted.

¶225 Absent compelling circumstances, we will not consider arguments which were not presented to the trial court. *Tell v. Rengiil*, 4 ROP Intrm. 224 (1994). This case presents no compelling reasons to depart from the normal rule and consider appellant's argument for the first time on appeal.⁴

Accordingly, the decision of the trial court is AFFIRMED.

⁴ Although appellant moved unsuccessfully for a trial *de novo* below, the motion was based on other grounds and did not mention any flaws underlying the presumption of accuracy of the Tochi Daicho or request the opportunity to present facts which would show that the presumption should be abandoned.