

Omrekongel Clan v. Ikluk, 6 ROP Intrm. 4 (1996)
**OMREKONGEL CLAN, Rep. by
ESPANGEL ESEBEI ARBEDUL and UODELCHAD ISEBONG,
Appellant,**

v.

**SANTOS IKLUK,
Appellee.**

CIVIL APPEAL NO. 28-94
Civil Action No. 124-92

Supreme Court, Appellate Division
Republic of Palau

Opinion

Decided: October 30, 1996

Counsel for Appellant: Yosiharu Ueda, T.C.

Counsel for Appellee: J. Roman Bedor, T.C.

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

MILLER, Justice:

Appellant Omrekongel Clan, represented by its male and female titleholders, brought an action seeking to eject the appellee, Santos Ikluk, from a parcel of land known as Ngeluul in Ngerkebesang Hamlet, Koror State. The trial court denied the **L5** requested relief. We reverse.

Sometime before 1962, Espangel Ngirchongor Melimarang, Omrekongel Clan's male chief, gave Meklechel Remoket a use right in Ngeluul, which is omsolel a blai (chief's title land or clan house land) for the Clan.¹ The current Espangel, Esebei Arbedul, never gave permission

¹ Ikluk has devoted a substantial portion of his appellate brief and argument to the contention that Ngeluul has the unusual status of being omsolel a blai for both Omrekongel Clan and Ngeluul Lineage. As best as we can discern, this contention was not raised in the trial court. Indeed, Ikluk's counsel sought on cross-examination to have one of the Clan's witnesses accede to the opposite proposition -- "that, under Palauan custom, a clan and a lineage cannot share one omsolel a blai". (IV, 9) (The citation refers to the transcript volume and the page number, respectively, of the quoted testimony.)

In the absence of compelling circumstances not present here, this Court will not consider an issue raised for the first time on appeal. *Tell v. Rengil*, 4 ROP Intrm. 224, 225-26 (1994). Ikluk did, and is now entitled to, argue that Ngeluul is not omsolel a blai for the Clan. The trial court's

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to Remoket or Ikluk, who resides in Remoket's house, to occupy Ngeluul. In 1992, he and the Clan's female titleholder commenced this action against them. The action was originally defended by both of them on the basis of Remoket's use right from the prior Espangel. *See* Answer (March 26, 1992), at ¶ 3; Trial Brief (July 29, 1992), at p.3. However, Remoket having died later that year, Ikluk argued at trial that, with Remoket's permission given before her death, he had succeeded to that right.

The trial court's rationale in rejecting the Clan's efforts to evict Ikluk from Ngeluul is encompassed in the following finding:

“Under Palauan custom, established by clear and convincing evidence, the highest male title holder and his female counterpart may terminate a use right to clan house land, absent a[] contrary agreement, without cause provided that if the holder of the use right is a good member of the clan, the holder of the use right must be provided with comparable substitute land upon which to live.” Decision at 2.

Based on its additional findings that Ikluk is a good member of the Clan; that he is, through Remoket, the holder of a use right to Ngeluul; and that he has not been offered substitute land; the trial court concluded that the Clan's attempt to eject Ikluk should be denied.

¶6 We assume, without deciding, that the finding quoted above is an accurate statement of customary law. We also assume, without deciding, that Ikluk is a good member of the Clan. However, we find that we cannot uphold the trial court's finding that, under custom, Ikluk is the holder of a use right to Ngeluul.

Undisputed testimony and prior judicial opinions indicate that omsolel a blai is highly significant. It "is a symbol of tribal unity and existence. It is a physical indication that the clan has not been dissolved and that its chief is the person who exercises control over the land while holding that office. . . . [T]he general pattern is for chief's title land to pass from chief to chief for use during the period he is head of the clan." *Kisaol v. Gibbons*, 1 TTR 597, 598 (App. Div. 1956).

In light of this understanding, we believe -- and his counsel acknowledged at oral argument -- it was Ikluk's burden, in seeking to avoid ejection, to show that he indeed possesses a use right to Ngeluul. Specifically, it was his burden to demonstrate (1) that Remoket's use right continued to exist after the death of the prior Espangel and his succession by the current Espangel; and (2) that Remoket's use right descended to Ikluk upon her death. And because the existence of any such use right in the circumstances of this case depends on the operation of customary law,² we believe that Ikluk was required to make those showings by clear finding that it is, however, *see* Decision at 6-7, is not clearly erroneous.

² In other circumstances, the existence vel non of a use right will raise a question of historical fact that need only be resolved by a preponderance of the evidence: Did or did not a clan or its chief grant someone a use right at a particular time? Here, however, as noted above, it is undisputed that Ikluk did not receive a use right from any Espangel or from the strong

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and convincing evidence. *Udui v. Dirrecheteet*, 1 ROP Intrm. 114, 115-17 (1984). Without addressing whether the first burden was met, we are convinced, on our review of the record as a whole, that the second was not.

Three witnesses offered testimony on the question whether Remoket, assuming her use right survived the death of the Espangel who gave it to her, could by herself transfer that right to Ikluk. First, the current Espangel, who testified both as a fact witness and as an expert on Palauan custom (*see* I, 28), stated that "if a person [with permission to live on omsolel a blai] is deceased, **L7** that terminates the right." (I, 106) Next, the Clan's expert twice answered in the negative:

"[I]f any person was given [a] use right to omsolel a blai, can she or he . . . transfer that permission to another person without consent from the chief title bearer?"

"No." (I, 145)

"Pursuant to Palauan custom, if a person who was given permission to live on a land, if he or she dies, can that permission transfer to another person, including the child, without consent of the senior members of the clan?"

"No, it's absolutely impossible." (I, 147)

Finally, Ikluk's expert, although at times appearing to support his claim, at other times appeared to agree with the Clan's position:

"He was given permission to the omsolel a blai and dies, isn't that permission simultaneously terminate[d] upon the death of that person?"

"The omsolel a blai will go back to the clan, . . . as the clan is a trustee for the omsolel a blai." (III, 1-2)

In reaching the opposite result, the trial court did not advert to any of this testimony, but appears to have relied solely on its own questioning of the Clan's expert:

"While the plaintiff claims that these facts [i.e., that Remoket gave Ikluk permission to live on Ngeluul and in her house following her death] do not confer on the defendant a use right to the land, the plaintiff's own expert witness testified that the holder of a use right to clan house land may give permission to another member of the clan to live on the house site and that person is entitled to continue living there as long as he or she remains a 'good' member of the clan until the use

members of Omrekongel Clan but claims to have received such a right from Remoket. We accept the trial court's finding that Remoket gave Ikluk permission to live on Ngeluul following her death. The central question remains, however, whether that permission was effective under custom.

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right is terminated. Therefore, the court finds that the defendant has a valid use right to the land known as Ngeluul.” Decision at 8.

This interpretation of the Clan's expert's testimony fails to take account of his earlier, conflicting testimony, quoted above, to the effect that a person with a use right to omsolel a blai may not **18** transfer that permission to another person without consent of the chief.

While we are hesitant to substitute our interpretation of testimony for the trial court's, we believe that the apparent conflict can be resolved if the subsequent testimony, on which the trial court relied, is understood to acknowledge the authority of Remoket to give permission to Ikluk to live in her house, but not any authority to transfer her right to use the land.³ But even if **19** we

³ Before addressing omsolel a blai, the court inquired with respect to clan land generally:

“Let's say there is a member of the clan living on a piece of property, and that member of the clan before she or he dies, gives another member of the clan permission to live in the house. . . . The person who gave permission then dies. Does the person who received permission to live in that house, and who is now living in the house, have any right to stay in that house?”

“Just like what I said, if he is good, . . . that this rubak like him, that he's a good and. . . loyal, dedicated member of the clan, then he can live [i]n the house. But is he's not good, . . . to the point that . . . the chief dislikes him, then the rubak and the ourrot . . . has the right to kick him out of the house.” (II, 26-27)

Later, the court applied the same question to omsolel a blai:

“Before the break, . . . you told me what would happen with a person who received a use right to clan land, and then gave permission to someone else also a member of the clan to live in that house. Do you recall that?”

“Yes.”

“Would the answers be the same if we were talking about omsolel a blai?”

“That's correct. It may depend on the people. If they are good to the members of the clan, it will happen, the same answer that I gave you. But if they're not good members of the clan, it won't happen.” (II 38; emphasis added)

There is admittedly a fine distinction between the right to live in a house located on omsolel a blai and a use right to omsolel a blai itself. Notably, however, this distinction was also drawn by Ikluk's expert. In the midst of questioning on this point, he stated: “There are two things that confuse[] me, the omsolel a blai, the land, and the house itself.” (III, 1) He explained that the authority to give another person the right to use the house belongs to: “[t]he person who owns the house. The chief doesn't have authority over the house.” (*Id.*) Shortly after, he testified in contrast, as quoted above, that the use right to the land terminates upon the death of

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accept the trial court's interpretation, we are left with a record containing, at best, self-contradictory testimony from both of the non-party experts as to Ikluk's claimed use right. We do not believe it can be said, on that record, that that right has been established by clear and convincing evidence and we thus must reject the trial court's finding in that regard as clearly erroneous. We accordingly find that the trial court's judgment must be reversed, and remand this matter for entry of judgment in the Clan's favor and requiring that Ikluk vacate Ngeluul within a reasonable time. *See Gibbons v. Kisaol*, 1 TTR 219, 222 (Tr. Div. 1955).

the use right holder. (*Id.*, 1-2).