IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

ELIBOSANG EUNGEL,
Appellant,
v.
HESUS BELIBEI,
Appellee.

Cite as: 2016 Palau 16
Civil Appeal No. 15-005
Appeal from LC/N 14-124

Decided: June 22, 2016

Counsel for Appellant.....J. Uduch Sengebau Senior
Counsel for Appellee .....Siegfried B. Nakamura

BEFORE: KATHLEEN M. SALII, Associate Justice
LOURDES F. MATERNE, Associate Justice
HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem

Appeal from the Land Court, the Honorable Salvador Ingereklii, Associate Judge, presiding.

OPINION

PER CURIAM:

[¶ 1] After hearing testimony, the Land Court determined that Hesus Belibei is the owner of a piece of land called *Ngertechoi*. Claimant Elibosang Eungel appeals that determination. Eungel argues that some of the Land Court's factual findings were clearly erroneous. He further argues that, even if those factual findings were correct, Eungel has acquired the land at issue through adverse possession, and should have been awarded the land on that basis. For the reasons explained in this Opinion, we affirm the Land Court's determination.[1]

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[1] We determine that oral argument is unnecessary to resolve this matter. ROP R. App. P. 34(a).

BACKGROUND

[¶ 2] The Land Court made these determinations (as well as further details not directly relevant to the appeal): The land at issue in the case below is Lot 05N001-066, known as *Ngertechoi*, located in Airai State. Techubel Clan gave *Ngertechoi* to claimant Hesus Belibei. Belibei and Telei were children of Trachol and Sechelong, and Trachol was a member of Techubel Clan. Sometime in the 1970s, and without Belibei's knowledge or authorization, Telei sold *Ngertechoi* to Roman Tmetuchl. Tmetuchl, thinking he had clear title, engaged in a land exchange with claimant Elibosang Eungel that purported to transfer *Ngertechoi* to Eungel. (Land Ct. Decn. at 4-5.)

[¶ 3] The Land Court held that the sale to Tmetuchl was void because one cannot convey what one does not own. (*Id.* at 6 (citing *Aquon v. Aquon*,[2] 5 ROP Intrm. 122, 126 (1995)).) The Land Court therefore also held that the transfer from Tmetuchl to claimant Eungel was void because Tmetuchl did not own *Ngertechoi*, so he didn't have the power to convey it. (*Id.*)

[¶ 4] One of claimant Eungel's attacks on the Land Court's determination of ownership is that certain factual findings are unsupported. In short, Eungel argues that Belibei did not prove that Techubel Clan owned Lot 05N001-066, known as *Ngertechoi*; that Techubel Clan gave *Ngertechoi* to Belibei as his individual property; or that Telei had no ownership interest in *Ngertechoi* but sold it anyway. Eungel's reasoning is that the evidence underlying those key facts was demonstrated only by testimony that Eungel deems so unauthoritative that he considers it no evidence at all. Eungel's other issue presented for appeal is that he now owns the land via adverse possession, an argument he did not make before the Land Court.

STANDARD OF REVIEW

[¶ 5] A lower court judge's decisions are grouped into three main categories, each of which requires a unique standard of review on appeal: questions of law, questions of fact, and matters of discretion. *See Remengesau v. Republic of Palau*, 18 ROP 113, 118 (2011); *Ngoriakl v. Gulibert*, 16 ROP 105, 106-07 (2008); *see also Pierce v. Underwood*, 487 U.S. 552, 557-58 (1988). Eungel's appeal raises issues as to the former two. Matters of law we decide de novo. *Baules v. Toribiong*, 2016 Palau 5 ¶ 12;

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[2] This case was published at 5 ROP Intrm. 122 (1995) as *Aguon v. Aguon*, but has sometimes been cited as *Aquon v. Aquon*, as it was in the case below. Such are the difficulties of transliteration.

Uchelkumer Clan v. Sowei Clan, 15 ROP 11, 13 (2008); *Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, 31 (2006). We review findings of fact for clear error and will overturn them only if they have no evidentiary support in the record, such that no reasonable fact finder could have made them, or such that we are left with a definite and firm conviction that a mistake has been made. That means, where the evidence could plausibly support different interpretations, we will affirm the Land Court's interpretation so long as it is among them. *Baules*, 2016 Palau 5 ¶ 12; *Koror State Pub. Lands Auth. v. Idid Clan*, 2016 Palau 9 ¶ 9; *see also Urebau Clan v. Bukl Clan*, 21 ROP 47, 49-50 (2014) ("The standard for upsetting the Land Court's determination of ownership because of insufficient evidence is a high one. . . . It is not the appellate panel's duty to reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence." (citations and quotation marks omitted.)).

ANALYSIS

[¶ 6] Eungel advances his appeal through two separate and alternative arguments: (1) the Land Court's finding that Techubel Clan gave *Ngertechoi* to Belibei as his individual property was clearly erroneous; and (2) the Land Court erred in failing to find that Eungel acquired *Ngertechoi* by adverse possession.

I. The Land Court's factual findings were not clearly erroneous

[¶ 7] In making his first argument, claimant Eungel disagrees with the evidence that claimant Belibei propounded and the facts that the Land Court ultimately found. He argues that certain of the Land Court's factual findings are so unsupported that no reasonable factfinder could have made them. (*See* Opening Br. at 9.) Eungel states that there is "no evidence" to support certain factual findings upon which the determination of ownership depends. (*See id.* at 10-12.) He then goes on to state that the testimony of one of Belibei's witnesses is the only evidence of the factual finding in question, and he points out credibility issues with the witness's testimony. But the testimony of a witness, even testimony with credibility issues, still qualifies as evidence. The evidence in Land Court cases is often less than ideal, and the broad admissibility of "relevant evidence" in the Land Court Rules of Procedure, Rule 6, allows the Land Court to consider evidence that might not be admissible in other courts, including hearsay. The issues that Eungel identifies with respect to Dave Tarimel's testimony (i.e., that it is not based on personal recollection or firsthand knowledge) (Opening Br. at 11; Reply Br. at 2) are problems that inhere in hearsay testimony, but sometimes, as

here, that is the only evidence available, as the Land Court noted (Land Ct. Decn. at 4-5). One of Eungel's representatives acknowledged that no party had written records showing the boundaries of each claimant's claim, and that boundaries could at most be inferred from written records of other lands. (*See* Tr. at 31.)

[¶ 8] Eungel's opening brief attempts to poke some holes in Belibei's evidence, but a finding of clear error on the part of the Land Court requires a lot more than that. (*See* Standard of Review section, *supra* (citing *Urebau Clan v. Bukl Clan*, 21 ROP 47, 49-50 (2014)).) The Land Court did not need to find Belibei's version of events to be perfect in order to determine that he owns *Ngertechoi*, just that it was better than the version of the only other claimant of *Ngertechoi*, Eungel. The Land Court did that, and the record does not indicate that the Land Court's findings of fact or determination of ownership were clearly erroneous. Claimant Belibei's version was the most complete and coherent, although claimant Eungel provided alternates for certain portions (*see, e.g.*, Tr. at 32-33, explaining the belief that *Ngertechoi* was not Techubel property, and that Telei had other authority to sell it), which the Land Court apparently did not credit. There was evidence in the form of testimony for everything that the Land Court found; the Land Court was the appropriate forum for determining the relative credibility of that testimony.

II. Appellant waived his adverse possession theory by failing to argue it below

[¶ 9] The Court need not address the merits of Eungel's assertion of his ownership of *Ngertechoi* via adverse possession, his second theory on appeal. There is no mention of adverse possession in the Land Court hearing transcript; the theory first appears in appellate briefing. This is a straightforward instance of waiver by failure to raise a theory in the court below, and presents no novel question of law. It amounts to an argument that the Land Court was at fault for failing to assert on Eungel's behalf an ownership theory that Eungel never asserted. Appellee Belibei addresses the waiver of an adverse possession theory in his response brief,[3] and Appellant Eungel does not address waiver in his reply brief, nor does he address adverse possession again at all, seemingly conceding the waiver of his adverse possession argument.[4]

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[3] Incorrectly captioned "Reply Brief for Appellee Hesus Belibei."

[4] Eungel does discuss in his reply brief Belibei's long delay in seeking to reclaim the land, but it does not appear to be an assertion of adverse possession.

[¶ 10] "To the extent that [a party] raises [the] issue [of adverse possession] for the first time on appeal, it has waived it." *Idid Clan v. Demei*, 17 ROP 221, 230 n.6 (2010) (citing *Nebre v. Uludong*, 15 ROP 15, 25 (2008)); *see also Rechucher v. Lomisang*, 13 ROP 143, 149 (2006). In order to advance an adverse possession theory on appeal, a party must have "set out [in the court below] the basis for their adverse possession argument that would have given the Land Court the opportunity to rule on the issue. Having found no record of [the party's] preservation of this issue, the Court deems it waived." *Badureang Clan v. Koror State Pub. Lands Auth.*, 20 ROP 80, 85 (2013). Waiver may seem a harsh doctrine, but this Court has explained it this way: "'Enormous confusion and interminable delay would result if counsel were permitted to appeal upon points not presented to the court below. Almost every case would in effect be tried twice under any such practice. While the rule may work hardship in individual cases, it is necessary that its integrity be preserved.'" *Tell v. Rengiil*, 4 ROP Intrm. 224, 226 (1994) (quoting *Miller v. Avirom*, 384 F.2d 319, 322 n.11 (D.C. Cir. 1967)).

[¶ 11] That rationale applies here. An adverse possession argument requires its proponent to prove several very particular elements, for which evidence must be deliberately and carefully developed during a fact hearing. *See, e.g., Shiro v. Estate of Reyes*, 21 ROP 100, 102 (2014) ("a party claiming title by adverse possession bears the burden to prove affirmatively each element of adverse possession" (brackets, quotation marks omitted)). On the other hand, the opponent of the adverse possession argument must in fairness be alerted to the argument before the hearing so he can develop evidence to refute it. *See Badureang Clan v. Ngirchorachel*, 6 ROP Intrm. 225, 226 n.1 (1997) (issue of fact cannot be raised for the first time on appeal because that prejudices non-proponent). With a factual record not developed to address a given issue because that issue only came up on appeal, a litigant's omission

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Instead, it seems to be an argument that Belibei's failure to act sooner is evidence that Belibei was not wrongfully dispossessed of his land, and never truly considered himself to have been. In any event, Eungel's semantic choices in his reply raise more questions than they answer, and demonstrate the problems that arise when a recovery theory is not raised below and properly probed during the hearing: Eungel repeatedly argues that "Belibei *allowed* Appellant to live on the land known as Ngertechoi without objection for over 40 years" (Reply Br. at 4 (*emphasis* added))—of course, this permission, if present, might well undercut Eungel's adverse possession theory.

in the lower court would leave the appellate court with no choice but to send cases back to the lower courts to be heard repeatedly.

[¶ 12] Here, the closest Eungel's representatives came to the idea of adverse possession during the Land Court hearing was pointing out that Telei sold *Ngertechoi* in the early 1970s, yet Belibei had done nothing in the intervening years to recover it. (Tr. at 35.) As with the argument in Eungel's reply brief (*see* n.4, *supra*), the hearing comments about Belibei's long delay do not sound in adverse possession, but rather were made to support the argument that Belibei was not in fact wrongfully dispossessed of his land, and never truly considered himself to have been. Additionally, the lack of development of facts bearing on an adverse possession theory underscore that Eungel did not raise the theory in the Land Court. For example, the hearing resulted in very little information about Eungel's use of *Ngertechoi*. It also failed to produce any evidence that Belibei was aware of the sale by Telei or possible possession or use by Tmetuchl or Eungel (this was merely suggested in unfounded and contested inferences that Belibei must have known because how could he not or that he knows now, so he must have known all along (s*ee, e.g.*, Tr. at 24, 35, 38, 39)).

[¶ 13] As the Court held with respect to waiver of an adverse possession theory in another land case, *Rechucher v. Lomisang*, "[n]either of the two recognized exceptions to this general rule—which allow the court to consider an issue first raised on appeal (1) to prevent the denial of fundamental rights, and (2) when the general welfare of the people is at stake—is present here." 13 ROP at 149 (quotation marks omitted). The "fundamental rights" exception to the waiver rule is most apropos "in criminal cases where the life or liberty of an accused is at stake. This exception to the waiver rule is only to be applied in exceptional circumstances," and is not applicable in a case like this one involving a civil litigant who does not have at stake his life, liberty, or any other fundamental right. *Tell*, 4 ROP Intrm. at 226.

[¶ 14] We therefore deem waived Appellant Eungel's second issue on appeal, his assertion of adverse possession, and we hold that it is not subject to an exception that might allow it to be asserted for the first time on appeal.

CONCLUSION

[¶ 15] For the foregoing reasons, we **AFFIRM** the Land Court's determination of ownership in favor of claimant and Appellee Belibei.

SO ORDERED, this 22nd day of June, 2016.