Kirk v. KSPLA, 6 ROP Intrm. 346 (1997)
SALOME Y. KIRK,
Plaintiff,

v.

KOROR STATE PUBLIC LANDS AUTHORITY,
Defendant.

CIVIL ACTION NO. 24-95

Supreme Court, Trial Division
Republic of Palau

⊥347
Decision
Decided: July 1, 1997

Counsel for Plaintiff: Kevin Kirk

Counsel for Defendant: Antonio Cortes

LARRY W. MILLER, Associate Justice:

This action seeks the return of a land known as *Suluu*, located in Ngermid Hamlet of Koror State. The land is claimed by Salome Y. Kirk, the granddaughter of Yalap, who is listed in the Tochi Daicho as its owner. This opinion constitutes the Court's findings of fact and conclusions of law. The Court addresses first its jurisdiction to hear the claim, and then the merits of the claim itself.[1]

I.

At the start of trial, Koror State Public Lands Authority (KSPLA) requested that the Court refer this matter to the Land Court, arguing that such a referral was required by RPPL 4-43. For reasons more fully stated on the record, the Court denied the request, finding that a referral was neither necessary nor appropriate under the circumstances.

This case originated as a claim for public land timely filed with the Land Claims Hearing Office in December 1988. In December 1994, the LCHO's Senior Hearing Officer dismissed the claim without a hearing, finding it barred by a prior adjudication. [2] This action was commenced and the Court ultimately issued a decision to the effect that, while collateral estoppel was potentially applicable to Mrs. Kirk's claim, the applicability *vel non* of that defense could not be

[1] Uburk Ngchar, who had previously claimed this land, was invited to file a motion to intervene by not later than August 1, 1996. No motion was filed, and her counsel appeared at the beginning of trial to acknowledge that she did not wish to proceed herein.

[2] The LCHO relied on a prior Land Commission determination which was, in turn, based on the Land Title Office proceedings discussed below.

decided without giving her an opportunity to be heard. Decision, August 21, 1995. The Court therefore directed the LCHO either to hold a hearing on her claim, or to refer it to this Court in accordance with the then applicable statute, 35 PNC § 1104(b)(1). By memorandum dated January 16, 1996, the LCHO chose the latter option.

⊥348 Before the trial in this matter was held, the OEK passed RPPL 4-43 which, among other things, created the Land Court in place of the former LCHO. As the Court has previously held, and now reiterates, *see* p.5 *infra*, it believes that substantive changes effected by that law were meant to have immediate effect. Contrary to KSPLA's suggestion, however, the Court perceives no intention on the part of the legislature to divest this Court of jurisdiction over claims properly referred to it under the prior law. Certainly there is no express provision to that effect. Nor does the Court see any basis to infer such an intention. Although KSPLA characterizes the Land Court's jurisdiction over claims for public lands as exclusive, its role is precisely the same as was the LCHO's: it is empowered to hear such claims in the first instance or may refer them to this Court if it "deems that consideration of [the] claim will seriously interfere with accomplishment of the purposes of [the] Act." Given the identical language in the LCHO's referral powers, compare RPPL 4-43, § 4(d) *with* 35 PNC § 1104(b)(1), there is simply no reason to believe that the OEK intended that the Land Court should re-visit prior referrals made by the LCHO.

II.

> To succeed with her claim to *Suluu*, Mrs. Kirk has the burden of proving
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> (1) that the land became part of the public lands, or land claimed as public land, as a result of the acquisition by previous occupying powers or their nationals prior to January 1, 1981, through force, coercion, fraud, or without just compensation or adequate consideration, and (2) that ... [she] is the proper heir[] to the land.[3]

There are two principal elements to this burden: that *Suluu* was acquired as public land in the specified circumstances, and that Ms. Kirk is the proper heir to such land. The Court discusses each in turn.

A.

Mrs. Kirk's claim to *Suluu*, supported by the testimony of ⊥349 several of her relatives, can be stated fairly simply: her grandfather Yalap owned it and never sold it or transferred it to anyone else, but the land was taken by the Trust Territory Government, without compensation, as a result of proceedings before the Palau District Land Title Office in the late 1950s and early 1960s. KSPLA's rejoinder is also relatively straightforward: the Land Title Office proceedings about which Kirk complains correctly concluded that Yalap had sold *Suluu* to a Japanese national before the war for a fair price; accordingly, her claim fails to meet the statutory requirement of a taking without adequate consideration or just compensation.

A preliminary question is raised by this Court's consideration of the record of the 1950s

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[3] This standard, contained in § 4(b) of RPPL 4-43, is substantially unchanged from the prior statute. *See* 35 PNC § 1104(b).

proceeding, more easily referred to as Claim 187. As noted earlier, the Court's initial opinion in this matter concluded that it was appropriate for the LCHO (or whoever heard Ms. Kirk's claim) to consider -- after a hearing -- whether that claim was barred under the doctrine of collateral estoppel. Section 4(b) of RPPL 4-43, however, amended the prior statute so that it now provides:

> Except in cases where claims of Palauan citizens, clans or lineages prevailed over the claim of the Trust Territory Government, its Land Title Officer and all of its political subdivisions, . . ., res judicata or collateral estoppel as to matters decided before January 1, 1981, . . . may not be asserted against and shall not apply to claims for public land by citizens of the Republic. The record of proceedings of the District Land Title Officer or the Palau Land Commission may be introduced as evidence in land ownership proceedings before the Land Court. The record shall be given such weight as the Land Court or Trial Division, in the exercise of its discretion, deems appropriate.[4]

In another case decided by the Court, it concluded that this provision should be applied to all pending claims for public lands. Decision and Order, *Masang v. KSPLA*, Civil Action Nos. 235-90 & 241-90 (May 8, 1996), at 7-8. That analysis will not be repeated here. It is worthwhile, however, to put in writing the Court's ⊥350 view of a novel argument raised by KSPLA in a motion to dismiss filed and argued (and denied) at the close of Kirk's case.

That argument asserted essentially that application of res judicata and collateral estoppel to these claims is mandated by the following language of Article XV, § 3(b) of the Palau Constitution:

> All rights, interests, obligations, judgments, and liabilities arising under the existing law shall remain in force and effect and shall be recognized, exercised and enforced accordingly, subject to the provisions of this Constitution.

It is KSPLA's argument, in other words, that RPPL 4-43 is unconstitutional to the extent that it prohibits this Court (or the Land Court) from giving preclusive to prior judgments concerning public lands.

This argument, in the Court's view, is untenable in light of the return of public lands provision, Article XIII, § 10,[5] with which Article XV, § 3(b), must be read in harmony. It is clear that for the former provision to be made meaningful, the latter must give way at least in part. The Framers of the Constitution must be deemed to have been aware that numerous claims for public lands were rejected by Trust Territory courts in the 1950s. They cannot have intended that

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[4] The statute also precludes assertion of the defenses of laches or stale demand and waiver. The prior statute had barred only the defenses of statute of limitations and adverse possession. 35 PNC § 1104(b).

[5] "The national government shall . . . provide for the return to the original owners or their heirs of any land which became part of the public lands as a result of the acquisition by previous occupying powers or their nationals through force, coercion, fraud, or without just compensation or adequate consideration."

otherwise valid claims for the return of public lands pursuant to Article XIII, § 10, should be thwarted by rigid adherence to those judgments pursuant to Article XV, § 3(b). Rather, the more likely intention -- and one that is manifest in its concluding clause "subject to the provisions of this Constitution" -- is that § 3(b) need and should not be applied in this context.

The Court need not say now whether it was constitutionally required (by Article XIII, § 10) that the government waive the defense of collateral estoppel or any of the other defenses waived by RPPL 4-43 in claims for public lands. For present purposes, it is sufficient to say that it is surely permissible (*i.e.*, not ⊥351 constitutionally prohibited) for it to do so.[6]

That having been said, the question remains as to the weight, if any, to be given to the proceedings concerning Claim 187. To reiterate, it is Mrs. Kirk's contention that her grandfather never sold or transferred *Suluu* to any other person. The only evidence to the contrary, and that is relied upon by KSPLA, comes from the records and the ultimate resolution of Claim 187.

Claim 187 was filed by Isak Tumchub, not Yalap. There is some indication, though it is unclear, that Yalap was called to testify at an early stage of the proceedings but there is no evidence that he was questioned about, or given the opportunity to comment upon, his purported sale of Suluu. Indeed, there is in the record a comment by the Land Title Officer (two years after Yalap is said to have appeared as a witness) that it would be necessary for him to speak with Yalap, but that comment is followed by his handwritten note that Yalap had passed away.

The evidence concerning's Yalap sale (or not) of the land comes from a variety of witnesses in hearings over a three year period before three different Land Title Officers. At a hearing on June 25 or 26, 1958, the first witness -- presumably Tumchub himself but unidentified in the record -- states that he "heard the land was to be sold for 3600 yen in about 1938" but that Yalap "received only 2800 yen from Nakazune". During that same hearing, someone testified (it is again unclear who) that "Kamahara loaned Nakazune the money to buy the land from Yalap." At a hearing on July 8, 1958, V.O. Sasao -- later described by the Land Title Officer as the "main witness" for the government -- stated that, when their land was being surveyed, the members of Ngermeterkang Clan had divided it among themselves "before the land was sold to the Japanese" and that Yalap had been given Suluu "for his own land" at that time. He identified Ngiratkel as a member of Ngermeterkang who "knows of this division". Ngiratkel's statement was taken on September 5, 1960. When asked, "Do you have knowledge that this land was sold to the Japanese?", he responded, "I don't know about that at all."

At a final hearing, held on December 4, 1961, Tumchub ⊥352 testified that Yalap had rented and then sold to a Japanese "probably" in 1941. Huan Ulengchong then testified that on July 19, 1941, he had sold *Suluu* for 3000 yen to a Japanese named Nisimesa, but had received payment of only 2400 yen. He stated further, "[w]e didn't register it [with the Japanese land office] or make the contract because he didn't pay all the money." Sasao then testified that, at the

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[6] Due process concerns would be raised by a statute that purported to restrict defenses available to private defendants or to limit the effect of judgments in their favor. The Court sees no problem (and KSPLA has not raised any) where the government limits its own defenses, particularly where it does so in furtherance of a constitutional mandate.

request of someone named Kawahara, he "went to Yalap and told him to go to Kawahara and get his money" but that he "wasn't with him when he went." He later said that he didn't know "whether or not Yalap received the rest of the money from Kawahara." Ulengchong testified that he didn't know of either Nakazune or Kawahara.

Shortly thereafter, the Land Title Officer issued a memorandum finding that the record "seem[s] to show that" Ulengchong had sold *Suluu* to Nisime while acting as agent for Yalap, that he had received 2400 out of an agreed price of 3000 yen, that later Kawahara, "evidently either an agent for or successor to Nisime", summoned Yalap to receive the remainder of the money, but that there was no witness to an actual delivery of the money. Nevertheless, the Land Title Officer stated that it was "highly unlikely that Yalap refused the offer" and he was therefore "inclined to feel that a firm and fair sale was made". He accordingly issued a Determination of Ownership declaring *Suluu* to be the property of the Trust Territory Government.[7]

Having fully reviewed the proceedings before the Land Title Office, this Court finds that they are not entitled to sufficient weight so as to conclude that Yalap sold *Suluu* (and received adequate consideration) such that his heirs should now be barred from reclaiming that land.

In the first place, it bears notice that, even absent the enactment of RPPL No. 4-43, the findings made by the Land Title Officer would not be entitled to preclusive effect under the general principles of collateral estoppel or issue preclusion. *See generally* Restatement of Judgments (2d), § 27. Yalap was not a party to those proceedings and Isak Tumchub can in no way be said to have been in privity with him. Moreover, the determination that Yalap had sold *Suluu* cannot be said to have been "essential to the judgment", *see id.*, because the Land Title Officer also concluded, ⊥353 based on the Tochi Daicho, that *Suluu* was Yalap's individual land. Once he had reached that conclusion, Isak Tumchub's claim to recover the land could not succeed for the simple reason that it was never his land in the first place. Even if the finding as to the sale could be considered an alternative determination, the rule is that where a judgment "is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." *Id.*, Comment i.

The reasoning behind this rule is instructive as to whether the Court should give weight to the Land Title Officer's finding even absent the principles of collateral estoppel: "[A] determination in the alternative may not have been as carefully or rigorously considered as it would have if it had been necessary to the result, and in that sense it has some of the characteristics of dicta." *Id.* With all due respect to the efforts made by the Land Title Officer in attempting to discern the facts, the Court believes that the evidence before him was -- and certainly is nearly forty years later -- too confused and incomplete to support a finding that Yalap had sold the land. While it is true that more than one witness testified that a sale took place, they could not agree on the pertinent facts. Did the sale take place in 1938 or 1941? Was it Nakazune who purchased the land -- as an early witness testified -- or was it Nisime -- as Ulengchong said. If the land was sold, did Yalap receive the whole purchase price? If one credits Ulengchong's

[7] Formally, he declared that the property belonged to the Alien Property Custodian, who then released it to the T.T. Government.

testimony -- as the Land Title Officer must have in finding that it had been sold to Nisime -- then the answer would appear to be no. Ulengchong had never heard of Kawahara, and even Sasao, who told of Kawahara's offer to pay the balance due, had no knowledge that it was actually paid. Of necessity, the Land Title Officer's findings were speculative -- Kawahara was "evidently either an agent or successor to Nisime", "it is highly unlikely that Yalap refused the offer", Isak's testimony about an argument with Yalap "is a fair indication that Isak suspected final payment had been made" (emphasis added), etc.

Finally, there is the absence of any testimony from Yalap. Mrs. Kirk has argued, with some basis, that Yalap never appeared in the proceedings. But even if the record is taken at face value, there is no indication that he was asked a single question about the alleged sale. It is often said that a court does not determine the res judicata effect of its own judgments. Nevertheless, while the Land Title Officer plainly had good reason to reject Isak's claim to *Suluu*, it is difficult to imagine that he would have considered the record before him a sufficient basis for a later court to adjudicate -- and extinguish -- the rights of Yalap or his ⊥354 heirs. In any event, for all of the reasons set forth above, that is this Court's view.

B.

The only remaining question is whether Mrs. Kirk is properly considered the heir to this land. Ample testimony was presented that, in accordance with Yalap's wishes as expressed to numerous members of his family, *Suluu* was given out to Yalap's son, Roisingang, after Yalap's death. Roisingang, Mrs. Kirk's father, deeded her the land in 1988.

There is no contrary evidence on these matters. The only alternative theory put forward by KSPLA is that Yalap's statements were insufficient to constitute an oral will under the version of Palau District Code § 801 then in effect, and that Suluu passed by operation of the same law to Yalap's oldest adoptive son, Mereb Tulik.[8]

The problem with this argument is that the only evidence that Mereb Tulik was Yalap's son comes from a witness who, later in her testimony, stated that she had misspoken.[9] According to her later testimony, although Mereb -- who was the natural son of Yalap's wife -- became a member of Yalap's household, he was already an adult and married by that time and was never adopted, legally or under custom, by Yalap. Unless this Court has a reason to discredit this corrected testimony -- and it does not -- KSPLA's arguments must be rejected.

CONCLUSION

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[8] Neither Mereb Tulik nor his heirs having filed a claim for Suluu before January 1, 1989, *see* 35 PNC§ 1104(b), RPPL 4-43, § 4(b), KSPLA would argue, the land must remain in public hands.

[9] Ms. Kirk also argues that Yalap's oral will was sufficient under the law then in effect, suggesting that under the original language of Resolution 28-57, on which § 801 was based, Yalap's will was sufficient. The Court leaves this issue, which raises the troubling question of whether § 801, or at least part of it, was miscodified, to another day.

For the reasons stated above, Mrs. Kirk is entitled to the return of *Suluu*. An appropriate judgment is entered herewith.