IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

MAGDALENA IMETUKER, PAULA KUMAGAI, EREONG REMELIIK, and JOHN RECHUCHER,
Appellants,
v.
KED CLAN/LINEAGE, TAKESHI ITO, DIRRUCHEI TEMENGIL, and UCHULARAK TKEL,
Appellees.

Cite as: 2023 Palau 16
Civil Appeal No. 23-005
Appeal from Civil Action No. 15-007

Decided: July 13, 2023

Counsel for Appellant ..... Johnson Toribiong
Counsel for Appellee ..... Raynold B. Oilouch

BEFORE: OLDIAIS NGIRAIKELAU, Chief Justice, presiding
FRED M. ISAACS, Associate Justice
DANIEL R. FOLEY, Associate Justice

Appeal from the Trial Division, the Honorable Lourdes F. Materne, Associate Justice, presiding.

OPINION

PER CURIAM:

[¶ 1] This appeal arises out of the Trial Division's decision and judgment on remand in favor of Ked Clan/Lineage, Takeshi Ito, Dirruchei Temengil, and Uchularak Tkel ("Appellees"). Magdalena Imetuker, Paula Kumangai, Ereong Remeliik, and John Rechucher ("Appellants") argue that the Trial Division disregarded the appellate mandate by simply reaffirming its original decision in favor of Appellees and failing to address an issue regarding the Certificate of Title.

[¶ 2] For the reasons set forth below, we **VACATE** and **REMAND** with instructions that the Trial Division reassign the case.

BACKGROUND

[¶ 3] The facts of this case were already set out in our previous appellate opinion in this same case, *Imetuker v. Ked Clan*, 2019 Palau 30.

[¶ 4] This appeal arises from a dispute among closely related *ochell* members of Ked Clan over burials on the Clan burial land (*odesongel*) known as Bangkur in Ngerutoi Village, Ngardmau State. A 1994 Determination of Ownership and a 1997 Certificate of Title for Bangkur were issued to Ked Clan, of which the Trial Division took judicial notice. The Certificate of Title lists the trustee of the land as "Arbedul ra Bangkur."

[¶ 5] In November 2014 and January 2016, two of Appellants' relatives, Kuiroy Arurang and Lorenzo Temol, were buried on Bangkur. The burials took place without the consent of Appellees. As a result, Appellees sought a temporary and preliminary injunction to stop the burial of Temol and remove Arurang from Bangkur. In their verified complaint, Appellees alleged *inter alia* that Arurang is not entitled to be buried on Bangkur because he is not their immediate family member and, pursuant to Palauan custom, he "should not and cannot be buried on Bangkur" without Appellees' consent.[1] *See* Verified Complaint, *Ked Clan et al. v. Imetuker et al.*, Civil Action No. 15-007 at 4 (Tr. Div. Aug. 3, 2018).

[¶ 6] Trial took place in April 2018. The Trial Division found that all the parties are closely related and are all (apart from Appellant John Rechucher and Appellee Uchularak Tkel) *ochell* members of Ked Clan.

[¶ 7] The Trial Division concluded that Bangkur became Ked Clan property through the Lineage of Toluk and Iketebeluu ("the Lineage") and has always been under the authority of Lineage members. The court also found that Bangkur is the residential and burial site for the descendants of Toluk and Iketebeluu and that individuals who are not members of the Lineage must obtain permission from Lineage members to be buried on Bangkur. Because

[1] It is true that Arurang and Temol are not members of Appellees' immediate family, but like the Appellants (except John Rechucher) they are *ochell* members of Ked Clan and are closely related to Appellees. *See* Findings of Fact and Decision, *Ked Clan et al. v. Imetuker et al.*, Civil Action No. 15-007 at 4 (Tr. Div. Aug. 3, 2018); Plaintiffs' Exhibit 3.

Appellants were found to be members of the Clan but not of the Lineage, the Trial Division concluded that they have no authority over Bangkur.

[¶ 8] On September 9, 2019, we vacated and remanded the Trial Division's decision on two grounds. First, we stated that "[t]he prevailing customary law is that the strong members of a clan have authority and control over clan lands" and that "[n]o case law exists excepting this custom." In other words, just because Bangkur became Clan land through the Lineage of Toluk and Iketebeluu, it does not follow that only Lineage members have authority over that land. We concluded that "[b]ecause Bangkur is owned by Ked Clan, it is under the authority and control of the proper Clan members" and remanded for further findings on the question of which Clan members have authority over decisions regarding Clan land. In addition, we remanded for clarification of the issue of the Certificate of Title, which lists as trustee of the land "Arbedul ra Bangkur," a name or title apparently not recognized by the parties.

[¶ 9] On remand, the Trial Division ordered the parties to present supplemental briefing on whether the consent of all senior strong members is applicable to decisions about intra-clan use of clan land. The court then made two alternative conclusions. First, it found that only Appellees were senior strong members of Ked Clan, and not Appellants. Second, the court went on to state that, even if Appellants were also senior strong members of the Clan, the point would be irrelevant, as consent is required of all senior strong members of the Clan. Because Appellees did not agree to the burials, the court maintained its original decision in favor of Appellees. Appellants now appeal the Trial Division's decision on remand.

STANDARD OF REVIEW

[¶ 10] We have delineated the appellate standards of review as follows:

> A trial judge decides issues that come in three forms, and a decision on each type of issue requires a separate standard of review on appeal: there are conclusions of law, findings of fact, and matters of discretion. *Salvador v. Renguul*, 2016 Palau 14 ¶ 7. Matters of law we decide de novo. *Id.* at 4. We review findings of fact for

> clear error. *Id.* Exercises of discretion are reviewed for abuse of that discretion. *Id.*

Kiuluul v. Elilai Clan, 2017 Palau 14 ¶ 4 (internal citations omitted).

DISCUSSION

[¶ 11] Our previous appellate opinion remanded this case for further proceedings regarding two specific issues. First, on the issue of Bangkur's control, we required further findings of which Clan members have authority over decisions regarding this Clan land. Second, we remanded for clarification on the Certificate of Title. Appellants contend that the Trial Division disregarded our appellate mandate by simply reaffirming its previous holding and failing to clarify the Certificate of Title issue. We address these arguments separately.

I. Authority over Bangkur

[¶ 12] When confronted with a question of a custom, a court should first ask whether the traditional law requirements[2] are so "firmly established and widely known as to justify taking judicial notice of the custom." *Beouch v. Sasao*, 20 ROP 41, 48 (2013). Past judicial recognition of a traditional law as binding will be controlling as a matter of law, absent evidence that the custom has changed. *Id.* Where there is no such judicial recognition in our precedent, a trial court may establish a new principle under customary law, or a principle that has heretofore not been addressed by controlling case law, but must do so by evaluating this principle under the *Beouch* framework. *Lakobong v. Blesam*, 2020 Palau 28 ¶ 6. To this end, a trial court should consider whether it may take judicial notice of *facts* justifying the treatment of a custom as traditional law under the four-element test articulated above. *Id.* at 49 (emphasis added). Therefore, the finding of a new principle under customary law must be supported by sufficient evidence. *See e.g., Ngerungor Clan v. Renguul*, 2019 Palau 4 ¶ 19 ("For us to review *de novo* the trial division's finding that appointment to *bedul* of Ngerungor Clan requires approval of all *ourrot*

[2] These requirements are that (1) the custom is engaged voluntarily; (2) the custom is practiced uniformly; (3) the custom is followed as law; and (4) the custom has been practiced for a sufficient period of time to be deemed binding. *Beouch*, 20 ROP at 48.

members of the clan, we would need to rely on existing case law regarding the custom of Ngerungor Clan or examine the expert customary witness's testimony.")

[¶ 13] On remand, the Trial Division asked the parties to file supplemental briefing on "whether the consent of all senior strong members is also applicable for decisions about the intra-clan use of land as opposed to its alienation." The Trial Division then found that Appellees are senior strong members of Ked Clan, not Appellants, and that therefore only Appellees have authority over the use and control of Bangkur. We follow the framework set out by *Beouch* to consider in turn whether there is controlling precedent on the customary law governing burials, and in its absence, whether the Trial Division properly recognized a new customary law.

A. Customary laws recognized by precedent

[¶ 14] A close review of our case law shows that we have no judicial precedent to resolve this specific issue. Nevertheless, in the interest of clarity, let us recapitulate the rules this Court has recognized regarding authority over Clan land.

[¶ 15] It is well-established customary law that a clan's chief can administer the clan's lands. *See, e.g., Eklbai Clan v. Imeong*, 13 ROP 102, 108 n.3 (2006) (noting that the Land Court recognized a chief's right to administer lands for his clan). On the other hand, it is indisputable that land owned by a clan or lineage cannot be transferred except upon the agreement of the senior strong members of the clan or lineage. *Obak v. Bandarii*, 7 ROP Intrm. 254, 255 (Tr. Div. 1998); *see also Mesebeluu v. Uchelkumer Clan*, 10 ROP 68, 72 (2003) ("It is axiomatic that a chief may not alienate clan land without the consent of the clan."). A lease to a non-clan member is tantamount to alienation, and requires consent of the clan's senior strong members. *Ngiramechelbang v. Katosang*, 8 ROP Intrm. 333, 336 (Tr. Div. 1999). However, such unanimous consent is not required when a clan member is the lessee; in that case, the male title bearer's consent is enough. *Demei v. Sugiyama*, 2021 Palau 2 ¶ 11.

[¶ 16] Moreover, we have made clear that clan members cannot own partial interests in clan land. *Obak*, 7 ROP Intrm. at 225 ("[N]ot only can one clan

member not transfer the land on his own, he alone cannot transfer any part of the land, whether during his lifetime or upon his death."). Thus, under this form of group ownership, no individual has any right to transfer either the whole or even a part interest in the property. *Id.*

[¶ 17] Our existing case law specific to burials is succinct but regrettably not fully apposite to the circumstances of this case. In *Camacho v. Osarch*, 19 ROP 94 (2012), we remanded a case where the Trial Division declared that the female title bearer, Osarch, had sole authority to determine who could be buried in a clan's *odesongel* (stone platform serving as a family cemetery). Thus, she could deny the privilege to a strong *ulechell* member of the clan, Camacho, who wanted to bury his father and former bearer of the highest male title on the *odesongel*. *Id.* at 96. We first affirmed the Trial Division's finding that Camacho and his father were *ulechell* members, and not *terruoal* (adopted into the clan). *Id.* We then pointed out that the clan in question no longer had any *ochell* members, and its *ulechell* members were the strongest members of the clan. *Id.* at 97. Finally, we noted that the Trial Division had also made a finding and heard uncontroverted expert testimony that in a clan without *ochell* members, *ulechell* members decide who can be buried at the *odesongel*, and that title-bearers should generally be buried at the clan's *odesongel*, particularly if they held the highest title. *Id.* Therefore, we remanded for clarification between these inconsistent findings. *Id.*

[¶ 18] In another case, we affirmed the Trial Division's decision that the bearer of the male chief title did not need permission of other clan members to bury his relatives, because he was not trespassing on clan land. *Rengulbai v. Azuma*, 2019 Palau 12 ¶ 12. We emphasized that the suit in that case had been brought solely for trespass. *Id.* We further found that it was not necessary for the Trial Division to determine whether the other clan members were senior strong, because the Trial Division had already determined that all parties were members of the clan, and the male chief did not need permission to enter clan land to bury his relatives' remains. *Id.* at ¶ 13.

[¶ 19] Several conclusions can be drawn from this brief review. First, there is no controlling precedent as to which clan members have the authority to decide who can be buried on clan burial land (*odesongel)*. Second, burials are a particular use of clan land by clan members, discrete and distinct from other

types of usage, in particular the alienation of clan land to outsiders. The trial court correctly recognized this and ordered the parties to submit supplemental briefing on "whether the consent of all senior strong members is also applicable for decisions about the intra-clan use of land as opposed to its alienation." Thus, we believe that the relevant question in this case should not only be who has the power to administer the clan land and, in particular, clan burial land, but also who is *entitled* to be buried on clan burial land.[3] Nonetheless, determining whether a customary law exists remains the duty of the Trial Division, and our analysis reinforces that it is important for the trial court to do so by complying with the command of *Beouch*.

B. Finding a new customary law under Beouch

[¶ 20] The Trial Division concluded that that Appellees are senior strong members of Ked Clan, not Appellants, and that therefore only Appellees have authority over the use and control of Bangkur. This conclusion proceeds from the assumption that a burial is equivalent to an alienation of clan land. In our previous opinion in this case, we only stated that the prevailing customary law is that the strong members of a clan have authority and control over clan lands; we made no determination as to what customs govern burials, as that issue was not properly before us. Now that this issue was raised on remand by the Trial Division in its order for supplemental briefing, it is now properly before us. Nonetheless, we still do not have the means to resolve it adequately.

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[3] This conclusion is heightened by one of the rare written records on customary practices in Palau. Indeed, the Palau Society of Historians has given us some insight on the customary rules governing funeral customs. Specifically, they found that "[i]t was a well-maintained tradition not to permit burial of a deceased in a grave other than his original family's burial place (*kotel*) or the seat of the *kebliil* (clan)." Palau Soc'y of Historians, *Deaths, Funerals and Associated Responsibilities*, *in* Traditional and Customary Practices English Series 2, Ministry of Community and Cultural Affairs (1998). Their research also touches on the practice of *oretech*, a payment made to secure the right to bury a deceased person within the burial place of the *kebliil*. As explained, "*[o]retech* traditionally applied to *ulechell*, adoptee or any individual whose mother was of another *kebliil* who came into the *kebliil* to hold a *kebekuul* or *teleuechel* title. . . . This practice did not apply in the case of a deceased *ochell* titleholder, as the *kebliil* was his original *kebliil* (*kotel*)." *Id.* We only provide this reference for informative purposes, as it becomes increasingly difficult to ascertain what clan customs may be through the testimonies of clan elders. The proper way to determine whether a customary law exists remains the duty of the Trial Division, through the *Beouch* framework.

[¶ 21] First, the parties failed to provide a translation for the record. Trial in this matter was heard on April 23, 2018 to April 27, 2018, entirely in Palauan. The parties had a duty to provide a translation of the trial proceedings under ROP R. App. P. 10, which states that "[a]ny parts of the record a party relies on that are not in English must be accompanied by a translation prepared by that party." In the absence of a translation agreed to by both parties, it is difficult for this Court to review the record for evidence supporting the Trial Division's decision.

[¶ 22] Second, the decision on remand did not apply the *Beouch* four-factors test. *Beouch* is very clear that to establish a new principle under customary law, a trial court must evaluate this principle under the *Beouch* framework. The trial court must ask itself whether (1) the custom is engaged voluntarily; (2) the custom is practiced uniformly; (3) the custom is followed as law; and (4) the custom has been practiced for a sufficient period of time to be deemed binding. *Beouch*, 20 ROP at 48.

[¶ 23] Third, the finding of custom is not supported by sufficient evidence. The Trial Division did not hear expert evidence, or any other evidence, on the custom controlling burials. While we cannot be certain of the extent to which the experts testified on custom during the trial because of the lack of translation, we can surmise that none was introduced, as neither the supplemental briefs nor the decision on remand make any mention of such testimony.

[¶ 24] In addition, it appears that the trial court relied entirely on its earlier findings, entered August 3, 2018, to determine that Appellees, not Appellants, are senior strong members of Ked Clan with authority over the use and control of Bangkur. The trial court made no further findings in support of its conclusion that Appellees are senior strong members of Ked Clan. This lack of further findings is critical because the trial court's earlier decision was based on a finding that Bangkur, despite the Certificate of Title, actually belonged to the Lineage of Toluk and Iketebeluu. The trial court writes: "Bangkur is the residential and burial site for the descendants of Toluk and Iketebeluu and is under the authority of the Lineage of Toluk and Iketebeluu." Findings of Fact and Decision, *Ked Clan et al. v. Imetuker et al.*, Civil Action No. 15-007 at 4 (Tr. Div. Aug. 3, 2018). As such, the premise itself of the initial decision was

flawed, and the findings on the parties' status in Ked Clan were deeply interwoven with the findings on the parties' status in the Lineage. For instance, when analyzing the *ourrot* status of Dirruchei, the decision read,

> Dirruchei Temegil is a senior *ourrot* of Ked Clan. She is also a senior *ourrot* member of the lineage of Toluk and Iketebeluu. Her grandmother Toluk and mother Nobuko were undisputedly senior *ourrot* members of the Clan. She helped her mother with Clan customary matters and now does all Clan obligations in her mother's place. She knows all of the stories of Ked Clan and the Lineage of Toluk and Iketebeluu as she grew up on the land called Ked with her mother and grandmother Lkong. As a senior *ourrot* member of Ked Clan she has a say over who should bear the title Arbedul ra Ked.

Findings of Fact and Decision, *Ked Clan et al. v. Imetuker et al.*, Civil Action No. 15-007 at 6-7 (Tr. Div. Aug. 3, 2018).

[¶ 25] The Trial Division reiterated the reasoning from its initial decision, without providing additional analysis to distinguish and clarify which factual findings related to the Clan and which related to the Lineage. Without further findings, we are left to guess whether the trial court independently analyzed the evidence with the premise that Bangkur was Clan, and not Lineage land. To boot, the remand decision leaves out any analysis of the parties' respective ages. A finding that Appellees are senior strong members of Ked Clan should necessarily include a discussion of the relative ages of the parties.

[¶ 26] As a result, the issue of traditional law is unresolvable on the record before us, and it must be properly developed in order to allow for resolution. *Beouch*, 20 ROP at 49 n. 8.

[¶ 27] We also emphasize that the overarching principle of custom in Palau is and has always been consensus. We have repeatedly stated that certain clan matters should be determined by the clan without interference from the courts, and that clan leadership should not abdicate to the courts its responsibility to

reach such consensus. *Sers v. Edward*, 6 ROP Intrm. 355, 358 (1997); *Remoket v. Omrekongel Clan*, 5 ROP Intrm. 225, 229 (1996). This is particularly true where the administration and disposition of a clan's property is involved, as that is "primarily a private matter in which the clan is entitled to exercise wide discretion." *Arbedul v. Diaz*, 9 ROP 218, 225 (Tr. Div. 1989). While we do not order the parties to get together and discuss the issue until a consensus is reached, it would be in their best interest to do so.

II. Title of Ked Clan

[¶ 28] A lower court must strictly comply with the appellate court's mandate on remand. *See Kumangai v. Isechal*, 3 ROP Intrm. 43, 45 (1991). Crucially, "an appellate court's mandate cannot be addressed piecemeal, nor should it be ignored." *Kiuluul et al., v. Elilai Clan*, 2023 Palau 11 ¶ 15.

[¶ 29] Our previous appellate opinion in this case explicitly required the Trial Division to clarify its judgment regarding the issue of the Certificate of Title. We stated, "[t]he Trial Division, in finding that the Certificate of Title incorrectly identifies the chief title of Ked Clan, must show why it is not clear error that an unambiguous term in a prior judgment was not fully credited." By doing so, we expected the Trial Division to make a finding as to whether the Certificate of Title is ambiguous. If it found the Certificate of Title to be ambiguous, it could have resolved this ambiguity by looking at the underlying 1994 determination to establish the intention of the trial court. *See Mikel v. Saito*, 20 ROP 95, 100 (2013) ("[A]ny ambiguity as to the meaning of a certificate must be resolved by reference to the underlying determination"). If it found the Certificate of Title to be unambiguous, the Trial Division ought to explain why it refused to credit its unambiguous terms. However, the Trial Division's judgment on remand did not address the issue. Therefore, we must again **REMAND** with instructions to clarify this matter.

III. Reassignment

[¶ 30] We now turn to the question of remand. As a general rule, we remand a case to be heard by the same judge or justice who first heard it. However, the unusual circumstances of this case lead us to believe that reassignment to a different justice is in the public interest by minimizing any suspicion of partiality.

[¶ 31] Under 14 PNC § 604(a), "[t]he . . . Supreme Court on appeal or review . . . shall have power to affirm, modify, set aside, or reverse the judgment or order appealed from or reviewed and to remand the case with such directions for a new trial or for the entry of judgment *as may be just*." (emphasis added). This statute is worded similarly to a U.S. statute, 28 U.S.C. § 2106,[4] which is often used by U.S. federal courts to reassign cases on remand. Given the similarity of the two statutes, we look to U.S. case law as guidance for our reasoning here.

[¶ 32] We have previously found that we have the inherent authority and responsibility to safeguard against violations of Judicial Canon 2.5. *Etpison v. Rechucher*, 2020 Palau 14, ¶ 16. The goal of Canon 2.5, like that of its U.S. equivalent in 28 U.S.C. § 455(a), is "to avoid even the appearance of partiality." *Cura v. Momen*, 2022 Palau 6 ¶ 11. Correspondingly, when a trial court makes significant credibility findings in a prior judicial proceeding that could cause a reasonable observer to harbor doubts about the court's impartiality, it may sometimes be necessary to reassign the case to a different justice. *Cura*, 2022 Palau at ¶ 11.

[¶ 33] Thus, we will reassign a case to a new judge on remand only under "unusual circumstances or when required to preserve the interests of justice." *United States v. Wolf Child*, 699 F.3d 1082, 1102 (9th Cir. 2012). To do so, we consider:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected,
>
> (2) whether reassignment is advisable to preserve the appearance of justice, and

[4] "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C.A. § 2106.

> (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving appearance of fairness.

Manley v. Rowley, 847 F.3d 705, 712 (9th Cir. 2017).

[¶ 34] In this case, we find that the trial justice might reasonably be expected upon remand to have substantial difficulty in discarding previously expressed findings. As we stated before, the Trial Division reiterated the reasoning from its initial decision, and the Certificate of Title issue was fully ignored in the decision on remand.

[¶ 35] We particularly stress the fact that we do not call into question Justice Materne's actual impartiality and make no findings of bias or misconduct. We merely acknowledge that the initial decision required extensive credibility findings; that it would be understandably difficult to discard these previous findings; that reassignment would be best to preserve the appearance of partiality; and that it would not cause an extreme waste of judicial resources. Therefore, to preserve the appearance of justice, we **VACATE** and **REMAND** and direct the Trial Division to reassign the case.

CONCLUSION

[¶ 36] We **VACATE** and **REMAND** the Trial Division's judgment with instructions that the case be reassigned to a different judge. In addressing the issues on remand, we leave it to the new trial judge to rely on the existing record or to receive additional evidence.