Lakobong v. Tebei, 8 ROP Intrm. 87 (1999)

HILARIA LAKOBONG, ALBERT MALDENGESANG, and EDANGEL ITEI,
Appellants,

v.

MELAITAU TEBEI,
Appellee.

CIVIL APPEAL NO. 56-97
Land Court D.O. No. 04-60

Supreme Court, Appellate Division
Republic of Palau

Argued: September 9, 1999
Decided: December 9, 1999

Counsel for Appellant Hilaria Lakobong: Carlos H. Salii

Counsel for Appellant Albert Maldengesang: Raynold B. Oilouch

Counsel for Appellant Edangel Itei: David J. Kirschenheiter

Counsel for Appellee: Johnson Toribiong

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

BEATTIE, Justice:

This is an appeal from a Land Court determination of ownership which held that Melaitau Tebei is the owner of property in Ngiwal State known as Cadastral lot number 65-5066. [1] We affirm.

The subject property is registered in the Tochi Daicho as the individual property of Itei. Itei died in or about 1940. The Land Court found that, after Itei died, his relatives had a meeting to discuss his properties and gave this property to Ebil. Ebil was appellee's mother, and he claimed the property as her heir.

Appellant Lakobong claimed that the Tochi Daicho was inaccurate and that the Ngeschei Lineage was the true owner of the property. She claimed that it was only with the permission of the Lineage that Itei lived on the property. Lakobong claims the property as trustee for Ngeschei

[1] The property is in Ngermechau Hamlet and is also known as Kimikrang and Tochi Daicho lot 539.

Lineage.

Appellant Maldengesang is a grandson of Itei and claimed the property on behalf of Itei's children and grandchildren. Appellant Edangel Itei, the only surviving child of Itei, claimed the property as his child. Both Maldengesang and Edangel claim that they inherited the land under custom when Itei died.

I.

On appeal, Lakobong argues that there was insufficient evidence to support the Land Court's findings due to the conflicting testimony of the claimants. In order to prevail on her claim, however, Lakobong had to prove that the Tochi Daicho was inaccurate and that Ngeschei Lineage, not Itei, was the owner of the property. With limited exceptions not here applicable, the Tochi ⊥88 Daicho listing of property owners is presumed to be accurate, and a party who disputes the listing bears the burden of rebutting the presumption by clear and convincing evidence. *Silmai v. Sadang* , 5 ROP Intrm. 222, 223 (1996). The only support for Lakobong's claim in the record is her testimony that the property belonged to the Lineage and that the Lineage allowed Itei to live on it. Other witnesses' testimony conflicted with Lakobong's. We review the Land Court's findings under the clearly erroneous standard. *Tesei v. Belechal*, 7 ROP Intrm. 89 (1999). We cannot say that the Land Court's finding that Itei was the owner of the property was clearly erroneous.

II.

Albert Maldengesang and Edangel Itei have similar claims because they are each claiming as children, or in Albert's case, as a grandchild, of Itei. They claim that, because Itei died intestate before any statute of descent and distribution had been enacted, under custom his children inherited the property. They do not rely on expert testimony to support this alleged custom, but they cite *Edeyaoch v. Timarong*, 7 T.T.R. 54, 62 (Tr. Div. 1974) (individually owned land passes to the decedent's heirs "which by custom are the children" of the decedent). *Edeyaoch* did not present a situation where an eldecheduch or similar meeting of relatives was held to discuss the decedent's property. For that reason, *Edeyaoch* cannot be read so broadly as to preclude disposal of a decedent's property by a meeting of the appropriate members of his family. Although it held that in the absence of a will or applicable statute a decedent's property passes to his heirs, we are not aware of any authority, including *Edeyaoch*, which would preclude the decedent's relatives from making the determination of who the heirs would be at an eldecheduch or similar customary meeting of the decedent's relatives. *See Remengesau v. Sato*, 4 ROP Intrm. 230, 235 (1994).

III.

Edangel Itei argues that the Land Court erred in recognizing a custom of disposing of a decedent's land by way of a meeting of relatives because no expert testimony was provided to establish that such a custom existed in the 1940s. Melaitau Tebei, who was 81 years old at the time of the hearing, testified that there was no formal eldecheduch when Itei died, but that there

was a meeting of his relatives to discuss his property. The meeting was called by Itei's older brother, Beouch. Those present included the male title bearer of Ngeschei Lineage, Ngirngeschei Meltel, Melaitau Tebei, his mother, Ebil, and other senior family members. Tebei testified that the subject property was given to his mother, Ebil, at the meeting. The Land Court found that, during the 1940s, "customs and traditions were strong, and discussions with family members involving properties prevailed . . . ." Although there was no expert testimony regarding this custom, the Land Court is permitted to take judicial notice of any Palauan custom. Rule 9, Land Court Rules of Procedure. Because the Land Court first took judicial notice in its findings, appellants were entitled to present evidence in opposition to the finding of custom, provided that they made a request to do so within ten days after service of the findings. Rule 5, Land Court Rules of Procedure. Appellants did not do so. Accordingly, we find no error in the Land Court's finding that, under Palauan custom prevailing in the 1940s, property of a decedent could be distributed based upon decisions made at meetings of the decedent's family ⊥89 members.[2]

IV.

Appellants also claim that the Land Court should have found appellee's testimony to be less credible than other testimony which conflicted with it. We review the Land Court findings under the clearly erroneous standard. *Tesei v. Belechal*, 7 ROP Intrm. 89 (1999).[3] We do not test the credibility of witnesses, but rather take into account the fact that the Land Court heard and observed the witnesses and accepted one version of events rather than another. *See Remengesau v. Sato*, 4 ROP Intrm. 230, 233 (1994). Thus, "where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Ngiramos v. Dilubech Clan*, 6 ROP Intrm. 264, 266 (1997) (quoting *Anderson v. City of Bessemer*, 105 S. Ct. 1504 (1985)). It was therefore not clearly erroneous for the Land Court to credit appellee's testimony rather than conflicting testimony of other witnesses.

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[2] This custom has been recognized in at least one previous case. *See Lakobong v. Anastacio*, 6 ROP Intrm. 178 (1997).

[3] Edangel Itei and Maldengesang argue that we should review Land Court findings *de novo*, citing 14 PNC § 604(b), which provides that findings of fact of a tribunal other than the Trial Division of the Supreme Court "may" be reviewed. Arguably, the statute would permit a *de novo* review of the Land Court findings, but it clearly does not require that we perform a *de novo* review. Moreover, for the reasons stated in *Tesei v. Belechal*, when this statute is read together with the later enacted Land Claims Reorganization Act, 35 PNC § 1301 *et seq.*, we see a legislative intent that the Land Court findings be reviewed in the same manner as Trial Division findings.

Appellant Edangel Itei argues that the Land Court decision should be reversed or remanded because it allowed appellee to testify in Ngiwal, outside the presence of the appellants. This argument has no merit. The hearing was scheduled to take place in Ngiwal. All claimants, including appellants, were notified of the time and place of the hearing in Ngiwal and had an opportunity to attend. Only appellee appeared at the hearing. After the hearing was over, Maldengesang asked that a hearing be held in Koror. The Land Court granted the request and took the testimony of appellants in Koror. Appellee also appeared and testified in Koror. Although the Ngiwal testimony was not transcribed, the testimony which was given in the Koror proceedings provide sufficient basis to support the Land Court findings.

CONCLUSION

For the foregoing reasons, the determination of the Land Court is AFFIRMED.

MICHELSEN, J., concurring:

I concur in the result reached in Part I of the majority opinion. Appellant Lakobong raised only one issue on appeal. She argued that "given the diametrically opposite and conflicting claims [and] the clear lack of corroborating evidence . . . a trial de novo" is required. However, many cases in the Land Court are complex cases, involving multiple parties, conflicting claims, and little or no corroborating evidence. Retrials do not necessarily improve the quality of evidence, or the reliability of the result. For that reason, appeals challenging findings of fact are sustained only when we are "left with a ⊥90 'definite firm conviction' that a mistake has been made." *Tesei v. Belechal* , 7 ROP Intrm. 89, 90 (1998) (quoting *Kulas v. Becheserrak*, 7 ROP Intrm. 76, 77 (1998)).

Here, the trial was held before a senior judge, long experienced in land matters. His resolution of this difficult case, while not the only possible outcome, is not clearly erroneous.

I join in Parts II-V of the majority opinion.