

Filibert v. Ngirmang, 8 ROP Intrm. 273 (2001)
**LUIS FILIBERT, POLYCARP BASILIUS,
and BAULANG RDECHOR,
Appellants,**

v.

**RAPHAEL “BAO” NGIRMANG and UDES CLAN,
Appellees.**

CIVIL APPEAL NO. 98-67
Civil Action No. 98-264

Supreme Court, Appellate Division
Republic of Palau

Argued: September 13, 2000
Decided: March 8, 2001

Counsel for Appellants: Kevin Kirk

Counsel for Appellees: Oldiais Ngiraikelau, Yukiwo Dengokl

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; DANIEL N. CADRA, Senior Judge, Land Court.

MILLER, Justice:

The Trial Division issued a declaratory judgment that Appellee Raphael “Bao” Ngirmang holds the chiefly title Reklai of Uudes Clan of Melekeok State. We affirm the trial court in all respects.

Background

The title Reklai is the highest-ranking male title of Uudes Clan of Melekeok State. The bearer of the title Reklai is the High Chief of Melekeok State and the Paramount Chief of Bital Ianged, the northern half of Palau. Reklai is also one of the leaders of the Council of Chiefs¹ and is the head of the Ngara Bai Melekeong, the Melekeok traditional council of chiefs.

Raphael “Bao” Ngirmang and Appellants Luis Filibert, Polycarp Basilius, and Baulang Rdechore are members of Uudes Clan. In 1992, Bao² was appointed to bear the title Reklai. In 1998, Appellants took actions to remove the title Reklai from Bao. In September 1998, Bao

¹ The Council of Chiefs consists of a traditional leader from each state of Palau and is part of the Executive Branch of the national government. *See* Palau Const. art. VIII, § 6.

² For convenience we follow the Trial Division’s practice of referring to clan members by their first names.

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brought this action in his own name and on behalf of Uudes Clan seeking a declaratory judgment that he held the title Reklai and that the removal was invalid. Bao also sought an injunction barring Appellants from further interference with his title and alleged that Appellants had defamed him by stating publicly that Bao's title had been removed. Bao withdrew the defamation claim before trial.

Trial was held in October and November of 1998. Bao presented evidence of his appointment and of Appellants' interference with his title. He testified that he was appointed as title-bearer in 1992 and was confirmed by a unanimous decision of the Ngara Bai Melekeong. He said that he had held the title without interference until May or June of 1998, when Baulang came to his house to remove the title. He also claimed that in August 1998 Luis had called a meeting of the Council of Chiefs without his knowledge. Bao called Luis as an adverse witness, and Luis confirmed that in August he had entered the office of the Council of Chiefs as the newly-appointed Reklai, had been shown Reklai's seat, had sat in the seat, and 1274 had been given and signed a notice with his name listed as Reklai Luis Filibert.

Appellants initially disputed the validity of Bao's installation but later agreed to a stipulation that Bao had been appointed, installed, and confirmed as Reklai in 1992. After Bao presented his evidence, Appellants moved to dismiss on the grounds that Bao had not proven that the removal of his title was invalid. The court denied the motion, stating that Bao had established a prima facie case that he was Reklai and that if Appellants had evidence that the title was removed it was time to present that evidence.

Appellants and some other clan members then testified about the actions taken to remove Bao's title.³ They testified that Appellants and some other clan members had become dissatisfied with Bao and had held a series of meetings in 1996 and 1998 in which Bao was criticized for violating custom and opposing a quarry project. The meetings culminated in a May 1998 meeting at the house of Kazuo Asanuma where Raymond Ulochong read a statement accusing Bao of various customary violations and of habitually opposing the public interest. Appellants claimed that a decision to remove Bao's title had been made at the meeting. On June 13, 1998, Baulang went to Bao's house and told him she had come to remove the title. Appellants and some other clan members then decided to appoint Luis as the title-bearer.

Toward the end of Appellants' case Ibedul Yutaka M. Gibbons tried unsuccessfully to negotiate a settlement. Some clan members then testified for Bao in rebuttal.⁴ Tosko and Kelau said no decision to remove Bao's title had been made at the meeting, and Tosko, Kelau, and Ayako Onklungel testified that they had never agreed to the removal of Bao's title and still recognized him as Reklai. Judge Moses Mokoll and Moses Uludong testified that Bao retained his seat in the Ngara Bai Melekeong.

³ The clan members besides Appellants who testified were, in order, Raymond Ulochong, Techereng Baules, Baslisa Tarkong, Gracia Yalap, Basilia Kintaro, Hermino Olkeriil, and Ramona Andres.

⁴ Clan members testifying for Bao were, in order, Kliu Tellei, Lazarus Kodep, Tosko Ikeya, Kelau Gabriel, Ayako Ongklungel, and Ubal Tellei.

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The Trial Division denied Bao's request for an injunction but issued a declaratory judgment that Bao held the title Reklai. The court first held that Appellants had the burden of proof on the issue of removal. The court determined that as Bao's only claim was that he was the Reklai, Bao had to prove that he was properly appointed and installed as the title-bearer under Palauan custom. The court found that the evidence of Bao's appointment and installation made out a prima facie case that Bao was Reklai, and that Appellants had to prove that the title had been removed according to Palauan custom to defeat Bao's claim.⁵

The court then held that Appellants had failed to prove the title had been removed from Bao. The court found clear and convincing evidence that under Palauan custom one of the essential steps in the process of removing a title is that all the senior *ourrot* have to agree on removal. The **L275** court determined that Appellants had not proven that all the senior *ourrot* of Uudes Clan had agreed on the removal of Bao's title. The court found that a decision to remove Bao's title had not been made at the May meeting at Kazuo's house, as only four senior *ourrot* were present and two of those -- Tosko and Kelau -- testified that a decision to remove Bao's title had not been made at the meeting. It also found that the female title-holder, Ebilreklai Yaorong Kebou, had not agreed to the removal of Bao's title at the meeting. The court concluded that Appellants had only established that three senior *ourrot* had agreed to the removal of Bao's title -- Baulang, Gracia, and Techereng Baules. It found that Tosko, Kelau, and Ayako testified that they did not agree to removal and neither Ebilreklai nor Inglong Ngiraidong testified at trial or by deposition. In a footnote the court denied Appellants' pre-trial motion to dismiss Uudes Clan as plaintiff.

Issues on Appeal

Appellants raise five issues on appeal: (1) Whether the trial court erroneously gave Appellants the burden of proof on the issue of removal; (2) Whether the case was a proper subject for declaratory relief; (3) Whether the trial court erred in finding that all the senior *ourrot* had to agree on removal; (4) Whether the trial court erred in denying Appellants' pre-trial motion to dismiss Uudes Clan as Plaintiff; and (5) Whether the trial court erred in not ruling on all of Appellants' affirmative defenses. We address the issues seriatim.

A. The Burden of Proof on Removal

Appellants contend that the Trial Division erred in giving them the burden of proving removal. They argue that the court erred in concluding that Bao's only claim was that he was Reklai. They argue that Bao also claimed that the purported removal of his title was invalid and that he therefore should have had the burden of proving that fact.

The Trial Division held that a party claiming a title must prove a proper appointment and

⁵ The court determined that Bao would have had the burden of proof on removal if he had not dismissed the defamation claim, as he would have had to prove that Appellants' alleged defamatory statements were untrue. However, the court concluded that after dismissal of Bao's defamation claim his only claim was that he was Reklai and he did not need to prove the title had been removed to establish that claim.

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installation as title-bearer and that the party opposing the claim must prove that the title was removed according to custom. We affirm this holding and the court's application of it to this case. While a plaintiff has the burden of proving each element of his cause of action, *see, e.g., Woerth v. City of Flagstaff*, 808 P.2d 297, 304 (Ariz. App. 1990), lack of removal cannot be considered an essential element of a claim to title because removal will not be an issue in all title disputes. It makes little sense to require a title claimant to prove that the title was not removed where removal is not an issue. It makes more sense to view removal as a defense that must be raised by the party opposing the claim.

In addition, there are sound reasons for giving the burden of proof on the issue of removal to the party opposing a title claim rather than to the claimant. The allocation of the burden of proof presents a question of "policy and fairness based on experience." *See Keyes v. School Dist. No. 1*, 93 S. Ct. 2686, 2698 (1973) (quoting 9 J. Wigmore, *Evidence* § 2486, at 275 (3d ed. 1940)). A party ordinarily does not bear the burden of proof on an issue for which the relevant facts lie peculiarly within the knowledge of the adverse party. *See Campbell v. United States*, 81 S.Ct. 421, 427 (1961). In a removal case, the party claiming the title cannot be expected to have first-hand knowledge of the actions taken by other clan members to remove the title, as he or she may not have been involved in the decision-making process. On the other hand, the party opposing the claim will typically consist of the clan members who were involved in the removal of the title. Consequently, it will be easier for the party opposing the claim to identify and produce 1276 evidence of removal than for the person claiming title to do so.⁶

⁶ This case bears out these concerns. Appellants, along with other clan members, acted to remove Bao's title. Appellants were involved in calling the meetings, they attended the meetings, and they participated in the decision to remove the title. Bao, on the other hand, was not notified of, and did not attend any of the 1998 meetings and was not informed of the events that transpired at those meetings. The evidence was that Bao acquired first-hand knowledge of the removal only when Baulang came to his house to remove the title and even then was not informed of the events leading to the removal.

B. *The Propriety of Declaratory Judgment*

Appellants contend that issuing a declaratory judgment was error because this case was not a proper subject for declaratory relief. They argue that a declaratory judgment cannot issue in a case that does not present a justiciable controversy, that is not ripe for adjudication, or if there remain alternative remedies. They argue that this case met none of these criteria, as the evidence was that the Ngara Bai Melekeong along with traditional leaders and national government officials still recognized Bao as Reklai and Bao did nothing to resolve the matter through customary processes before filing the lawsuit. They also argue that the case presented the equivalent of a political question, in that it involved a question of who held a title of traditional leadership, an issue traditionally falling within the authority and competence of the clan.

The court may issue a judgment declaring the rights and legal relations of any interested party seeking such a declaration in a case of actual controversy. *See* 14 PNCA § 1101 (1996). A party seeking declaratory relief must demonstrate the existence of a “substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *See The Senate v. Nakamura*, 8 ROP Intrm. 190, 193 (2000) (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 61 S. Ct. 510, 512 (1941)). Although the availability of other remedies does not bar declaratory relief, courts should not issue declaratory judgments where an available alternative remedy is better or more effective. 12 *Moore’s Federal Practice* § 57.21[1] (3d ed. 1998). A case must also be ripe for adjudication, *see id.* § 57.10[1][3], and the courts will not adjudicate political questions. *See Fritz v. Republic of Palau*, 4 ROP Intrm. 264, 272 (Tr. Div. 1993) (discussing *Baker v. Carr*, 82 S. Ct. 691, 710 (1962)).

This Court has stated, “The selection of a title bearer is the Clan’s responsibility, not the Court’s.” *Sato v. Ngerchelong State Assembly*, 7 ROP Intrm. 79, 81 (1997). Although the courts have constitutional authority over matters presenting issues of customary law, *see Espangel v. Diaz*, 3 ROP Intrm. 240, 244 (1992), it remains true that disputes over customary matters are best resolved by the parties involved rather than the courts.

Nevertheless, as conceded by Appellants at oral argument, a decision by a trial court to intervene in a customary matter and issue a declaratory judgment that a person holds a position of traditional leadership is a matter committed to the sound discretion of the trial court and cannot be reversed absent an abuse of that discretion. *See Wilton v. Seven Falls Co.*, 115 S.Ct. 2137, 2141 (1995) (holding that the standard of review for a declaratory judgment is an abuse of discretion). In deciding whether it is appropriate to intervene in a matter of custom, the court must ultimately decide whether intervention is necessary to “quiet controversy, bring peace, and settle differences” among the participants in the 1277 customary matter. *Espangel*, 3 ROP Intrm. at 244. With these considerations in mind, we cannot say that there was such an abuse of discretion in this case.

Trial revealed a deep division within Uudes Clan over whether Bao or Luis held the title Reklai. Appellants and clan members Raymond Ulochong, Gracia Yalap, Techereng Baules,

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Basilia Kintaro, and Hermino Olkeriil testified that they recognized Luis as the title-bearer. On the other hand, Tosko Ikeya, Kelau Gabriel, Ayako Ongklungel, and Ubal Tellei testified that they recognized Bao. Four months had passed since Baulang had purported to remove Bao's title, yet there was no evidence that the parties were moving toward resolution of the matter. On the contrary, the evidence was that they were not. Ibedul Gibbons tried to negotiate a settlement during trial, but the attempt failed. From this evidence the trial court could have reasonably concluded that the matter would not be resolved in a timely manner without judicial intervention. Moreover, although Appellants protest that the trial court's decision to act unnecessarily forced a private disagreement into the public eye, the evidence at trial was that the controversy was no longer solely an internal clan matter, but had already -- and through Appellants' own actions -- manifested itself publicly. Luis testified that after being appointed Reklai he went to Kayangel to "take off his hat and plant his coconut," (Tr. 2:126), in the customary process of being recognized and sworn in as Reklai by clan chiefs in Kayangel. He said that after this process was concluded he returned to Melekeok where he attended an inaugural feast which the Trial Division found was attended by at least one member of the Ngara Bai Melekeong other than Polycarp. Luis testified that, in August, he went to the office of the Council of Chiefs, was recognized as Reklai by Ibedul, was shown Reklai's seat, and was given a notice with his name listed as Reklai. The court could have reasonably concluded from this evidence that the removal of Bao's title and the appointment of Luis had created confusion, both inside and outside of the Clan, as to who held the title, and that Bao's ability to function as the High Chief of Melekeok in relation to other states and as Reklai in the Ngara Bai Melekeong and the Council of Chiefs would be impaired if the dispute were allowed to continue.

C. *The Findings on Custom*

Appellants contend that the trial court erred in finding that all the senior *ourrot* of the Clan had to agree on the removal of Bao's title, arguing that the finding is counter-intuitive and lacks support in the record.

The existence of customary law must be established by clear and convincing evidence. *Udui v. Dirrechetet*, 1 ROP Intrm. 114 (1984). A finding that there exists clear and convincing evidence of customary law is a finding of fact reviewed under the clearly erroneous standard, under which a finding will not be reversed unless it so lacks support in the record that no reasonable fact-finder could have reached the same conclusion or this Court is firmly convinced a mistake has been made. *See Remoket v. Omrekongel Clan*, 5 ROP Intrm. 225, 228 (1996).

The trial court did not indicate the evidence upon which it based its finding of customary law. However, the court's finding is supported by the testimony of Judge Mokoll, who was called by Bao to testify as an expert on Palauan custom. Bao's attorney asked Judge Mokoll, "[C]an only a few of the *ourrot* decide to remove the title from the male title bearer without the other *ourrot*?" (Tr. 4:204). He answered, "It does not seem to be possible." (Tr. 4:204). In the same vein, Judge Mokoll was asked, "[L]et's assume that the eight *ourrot* represent the, the lineages of the, of the clan, and only three of them agree to remove the title, but the other five do not **L278** agree to remove the title, is the title removed?" (Tr. 4:205-06). Again, Judge Mokoll responded, "It's not possible." (Tr. 4:206). The court asked Judge Mokoll, "If the consent is not

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obtained from one of those senior *ourrot*, can the title still be removed?” (Tr. 5:22-23). Judge Mokoll answered, “The title cannot be removed if the consent is not taken from one of the *ourrot* of the lineages.” (Tr. 5:23). A reasonable trier of fact could have found in this testimony clear and convincing evidence that “every . . . senior *ourrot* member of the clan must agree to remove the title.”

Appellants argue that Judge Mokoll’s testimony was not clear and convincing because it was contradicted by Kathy Kesolei and because Judge Mokoll had been sued by Polycarp Basilius in *Acting High Chief Reklai v. Isimang*, Civ. Act. 144-80, another case involving the Reklai title. We note initially that we are doubtful that the differences in phraseology between the parties’ experts was decisive here. Although Ms. Kesolei testified at one point that “they don’t all have to agree,” (Tr. 3:187), she also said that removal was a “consensus decision” in which “everybody gets consulted and come to a common understanding.” (Tr. 3:206). And in response to a question from the court, she acknowledged that if clan *ourrot* are voicing objections to a potential removal, “Then it keeps on being discussed until [they] come to an agreement.” (Tr. 3:207).⁷

In any event, to the extent there was disagreement between the two experts - a not uncommon occurrence - that fact alone does not preclude a trial court from deciding that the testimony of one or the other was clear and convincing. A trial court’s credibility determinations will not be disturbed on appeal. *E.g., Lakobong v. Tebei*, 8 ROP Intrm. 87, 89 (1999). Likewise, the existence of potential bias goes to the weight, not the admissibility of evidence. *See United States v. Lee*, 991 F.2d 343, 349 (9th Cir. 1993) (“[A]ttacks on witness credibility are simple challenges to the quality of the . . . evidence and not the sufficiency of the evidence.”) (quotation omitted). Judge Mokoll testified that the lawsuit was ten years ago and he was sued as a member of the Ngara Bai Melekeong, not in an individual capacity. The trial court could have reasonably concluded from this evidence that Judge Mokoll’s testimony would not be biased against Appellants.

D. *Uudes Clan as Plaintiff*

Appellants contend that the Trial Division erred in denying their pre-trial motion to dismiss Uudes Clan as Plaintiff. They contend that Bao pled that Uudes Clan was a co-plaintiff and therefore had to prove that he had authority to bring the lawsuit for the Clan. They argue that Bao not only failed to present any evidence on this issue, but the evidence indicated that Bao lacked such authority, as Appellants and other senior members of the Clan affirmatively denied that they had authorized the lawsuit.

A decision to strike a party from a lawsuit is, in the absense of a statute or rule granting a right to drop a party, addressed to the sound discretion of the trial court. *See* 59 Am. Jur. 2d *Parties* § 209 (1987). We see no abuse of discretion in denying the motion to dismiss Uudes

⁷ Indeed, Appellants quote much of this testimony in their discussion regarding the propriety of declaratory relief for the purpose of arguing that the matter was not ripe for decision because a consensus had not been reached -- the members of the Clan “simply were disagreeing as to who their male titleholder should be.” *See* Opening Brief of Appellants at p.18.

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Clan. The Clan had an interest in the resolution of the controversy over its title-bearer and, as the Clan's putative title-bearer, Bao arguably had authority to bring 1279 the suit on behalf of the Clan. In addition, as noted by the Trial Division, Appellants did not provide any legal authority to support their arguments for dismissal.

In any event, the presence of the Clan as plaintiff had no impact on the outcome of the case. Bao's claim to be the title-bearer did not depend on the Clan's presence as party and the failure of other clan members to approve of the lawsuit on the Clan's behalf did not preclude him from seeking relief in his own right.

E. Affirmative Defenses

Appellants argue that the Trial Division failed to rule on certain of its affirmative defenses. To the extent that this is a challenge to the sufficiency of the trial court's findings, "It is a general principle of appellate jurisprudence that a party desiring more particularized findings at the trial court level must request them from the trial court." *United States v. Tosca*, 18 F.3d 1352, 1355 (6th Cir. 1994); *accord, Green v. Geer*, 720 P.2d 656, 660 (Kan. 1986) ("A litigant must object to inadequate findings and conclusions at the trial court level in order to give the trial court an opportunity to correct them. In the absence of an objection, omissions in findings will not be considered on appeal."). Appellants failed to do so.

Appellants are not precluded from arguing that the trial court's *sub silentio* rejection of their affirmative defenses was not supported by the evidence, *i.e.*, that it was clearly erroneous for the trial court not to have found certain facts that would have established those defenses. *Cf.* ROP R. Civ. Pro. 52(b) ("The question of the sufficiency of the evidence to support the findings may . . . be raised whether or not the party raising the question has made an objection to such findings or has made a motion to amend them . . .").⁸ But Appellants have not done so here.

Conclusion

In summary, we affirm the Trial Division's grant of Appellee Raphael "Bao" Ngirmang's claim for a declaratory judgment that he holds the title Reklai of Uudes Clan of Melekeok.

⁸ This assumes that the defenses were presented to the trial court at closing argument or at some point at the trial. We do not believe the trial court has any obligation to comb the parties' pleadings for defenses (or claims for that matter) that might be supported by the evidence but that the parties have not argued.