Olngebang Lineage v. ROP, 8 ROP Intrm. 197 (2000)

OLNGEBANG LINEAGE, et al.,
Appellants,

v.

THE REPUBLIC OF PALAU, et al.,
Defendants.

CIVIL APPEAL NO. 98-27
Civil Action No. 592-89

Supreme Court, Appellate Division
Republic of Palau

Argued: April 12, 2000
Decided: May 24, 2000

Counsel for Appellant Olngebang Lineage: Johnson Toribiong

Counsel for Appellant Tikei Clan: J. Roman Bedor

Counsel for Appellant Omrekongel Clan: Clara Kalscheur

Counsel for Appellee Republic of Palau: James Dixon, Assistant Attorney General

Counsel for Koror State Public Lands Authority: Christine Ryan

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

MICHELSEN, Justice:

This is an appeal of an action brought under Article XIII, Section 10 of the Constitution, and involves a number of parcels in Meyuns that are part of the land traditionally known as Kemur. The Trust Territory Government gave the area the designation, "Retention Area No. 7." The Tochi Daicho lot numbers for the claimed parcels are 1430-1437, 1446, and 1447. As was the case in *Uchelkeyukl Clan v. Koror State Public Lands Authority* , 7 ROP Intrm. 98 (1998), the proceedings below involved conflicting claims of ownership by many different private parties. Claims for all or part of the area were filed by Keity Bandarii, Dilbosch Merar, Melwert Tmetuchl, Olngebang Lineage (also called Dudul Lineage), [1] Idid Clan, Omrekongel Clan, and Tikei Clan. By the time of trial, the private claimants had been whittled down to the latter four entities.

[1] In the Trial Division, the claim of Olngebang Lineage was brought in the name of Gabriella Ngirmang. We have changed the caption to insert the name of the real party in interest; Olngebang Lineage.

The trial court determined that the Tochi Daicho listed the owners as follows: lots 1430, 1432, 1433, 1434, 1436, and 1437, the Olngebang/Dudul Lineage;[2] lot 1447, Tikei Clan; and lots 1431, 1435, and 1446, the Nanyo Pearl Oyster Association and the Palau Branch Administration Office, respectively. After considering the evidence of all the parties, the Court found that the presumption of ownership in the Tochi Daicho listings had not been overcome, and consequently held that Olngebang Lineage and Tikei Clan owned the lots noted above. Because there is ⊥198 no dispute that the Japanese military expropriated the whole of Ngerekebesang and forcibly removed the inhabitants in anticipation of military action in Palau during World War II, the Court found that the lots were taken "through force, coercion, fraud, or without just compensation or adequate consideration," and thus were to be returned to those claimants pursuant to Article XIII of the Palau Constitution.

Regarding the conflicting claims of ownership by the private claimants to lots 1431, 1435, and 1446, the trial court did not find any one private claimant's evidence of ownership more convincing than the others. Furthermore, no evidence was presented by any claimant that explained how title to those three lots came to be held by the Nanyo Pearl Oyster Association, or the Palau Branch Administration, at the time of the Tochi Daicho survey. Hence, the trial court held that none of the claimants proved that those lots had passed into foreign hands through duress or for inadequate consideration, and that therefore they remained government property.

APPLICABLE LEGAL STANDARDS

Article XIII, Section 10 of the Palau Constitution has been implemented by 35 PNC § 1304(b), which provides:

> The Land Court shall award ownership of public land, or land claimed as public land, to any citizen or citizens of the Republic who prove:
>
> (1) that the land became part of the public land, or became claimed as part of the 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 prior to that acquisition the land was owned by the citizen or citizens or that the citizen or citizens are the proper heirs to the land.

"Except for the states of Peleliu and Angaur, the identification of landowners listed in the Tochi Daicho is presumed to be correct and the burden is on the party contesting a Tochi Daicho listing to show by clear and convincing evidence that it is wrong." *Ngiradilubech v. Timulch*, 1 ROP Intrm. 625, 629 (1989).

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[2] At trial, Gabriella Ngirmang testified that Dudul Lineage and Olngebang Lineage were the same. She was the witness for the Lineage as the senior strong member. Her testimony on this point was unchallenged.

This Court reviews the trial court's factual findings under the clearly erroneous standard. *Lulk Clan v. Estate of Tubeito* , 7 ROP Intrm. 17, 19 (1998). We will consider each appellant's arguments separately.

APPEAL OF OLNGEBANG LINEAGE

1. Location of lots 1431 and 1434

As previously noted, the trial court determined that the Tochi Daicho listings, in conjunction with other evidence, warranted finding that the Lineage was the owner of Lots 1430, 1432, 1433, 1434, 1436, and 436 before the advent of the war in Palau. Two conflicting government maps were submitted that date from the Trust Territory period. ⊥199 Neither can be completely right because neither contains all of the lots. Regarding the absence of the omitted lots, we agree with the trial court that "[t]hese lots must have been located someplace, and given the contiguity of the lot numbers . . . it makes a great deal of sense to conclude that they are all within the same area."

The major discrepancy at issue here, however, is that the largest lot is listed as "Lot 1431" on one map, and "Lot 1434" on the other. On appeal, the Lineage argues that the trial court should have exclusively used the map it submitted, which lists Lot 1434 as the largest lot. The Lineage argues that this map is accurate because it was "relied upon by the Trust Territory High Court in *Torul v. Arbedul* , 3 TTR 486 (Tr. Div. 1968)." It is not entirely clear from the record that it is the same map. In any event, the map referred to in *Torul* was used as a reference to land "exclusive of Retention Area No. 7," so the correctness of the designation of Lot 1434 was not an issue.

The trial court examined the Tochi Daicho listing to make sense of the maps. It held that if the listing showed that the Lineage's holdings in the area totaled 3956.2 *tsubo*, then the later maps must be construed to give the Lineage an area of approximately that size. Hence, the map that showed Lot 1434 where the other map placed Lot 1431 had to be an error, because switching those numbers expands the Lineage holdings far beyond the size suggested by the Tochi Daicho. This finding was not clearly erroneous.

The Lineage argues that the trial court erred in relying on the size of the lot because in examining conflicting descriptions of boundaries, statements regarding quantity are the last resort. The applicability of this doctrine, generally used to clarify ambiguous descriptions in deeds,[3] is questionable here. Even if we disregarded the trial court's reliance on lot size, "[i]f the trial court's findings of fact are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion, they will not be set aside unless this Court is left with a definite and firm conviction that a mistake has been committed." *Umedib v. Smau*, 4 ROP Intrm. 257, 260 (1994).

A witness for the Lineage, Hatsuichi Ngirchomlei, a former employee of the Palau District Land Commission, testified that he drew the map the Lineage submitted by tracing it

[3] See 12 Am. Jur. 2d *Boundaries* §§ 2, 60 *et seq*.

from the Land Management map, but that he did not know if the Land Management map was a Tochi Daicho map. The map was dated December 2, 1970. It was not stamped or signed or approved, and was signed as "traced by H. Ngirchomlei." The Lineage also presented witnesses whose testimony corroborated the map with their recollections of where the lot was located.

Tikei Clan presented a witness who was the Director of the Bureau of Land and Survey and was a certified surveyor. He testified that Exhibit 12 was a copy of the true and original map; that map showed the large central lot as number 1431. The Exh. 12 map was dated March 28, 1958 and was stamped, signed, and approved as a map of the "Trust Territory of the Pacific Islands, Office of Land Management," and had been drawn from a survey. Witnesses also testified as to their recollections that corroborated this map.

⊥200 The Trial Court faced the choice of which map showed the correct location of Lot 1434. "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Lulk Clan*, 7 ROP Intrm. at 19. The testimony of the Tikei Clan's witness and the official stamp and signatures on the Exh. 12 map permitted the finding that the Exh. 12 map was the true map. Because there were two permissible views of the evidence, we cannot say that the Trial Court committed clear error in choosing the Exh. 12 map.

2. *Tochi Daicho Lots 1431, 1435, and 1446: Nanyo Pearl Oyster Association and Japanese Government*

Tochi Daicho Lots 1431, 1435, and 1446 were listed as owned by either by the Nanyo Pearl Oyster Association or the Palau Branch Administration Office. Although the Lineage argues that the Association's listing had to be wrong because of the land-locked location of the property, and notes the absence of supportive oral history regarding use of the parcels by those entities, these arguments do not compel reversal of the trial court's weighing of the evidence, and its determination that the Tochi Daicho listing was not proven wrong by clear and convincing evidence.

APPEAL OF OMREKONGEL CLAN

We have considered the issues that Omrekongel raised on appeal, and conclude that only one argument requires discussion. The Clan contested the claims of ownership asserted by Olngebang Lineage, and argued that its oral history evidence, combined with certain documents from the 1950s, including findings of fact made by the Land Title Officer at the time, should have been sufficient to overcome the Tochi Daicho listings in the name of Umang on behalf of the Olngebang Lineage.[4]

In 1955, the chief of Omrekongel Clan signed an affidavit (co-signed by other Chiefs of Meyuns) which suggested that although the name Umang appears on a number of lots in the Japanese Land Registry programs of both the 1920s and the 1930s, Ibedul Louch had granted Umang, representing Dudul Lineage, a use right, not an ownership right. The District Land Title

[4] The Clan, appropriately, does not argue that the Land Title Officer's decision is entitled to *res judicata* effect. *Uchellas v. Etpison*, 5 ROP Intrm. 86 (1995).

Officer thereafter held that Umang had only a use right and that the last Palauan owner of the land before the Japanese expropriation was the Omrekongel Clan. He recommended, however, that the Trust Territory government retain title to the lots.

The trial court discounted the Land Title Officer's determination because it found that the hearing did not comport with due process. Omrekongel Clan argues this finding was unsupported by the record. However, even if the trial court had considered the evidence, the outcome would be the same. The Tochi Daicho listing for these contested lots was in the name of Umang on behalf of Dudul Lineage. Therefore Omrekongel Clan had the burden of presenting "clear and convincing evidence that [the Tochi Daicho listing] is wrong." *Ngiradilubech v. Timulch*, 1 ROP 625, 629 (1989).

Because any prior fact-findings and decision were not entitled to *res judicata* effect, they would only be "considered as ⊥201 evidence, against whatever contrary evidence a party to the current suit may wish to present." *Greycas, Inc. v. Proud* , 826 F.2d 1560, 1567 (7th Cir. 1987). In this case, the facts found by the Land Title Officer cannot be considered definitive. For instance, they appear to conflict with the facts found in *Torul v. Arbedul* , 3 TTR 486, 487 (Tr. Div. 1968). There, the court determined that Umang's name appeared as owner in the Tochi Daicho on properties immediately adjacent to the lots at issue here because "all parties concerned [with exceptions not pertinent to this discussion] acquiesced in having these lands listed as owned either by the lineage or individual to whom the use rights had been given by Ibedul Louch . . . ." It would be error to hold any of the current parties to either of these seemingly conflicting prior fact-findings. The trial court's decision ruling not to give weight to this evidence was therefore not error.

As to the hearsay statement of the chief of Omrekongel Clan in the 1950s, it is merely cumulative to the testimony of other witnesses Omrekongel presented at trial, which the trial court did not find to be persuasive evidence.

Hence, we conclude the trial court correctly held that the available evidence does not provide clear and convincing proof that the Tochi Daicho listings are in error.

APPEAL OF TIKEI CLAN

The trial court found that prior to the wartime expropriation, Tikei Clan was the owner of Lot 1447, and therefore is entitled to return of that land under Article XIII. The Clan appeals, although its argument is not entirely clear. It appears that the Clan suggests that its land also includes some or all of Lot 1434 - a lot we have already noted was also claimed by Olngebang Lineage - and which was listed in the Tochi Daicho as owned by Nanyo Pearl Oyster Association.

The Clan was required to show that the alien ownership of Lot 1434 before the war was acquired by some type of duress, fraud, or was transferred for inadequate compensation. The Clan's emphasis on the later wartime expropriation, which supports a finding of duress for Lot 1447, does not show an improper taking of Lot 1434 before the war. The trial court had the

opportunity to consider the testimony of the Clan's witnesses, and did not credit their testimony over the Tochi Daicho listing. Tikei Clan cannot point to any error that the trial court committed in so doing, and the trial court's finding was not clear error.

To the extent Tikei Clan challenges the trial court's failure to determine that it owned lots 1445, 1448, or any lots with higher numbers, those lots were not part of Retention Area No. 7, and thus were not at issue in this action.

CONCLUSION

In this case, the trial court first had to sort through the conflicting evidence of the claimants, and then decide whether the property was taken from the rightful owner by duress, fraud, or inadequate compensation. The trial court's findings of fact were not clearly erroneous, and it correctly applied the applicable legal standards in its decision.

MICHELSEN, Justice, also concurring separately:

⊥202 If writing on a clean slate, I would not have adopted Associate Justice Turner's phrasing of the Tochi Daicho presumption, which this court accepted in *Ngiradilubech v. Timulch*, 1 ROP Intrm. 625 (1989), because it is based upon an oversimplification of Chief Justice Furber's decisions during his tenure on the Trust Territory High Court.

I will not attempt a full canvass of the applicable cases here. Suffice it to say that in some cases Chief Justice Furber applied a rule akin to estoppel or claim preclusion. The Tochi Daicho listings would be presumed correct "in cases of issues which were a matter of controversy at the time" of the Tochi Daicho survey. *Baab v. Klerang*, 1 TTR 284, 286 (Tr. Div. 1955). "To overcome this presumption in the case ***of such issues***, there must be a clear showing that the determination in question is wrong." *Id.* (Emphasis added.)

When property was listed as clan or lineage land, the presumption applied. *Ucherbelau v. Ngirakerkeriil*, 2 TTR 282 (Tr. Div. 1961); *Medaliwal v. Irewei,* 2 TTR 546 (Tr. Div. 1964). In cases where there was proof of acquiescence of clan or lineage leaders of the transfer of clan or lineage property to an individual, Chief Justice Furber also accepted the Tochi Daicho listing. *Rekewis v. Ngirasewei*, 2 TTR 536 (Tr. Div. 1964); *Torul v. Arbedul*, 3 TTR 486 (Tr. Div. 1968).

However,

> where the land has been listed as the private property of the individual who was admittedly in charge of it, had the lawful use of it, and normally represented it in dealings with outsiders, any presumption of private ownership as distinguished from family ownership is weakened, since in accordance with usual Palau practice he would be the one who would normally supply the detailed information as to the ownership and would be the one the family would naturally rely on to protect its interests in dealings with outsiders.

Ngirchongerung v. Ngirturong, 1 TTR 71, 74 (Tr. Div. 1953).

In the first five reported cases where the Tochi Daicho survey is mentioned, the listing is rejected in all but one case. *Arbedul v. Ngirturong* , 1 TTR 66 (Tr. Div. 1953) (rejected); *Ngirchongerung v. Ngirturong,* 1 TTR 71 (Tr. Div. 1953) (rejected); *Baab v. Klerang* 1 TTR 284 (Tr. Div. 1955) (accepted); *Orukem v. Trust Territory* , 1 TTR 356 (Tr. Div. 1958) (rejected); *Rubasch v. Trust Territory* , 2 TTR 80 (Tr. Div. 1959) (rejected). This is hardly the track record one expects of listings that are, in later cases, said to be entitled to a "presumption of accuracy." *Ngiradilubech,* at 627.

Nonetheless, Associate Justice Turner began to use Chief Justice Furber's presumption without qualification in the late 1960s, starting with an "extension" of the presumption even to cases "where there apparently was no controversy at the time of the survey . . . ." *Ngirudelsang v. Itol,* 3 TTR 351, 355 (Tr. Div. 1967). Soon thereafter, he held that the evidence needed to overcome the presumption had to be "clear and compelling." *Owang Lineage v. Ngiraikelau,* ⊥203 3 TTR 560, 565 (Tr. Div. 1968). The Palau Supreme Court has gone even further, erroneously citing *Baab* for the proposition that "[w]hen the listing in the Tochi Daicho is for individual ownership(s), as here, the rebuttal evidence must be particularly clear and convincing." *Espangel v. Tirso,* 2 ROP Intrm. 315, 318 (1991) (emphasis in original). In my view, this ratcheting up of the quantum of proof was unjustified.

The current formulation of the Tochi Daicho presumption was not the only possible approach. In line with Chief Justice Furber's unquestionably correct comments in his *Ngirchongerung* decision, the Court could have held that if land was owned by a clan or lineage before the Tochi Daicho survey, but was listed therein in the name of a chief or a strong senior member of that clan or lineage, the burden of persuasion would be placed on the party claiming that the land became individual land at the time of the survey.

Nonetheless, it has been four years since a litigant challenged the Tochi Daicho presumption. *Silmai v. Sadang* , 5 ROP Intrm. 222 (1996). The question must therefore be considered settled. Hence, the doctrine of *stare decisis* applies. *Stare decisis* is "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 111 S.Ct. 2597, 2609 (1991). The *Payne* Court also repeated the oft-quoted passage by Justice Brandeis that adherence to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule be settled than it be settled right." *Burnet v. Coronado Oil & Gas Co* ., 52 S.Ct. 443, 447 (1932) (Brandeis, dissenting). On that basis, I accept the present formulation of the Tochi Daicho presumption.