Roman Tmetuchl Family Trust v. Whipps, 8 ROP Intrm. 317 (2001)

ROMAN TMETUCHL FAMILY TRUST,
Appellant,

v.

SURANGEL WHIPPS,
Appellee.

CIVIL APPEAL NO. 00-01
Civil Action No. 98-104

Argued: March 5, 2001
Decided: May 28, 2001

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: John Rechucher

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, Associate Justice.

MILLER, Justice:

The Trial Division determined that a portion of land in an area known as Ngersung in Ngerusar Hamlet, Airai State, Lot No. 179, would belong to Appellee Surangel Whipps if he or the children of Ngirmekur Ksau tendered a sum of $998 to the Roman Tmetuchl Family Trust (the "Trust"). The money was tendered, and the Trust filed this appeal. Although we reject most of the Trust's arguments, we conclude that a remand is necessary before we may resolve one of the issues it raises.

In 1969, Ngirmekur Ksau, also known as Ngirmekur Tuchermel, was adjudged the owner of Ngersung. *See Adelbai v. Tuchermel,* 4 TTR 410 (1969). In 1970, Tmetuchl loaned Ksau $998, and Ksau ⊥318 executed a deed transferring a portion [1] of Ngersung to Roman Tmetuchl for the price of $998. The third paragraph of that deed states:

> To have and to hold these granted premises in fee simple, together with all the rights, easements and appurtenances thereto to the said Mr. Roman Tmetuchl of Koror, Palau District, Trust Territory of the Pacific Islands, his successors and assigns forever, that also it was agreed in good will that some day if Ngirmekur Tuchermel's children be able to repay Mr. Roman Tmetuchl for the same cost

[1] The exact amount of land appears to be in dispute. The 1970 deed states 300 tsubos plus 698 tsubos, and the Trust claims the parcel is 998 tsubos. At trial, Lomisang Ngirmekur testified that he believed the parcel was 300 tsubos, and a 1984 affidavit by Ksau states that it was only 300 tsubos.

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and reposes[2] the land in the future, that it will be done.

Lomisang Ngirmekur, Ksau's son, testified that in 1976, Tmetuchl requested that Ksau cut several mangrove trees for wood to build Johnson Toribiong's house. Lomisang stated that the value of the cut wood was $1,200, that Tmetuchl paid his father only $200, that the $1,000 was used to offset the $900 debt plus interest, and that Tmetuchl never gave Ksau a receipt. Following Ksau's death, his children conveyed Lot No. 179 to John Rechucher. Rechucher in turn transferred his interest to Appellee.

Johnson Toribiong testified that his house was built in 1978 or 1979, and that he never received wood for his house in 1976. Perpetua Tmetuchl, the widow of Roman Tmetuchl, testified that it was her husband's intent to return the land to Ksau and his children if they repaid the money; however, Roman Tmetuchl died before this could be accomplished.

The Trial Division found that the 1970 deed was transferred "as security for repayment of a loan, and not an unconditional transfer of ownership." Apparently finding that Appellee failed to carry the burden to prove that the loan had been repaid, the Trial Division concluded that if the children of Ksau (or their successors in interest) tendered $998 to the Trust, the 1970 deed would become void as a transfer of land.

All findings of fact, whether based on oral or documentary evidence, are reviewed for clear error. *Rechelulk v. Tmichol,* 6 ROP Intrm. 1, 2-3 (1996). When reviewing for clear error, if 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 the Appellate Division is left with a definite and firm conviction that a mistake has been committed. *Sadang v. Ngersikesol Clan,* 8 ROP Intrm. 63, 64 (1999). Legal conclusions are reviewable *de novo* . *Fanna v. Sonsorol State Government*, 8 ROP Intrm. 9 (1999).

The Trust first contends that, because the 1970 deed was in the form of a warranty deed, it conveyed a fee simple absolute estate to Tmetuchl. Simply because a deed may purport to be a warranty deed does not preclude a finding that the deed was given as a mortgage. "Even absolute language of a transfer of title will be considered to be a mortgage if that is the intent of the parties." Security Bank v. Chiapuzio, 747 P.2d 335, ⊥319 338 (Or. 1987); *see also* 54A Am. Jur. 2d *Mortgages* § 102. Factors to be considered in determining whether a deed is, in fact, a security instrument are:

> (a) existence of a debt to be secured; (b) survival of the debt after execution of the deed; (c) previous negotiations of the parties; (d) inadequacy of consideration for an outright conveyance; (e) the financial condition of the purported grantor; and (f) the intentions of the parties.

Kreiensieck v. Cook, 701 P.2d 277, 280 (Idaho App. 1985); *accord W.M. Barnes Co. v. Sohio Nat. Res. Co.,* 627 P.2d 56, 59 (Utah 1981); *see also* 54A Am. Jur. 2d *Mortgages* § 103 ("The ultimate

[2] The trial court determined that this word was "repossess."

and essential point to be determined in every case in which it is sought to have an instrument of transfer construed as a mortgage is the intention of the parties."). There was ample evidence to support the Trial Division's findings that the deed was given to secure a debt, the debt survived the execution of the deed, and that the parties intended the deed to function as a mortgage. Therefore, the Trial Division did not commit clear error in concluding that the 1970 transfer was a mortgage.[3]

The Trust also argues that the Trial Division erred in failing to address, and to give effect to, a 1981 document that purported to be a transfer of the same portion of Ngersung from Ksau to Tmetuchl that had been transferred in 1970. That document was introduced during the cross-examination of Ksau's son, who testified that the signature on the document was not that of his father. The document was admitted "with reservation," but was not addressed in the Trial Division's Findings of Fact and Conclusions of Law. The transcript indicates that the document may have been admitted only for the purpose of impeachment, but the record is unclear. Moreover, we note that, due to the death of the Trust's counsel shortly after the trial was completed, the case was submitted without closing arguments. Thus, we are uncertain whether the document was admitted for substantive purposes and, if so, whether the Trial Division considered its impact on this case. We therefore remand this case to the Trial Division, so that it may address these issues. We retain jurisdiction over this appeal and instruct the Trial Division to forward its findings to us. *See Malsol v. Ngiratechekii*, 7 ROP Intrm. 24, 25 (1998).

[3] Because the Trial Division was not clearly erroneous in concluding that the deed was actually a mortgage, we need not address the Trust's contentions relating to precatory language and conditions subsequent because those are predicated upon the assumption that the conveyance was a deed transferring an estate in fee simple, rather than a mortgage. Furthermore, it is not clear that any of these contentions were raised before the Trial Division. *Tell v. Rengiil*, 4 ROP Intrm. 224, 225-26 (1994) (stating that arguments not presented to the Trial Division may not be raised for the first time on appeal).