IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

CHARLES OBICHANG and CAROLYN N. TAKADA,
Appellants,
v.
SHALLUM ETPISON,
Appellee.

Cite as: 2021 Palau 26
Civil Appeal No. 21-001
Civil Case No. 17-185

Argued: July 3, 2021
Decided: September 7, 2021

Counsel for Appellants	C. Quay Polloi
Counsel for Appellee	Jeffrey L. Beattie (argued); Steven R. Marks (on brief); Ebil Y. Matsutaro (on brief)

BEFORE: GREGORY DOLIN, Associate Justice
DANIEL R. FOLEY, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Presiding Justice, presiding.

OPINION

FOLEY, Associate Justice:

[¶ 1] This case returns to us following a remand in *Etpison v. Obichang*, 2020 Palau 8. Appellants Charles I. Obichang and Carolyn N. Takada challenge the trial court's conclusion that they are not senior strong members

of Ngerteluang Clan[1] and therefore have no standing to object to the transfer of Clan land to Appellee Shallum Etpison. We **AFFIRM**.

BACKGROUND

[¶ 2] The facts underlying this long-running dispute are set forth at length in our opinion in *Etpison v. Obichang*, 2020 Palau 8, and we will not repeat them here except as necessary.

[¶ 3] Appellants trace their membership in Ngerteluang Clan to a woman named Ibul. Ibul was adopted into Ngerteluang Clan, but it is unclear what blood relationship, if any, she had to the members of that Clan. In 1973, predecessors in interest of the current parties litigated the disposition of certain property belonging to Ngiramesubed — the deceased holder of the *Iyechaderteluang* title, which is Ngerteluang Clan's highest male title. *See id.* ¶¶ 6, 8 (referring to *Ngertelwang Clan v. Sechelong*, 6 TTR 323 (1973)). The High Court of Trust Territory's judgment in that case opined that Mekesong, [who is the progenitor of Appellee's predecessors in interest], was not a strong member of the clan because she was of the paternal line," whereas "Ibul . . . was a strong maternal line-member" of the Clan. *Ngertelwang Clan*, 6 TTR at 326. In reliance on this statement, the trial court concluded that Etpison was collaterally estopped "from relitigating the relative status of the two factions or from arguing that Ibul was not biologically related to the Clan." *Etpison*, 2020 Palau 8 ¶ 16.

[¶ 4] We vacated the trial court's judgment that Obichang and Takada are senior strong members of Ngerteluang Clan and remanded the case for further consideration of this question. We held that because "a determination of the relative status of Ibul and Mekesong was not necessary to the District Court's holding, [the Trial Division's] application of issue preclusion [wa]s not proper." *Id.* ¶ 19. We instructed the Trial Division to "reconsider whether [Obichang and Takada] have met their burden of proof that they are senior strong members of Ngerteluang Clan without the use of collateral estoppel." *Id.* ¶ 30 (internal quotation marks omitted). Additionally, we reversed the trial

[1] This is also spelled Ngertelwang Clan. For names and titles used in this opinion, we have simply chosen one spelling for consistency and do not list all of the alternatives found in the record.

court's judgment insofar as it held that Ibul was a biological daughter of Meyong (a member of Ngerteluang Clan) because we found this determination to be clearly erroneous. *Id*. ¶ 29. Accordingly, we instructed the Trial Division that Obichang and Takada must establish their status as senior strong members of Ngerteluang Clan "without claiming that Meyong was Ibul's biological mother." *Id.* ¶ 30.

[¶ 5] Following remand, Appellee moved for judgment on the record. In their brief in opposition, Appellants argued that the trial court's earlier conclusion — that, given their descent from Mekesong, individuals who signed over the deed to Etpison are not senior strong members of Ngerteluang Clan — remains an undisturbed factual finding. Appellants suggested that "a further hearing is warranted but only on the issue of Ibul's status." The trial court heard arguments on Appellee's motion on October 19, 2020. On December 22, 2020, the Trial Division issued its Decision and Judgment, holding that Appellants "have not met their burden of proving that they are senior strong members of Ngerteluang Clan," and therefore "their consent was not required" for the transfer of Clan property. The present appeal followed.

STANDARD OF REVIEW

[¶ 6] We review the Trial Division's legal conclusions, including on matters of customary law, de novo and its factual determinations for clear error. *Demei v. Sugiyama*, 2021 Palau 2 ¶ 6. "On clear error review, a trial court's factual findings 'will be set aside only if they lack evidentiary support in the record such that no reasonable trier of fact could have reached the same conclusion.'" *Ngikleb v. Sadao*, 2021 Palau 5 ¶ 7 (quoting *Ngotel v. Iyungel Clan*, 2018 Palau 21 ¶ 7). Application of equitable doctrines is reviewed for abuse of discretion. *See Etpison*, 2020 Palau 8 ¶ 39 (Dolin, J., concurring) (quoting *Kakalik v. Bernardo*, 439 A.2d 1016, 1020 (Conn. 1981)).

DISCUSSION

I.

[¶ 7] Appellants first argue that the Trial Division violated the law of the case doctrine and the mandate rule. According to Appellants, the trial court's factual finding that deed signatories are "not senior strong members of Ngerteluang Clan" was not challenged in the prior appeal and therefore

continues to govern the case. Appellants contend that in the prior appeal Etpison only challenged the trial court's determinations of Ibul's (and her descendants') status, rather than the status of his predecessors in interest. Appellants' argument is wrong as a matter of law and irrelevant to the resolution of the case.

[¶ 8] "[A] notice of appeal designating the final judgment is sufficient to support review of all earlier orders that merge in the final judgment. The general rule is that an appeal from a final judgment supports review of all earlier interlocutory orders." *Arugay v. Wolff*, 5 ROP Intrm. 239, 241 n.2 (1996). In the first appeal, Etpison "appeal[ed] from the Decision and Judgment dated June 4, 2019" and "designate[d] the entire trial court record, including all pleadings, papers, and exhibits filed in the [T]rial [D]ivision." Given the all-encompassing Notice of Appeal, there was no need to separately designate each issue on which review was sought.

[¶ 9] Nor did the Trial Division usurp the authority of Appellate Division. It is axiomatic that "[a]ppellate courts review judgments, not opinions." *Ochedaruchei Clan v. Thomas*, 2020 Palau 11 ¶ 21 (Dolin, J., concurring) (quoting *Rubel v. Pfizer Inc.*, 361 F.3d 1016, 1020 (7th Cir. 2004)). Our vacatur of trial court's first judgment put the parties in the same position as if that judgment never existed in the first place. The purpose of vacatur is to "clear[] the path for future relitigation of the issues between the parties," *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950), and "the result is that the slate is wiped clean, leaving the parties in the same position they were in before the [the prior judgment] was issued," *Mundo Verde Pub. Charter Sch. v. Sokolov*, 315 F. Supp. 3d 374, 386 (D.D.C. 2018) (internal quotes omitted). Thus, when, on remand, the trial court reached a different conclusion than it did in the original proceedings, it was not "review[ing] trial decisions," Appellants' Op. Br. at 15, but rather reaching a judgment in the first instance on the record before it.

[¶ 10] Appellants' argument that the Trial Division violated the mandate rule is equally unavailing. "The mandate rule is a 'more powerful version' of the law-of-the-case doctrine, which prevents courts from reconsidering issues that have already been decided in the same case." *Yobech v. Materne*, 2021 Palau 22 ¶ 9 (quoting *Indep. Petroleum Ass'n of Am. v. Babbitt*, 235 F.3d 588,

597 (D.C. Cir. 2001)). The only thing that was decided in the first appeal was that Ibul was not a biological daughter of Meyong and that the application of collateral estoppel was not appropriate. All other issues were left for the Trial Division.

[¶ 11] Indeed, the trial court followed the precise scheme that Appellants argue it should have followed. According to Appellants, on remand, the trial court was required to 1) determine whether judicial estoppel bars Appellee's claims; 2) determine Ibul's exact status within Ngerteluang Clan; 3) determine whether, to the extent Ibul was a strong member of Ngerteluang Clan, she could pass on her strength to her descendants; and 4) determine whether there are any senior strong members of Ngerteluang Clan who did not sign the deed to Etpison. Appellants' Op. Br. at 17-18.

[¶ 12] There is no doubt that the Trial Division followed steps 2 and 3 demanded by Appellant.[2] The Trial Division considered the evidence in the record to determine whether, on the strength of that evidence, Appellants have met their burden of proving that they are senior strong members of Ngerteluang Clan. Viewing the evidence through the prism of our prior opinion (as it was obligated to do), the trial court concluded that Appellants have failed to establish that Ibul had any blood relation to Ngerteluang Clan and therefore was a *terruaol*, or a person with the lowest ranking in the Clan. *See Beouch v. Sasao*, 20 ROP 41, 52 (2013). Although a *terruaol* may acquire strength in a clan through services and contributions, *see Camacho v. Osarch*, 19 ROP 94, 95 (2012), such strength cannot be passed down to descendants, because, by definition, such descendants would also have no blood relationship to that clan, *cf. Isechal v. Umerang Clan*, 18 ROP 136, 141 (2011) (noting that individual's bloodlines and ancestry are relevant to the determination of strength in the clan). We do not see how the trial court's conclusion violated the mandate rule.

II.

[¶ 13] Appellants next argue that judicial estoppel applies to the case at hand and that the Trial Division's failure to apply it is a reversible error subject to de novo review. We reject each argument.

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[2] For discussion of steps 1 and 4 see *infra* ¶¶ 13-14, and ¶ 18, respectively.

[¶ 14] First, Appellants have waived their judicial estoppel argument by failing to raise it in their original filings in the Trial Division or their filings on remand. Nowhere in their brief in opposition to Etpison's motion for judgment do they even mention judicial estoppel, much less make any argument as to why it should apply. We have repeatedly held that "an issue that was not raised in the trial court is waived and may not be raised on appeal for the first time." *Techur v. Telungalek ra Techur*, 2018 Palau 12 ¶ 23 (quoting *Fanna Mun. Gov't v. Sonsorol State Gov't*, 8 ROP Intrm. 9, 9 (1999)).

[¶ 15] Second, even had Obichang and Takada preserved the issue, they would still fail on the merits. Appellants are wrong that the trial court's failure to apply judicial estoppel is subject to de novo review. To the contrary, as Appellants themselves recognize, judicial estoppel is an equitable doctrine, and as such, it is "invoked by a court at its discretion." *Etpison*, 2020 Palau 8 ¶ 39 (Dolin, J., concurring) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). A discretionary decision is reviewed for abuse of discretion rather than de novo. *Kiuluul v. Elilai Clan*, 2017 Palau 14 ¶ 4. "Generally, '[a] discretionary act or ruling under review is presumptively correct, and the burden is on the party seeking reversal to demonstrate an abuse of discretion.'" *Island Paradise Resort Club v. Ngarametal Ass'n*, 2020 Palau 27 ¶ 12 (quoting *Ngoriakl v. Gulibert*, 16 ROP 105, 107 (2008)). Appellants do not come close to meeting this standard. Though Appellants make an argument as to why judicial estoppel could (and maybe even should) apply in this case, they do not explain why refusal to apply it is an "abuse of discretion." Both for procedural and substantive reasons, Appellants' argument fails.

III.

[¶ 16] Next, Appellants argue that the Trial Division's determination of Ibul's status as a *terruaol* was clearly erroneous. In support of this position, Appellants recycle factual arguments made in the Trial Division but attempt to present them in a more favorable light. That is insufficient to meet the standard. *See Ngerdelolk Hamlet v. Peleliu State Pub. Lands Auth.*, 2021 Palau 15 ¶ 10 ("[A]n appeal that merely re-states the facts in the light most favorable to the appellant and contends that the [trial court] weighed the evidence incorrectly borders on frivolous." (quoting *Ngiraked v. Koror State Pub. Lands Auth.*, 2016 Palau 1 ¶ 8)).

[¶ 17] In any event, even if the trial court erred in concluding that Ibul was *terruaol*, it would not follow that the judgment below has to be reversed. "A party claiming to be a strong senior member of a clan has the burden of proving such status by a preponderance of the evidence." *Dokdok v. Rechelluul*, 14 ROP 116, 118 (2007). In this case, the burden was on Appellants since they are the ones who claim to be senior strong members of Ngerteluang Clan with veto powers over the transfer of Clan lands. In order to prevail on this claim, it would be insufficient to show that Ibul was related to Ngerteluang Clan by blood. Indeed, it would be insufficient to show that Ibul was an *ochell*, because not all *ochell* members are necessarily senior strong members of a clan. *See Estate of Rdiall v. Adelbai*, 16 ROP 135, 138 (2009) ("[R]ank alone does not determine strength within a lineage" or a Clan.); *Ngikleb v. Sadao*, 2021 Palau 5 ¶ 11 ("Our precedent establishes that one's strength in a clan can be diminished through failure to render services to the clan."). Our review of the record indicates that Appellants rested their entire case on Ibul's status, rather than proving that a combination of their ancestry and present-day involvement with the Clan's affairs makes them senior strong members of the Clan. Thus, even assuming that the trial court erred in its conclusion regarding Ibul's rank within Ngerteluang Clan, such an error (if an error it is) is harmless. We therefore decline to disturb the appealed judgment on that basis.

IV.

[¶ 18] Finally, Appellants contend that the deed to Etpison is "invalid because the evidence showed that those who signed the deed are not senior strong members." Appellants' Op. Br. at 24. The argument attempts to turn the procedural posture of this case on its head. It was Appellants who challenged the deed to Etpison and sought to set it aside. In order to do so, they had to prove that the transfer did not enjoy "the consent of all senior strong members of a clan in order to alienate clan land." *Etpison*, 2020 Palau 8 ¶ 31. However, "the relevant question is not whether the individuals who signed the deed to [Etpison] are [senior strong members], but whether Appellant[s are themselves] senior strong member and therefore ha[ve] standing to object to land's transfer." *Andres v. Aimeliik State Pub. Lands Auth.*, 2020 Palau 18 ¶ 20. "Whether one has a right to object to the transfer of Clan or Lineage lands turns on whether or not the objecting parties are strong senior members of the relevant clan or lineage." *Id.* (cleaned up). Etpison does not shoulder the

burden to show that those who signed the deed are senior strong members of Ngerteluang Clan. Rather, Appellants must show that they are senior strong members and that they did not consent to the transfer. Because they have failed to show that they are in fact senior strong members of Ngerteluang Clan, "we necessarily conclude that [they] ha[ve] no right to object to [transferors'] alienation of the subject lands [in favor of Etpison], irrespective of [transferors'] own status in the Clan." *Id.*

CONCLUSION

[¶ 19] Appellants have failed to show that the Trial Division committed any error of law, and have likewise failed to show that the trial court's factual findings are clearly erroneous. As a result, we conclude that Appellants failed to meet their burden of proof that they are senior strong members of Ngerteluang Clan, and therefore have no standing to object to the transfer of Clan lands.[3] The judgment appealed from is **AFFIRMED.**

[3] We have considered Appellants' remaining arguments and find them without merit.