Itolochang Lineage v. Ngardmau State Pub. Lands Auth., 14 ROP 136 (2007).

ITOLOCHANG LINEAGE,
Appellant,

v.

NGARDMAU STATE PUBLIC LANDS AUTHORITY,
Appellee.

CIVIL APPEAL NO. 04-030
LC/H 00-67

Supreme Court, Appellate Division
Republic of Palau

Argued: July 2, 2007
Decided: July 6, 2007

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: C. Quay Polloi

BEFORE: LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice.

Appeal from the Land Court, J. UDUCH SENGEBAU SENIOR, Senior Judge, presiding.

MILLER, Justice:

Appellant Itolochang Lineage appeals from the Land Court's determination of ownership concerning a parcel of land located in Ngardmau State. The land is designated as Worksheet Lot 32H24-A on BLS Worksheet No. 2001-H-01.[1] After holding a hearing in 2001 and another hearing in 2003, the Land Court determined that Ngardmau State Public Lands Authority ("NSPLA") owns lot 32H24-A because the land had been dedicated to ⊥137 public use. Itolochang Lineage appeals, arguing that the Land Court confused use with ownership and asking that the determination be reversed and the land awarded to the Lineage.

BACKGROUND

This appeal is the culmination of protracted litigation among eleven individuals and entities, each of whom claimed to own all or part of a tract of land in Ngetpong Hamlet,

[1]There is some confusion in the record regarding the common name for Lot 32H24-A. The four lots at issue during the second hearing were Lots 32H24, 32H24-A, 32H24-F, and 32H24-G. The claimants and their witnesses tended to identify the land as Taoch ra Iwekei, Kerrodel ra Iwekei, or Bai ra Iwekei based on the attributes of a particular area. No boundaries for or demarkation of these areas was ever provided, but they do not seem to match up with the worksheet lots. The Determinations of Ownership issued by the Land Court for lots 32H24-A, 32H24-F, and 32H24-G all identified the property as Taoch ra Iwekei, Kerrodel ra Iwekei, and Bai ra Iwekei.

Ngardmau State. The only determination of ownership at issue in this appeal is the award of Worksheet Lot 32H24-A to NSPLA. Itolochang Lineage seeks to have that determination overturned.

All of the lands at issue in this litigation were once owned by Iwet Clan. The head of Iwet Clan testified at trial that Bai ra Iwekei and Kerrodel ra Iwekei were given by the Clan to the public before the Japanese time. Most of the evidence suggests, however, that all three parcels were given to Itolochang Lineage and that it was the Lineage which controlled access to and development of the property.[2] Although ⊥138 it declined to identify the owner of Iwekei during the relevant period, the Land Court specifically found that "[a] preponderance of the available evidence establishes that members of Itolochang Lineage have consistently used these lands particularly lots 32H24 and 32H24-A for over 40 years." Summary of Proceedings at 28.

Only two witnesses contradicted the general story that Itolochang Lineage owned lot 32H24-A, that the Lineage allowed the public to use Iwekei for various purposes, and that community leaders sought and (usually) obtained permission from Itolochang whenever the

[2]The testimony provided at trial shows that the land along the river in lots 32H24, 32H24-A, 32H24-F, and 32H24-G, was made available to the local villagers many years ago for use as a dock. Land Court's Summary of Proceedings, Findings of Fact and Determination of Ownership ("Summary of Proceedings") at 19; Trial Transcript ("T.T.") Vol. 2 at 218-19. When the Japanese began using the dock, Medengelei Ngirachermall, then Kmederang of Itolochang, collected rent from them in exchange for such use. Summary of Proceedings at 16 and 17. In 1954, Kmederang Medengelei attempted to sell 32H24-A to Sisang Wachi, but other Lineage members objected to the sale and returned Sisang's money. Sisang operated a sawmill on the lot from 1954 until 1968, during which time he paid rent to Ngedrong Kemaitelong of Itolochang. Summary of Proceedings at 14-16.

Lineage members have lived in one or more houses on lot 32H24-A (Summary of Proceedings at 27; T.T. Vol. 2 at 288-89) and now use that lot as a yard (Summary of Proceedings at 13; T.T. Vol. 2 at 103). At some point after the sawmill ceased operations, chiefs of Ngardmau asked for and were granted Itolochang's permission to use the same area to build a canoe. Summary of Proceedings at 29. When the elders sought to build an abai on lot 32H24-A, they came to Itolochang leaders to obtain approval. T.T. Vol. 2 at 210-11. Permission to rebuild the abai was also sought from Itolochang Lineage after the first abai fell down. Summary of Proceedings at 14-15. The governor of Ngardmau relied on that approval again in 1997 when a third, concrete structure was built on the site. Summary of Proceedings at 15.

In addition to the third abai and some portion of the dock, Lot 32H24-A currently contains a stone platform where Ngederong Kemaitelong and her son, Kmederang Blacheos Kemaitelong, are buried. T.T. Vol. 2 at 99. Kesewaol Kemaitelong, Ngiraidid Ilengelkei, and Ngetwai Ederkeroi, who ranged in age from 67 to 94 at the time of the second hearing, testified that Taoch ra Iwekei is Itolochang land. Summary of Proceedings at 12, 18, and 19. Witnesses such as Akiko Sugiyama, Sabo Esebei, and Ngiraidid Ilengelkei testified that, although the public has been using the road, dock, and abai built on lot 32H24-A, the land is not public and will return to the owners if and when the public use abates. T.T. Vol. 2 at 136-38, 182-83, and 247. Sabo Esebei's testimony is typical: "[t]he government will retain this property 'cause there's a use for it. And when they stop using the . . . property they'll return them to the owners." T.T. Vol. 2 at 182-83. What is noteworthy about this testimony is that it was offered by the Governor of Ngardmau in support of NSPLA's claim of ownership, and yet it essentially acknowledges that the transfer of fee simple ownership of lot 32H24-A to NSPLA was never contemplated by the parties.

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nature or scope of the use changed.[3] As mentioned above, Ananias Ngiraiwet, who bears the title Errengas of Iwet Clan, testified that Iwet Clan donated the dock area to the public, thereby cutting Itolochang Lineage out of the chain of title altogether. T.T. Vol. 2 at 217. Errengas Ananias made no attempt to explain why Itolochang was intimately involved in the use and development of the property from the 1940s to the present. The second witness, Ngiraikelau Teriong, testified that the public purchased the dock area from Itolochang around 1950 by swapping a piece of public land (now part of lot 32H24) for the piece of land on which the dock and abai are now located (lot 32H24-A). T.T. Vol. 2 at 210. After reviewing the evidence, the Land Court apparently rejected the testimony regarding a sale and found that "regardless of whether the dock and the stone platform of Iwekei were owned by Itolochang Lineage or Iwet Clan, there is sufficient evidence to show that both entities at one point or another donated the lands for public use." Summary of Proceedings at 33. Ownership of lot 32H24-A was awarded to NSPLA.

STANDARD OF REVIEW

We review the Land Court's findings of fact for clear error. *Aribuk v. Rebluud*, 11 ROP 224 (2003). Under this standard, the factual determinations of the lower court will not be set aside if they are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion, unless this Court is left with a definite and firm conviction that a mistake has been made. *Espong Lineage v. Airai State Pub. Lands Auth.*, 12 ROP 1, 4 (2004). Conclusions of law are reviewed *de novo*. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

ANALYSIS

Using the common-law doctrine of dedication to public use, the Land Court awarded ownership of lot 32H24-A to NSPLA as the public's representative. Summary of Proceedings at 32-34. Although dedications made pursuant to a statute often result in the ⊥139 transfer of a fee estate to the public, "[c]ommon-law dedication transfers only a servitude" or easement. Restatement of Property: *Servitudes* § 2.18 cmt. d (2000). *See also* 23 Am. Jur. 2d *Dedication* § 54 (2002) ("By a common-law dedication the fee does not pass; the public acquires only an easement in the land designated for its use."); *Town of Newfane v. Walker*, 637 A.2d 1074, 1076 (Vt. 1993); *Santa Fe County Bd. of County Comm'rs v. Town of Edgewood*, 97 P.3d 633, 638 (N.M. App. 2004). Thus, the Land Court's award of ownership to NSPLA based on a common-law dedication to public use constitutes an error of law: that doctrine cannot be used to justify a transfer of fee simple ownership.

The award of lot 32H24-A to NSPLA cannot, therefore, be affirmed on the only theory espoused by the Land Court. Nor can a theory of sale for value, such as that asserted by Ngiraikelau, justify the Land Court's determination of ownership because the court made no factual or legal findings that indicate that a sale occurred. The only other possibility is that the

[3]When Kmederang Schwartz Tudong was asked to approve a paving project in the area, he refused to allow the public to build a third ramp at the dock. The paving project was allowed to proceed. T.T. Vol. 2 at 196.

land was gifted to NSPLA. At three points in its decision, the Land Court says that Kerrodel ra Iwekei and Bai ra Iewkei were "donated" to Ngetpong village. Taken in context, and especially in light of the fact that only the law of dedication is discussed in the decision, the Land Court used the term "donated" as a synonym for "dedicated to public use" and not as a separate legal theory justifying its determination of ownership.[4]

The award of lot 32H24-A to NSPLA was in error and only Itolochang Lineage remains as a viable claimant. Although Iwet Clan submitted a claim that encompassed at least a part of lot 32H24-A, it withdrew its claim during the Land Court proceedings and/or failed to preserve it on appeal. *See, e.g., Udui v. Rechucher*, 9 ROP 134 (2002) ("a party's failure to file a timely notice of appeal is a fatal defect."). Thus, this matter will be remanded to the Land Court for the sole purpose of issuing a Determination of Ownership in favor of Itolochang Lineage.[5]
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CONCLUSION

For all of the foregoing reasons, the Land Court's award of lot 32H24-A to NSPLA is reversed and this matter is remanded for the sole purpose of issuing a Determination of Ownership in favor of Itolochang Lineage. The only ground upon which the Land Court relied in making its determination constitutes legal error: the common-law doctrine of dedication to public use cannot effect a transfer of ownership to the public and the Land Court lacks the authority to determine any use rights that may or may not arise under that doctrine. Because only Itolochang Lineage preserved its claim to lot 32H24-A through trial and on appeal, no further Land Court proceedings are necessary.

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[4]Even if the Court were to assume that the Land Court intended to make the legally distinct finding that Itolochang gifted Iwekei to the public, such a finding would be clearly erroneous. Palauan law recognizes transfers of property accomplished through gifts, but the person claiming to have received such a gift must show "a clear, unmistakable, and unequivocal intention on the part of the donor to make a gift of his property." *In re Rengiil*, 8 ROP Intrm. 118, 119 (2000) (citing 38 Am. Jur. 2d *Gifts* § 17). As set forth in footnote 3 and the accompanying text, most of the witnesses at trial testified that Itolochang allowed the public to use lot 32H24-A while retaining both ownership and the right to control. Although two witnesses cited by the Land Court testified that Itolochang Lineage "gave" 32H24-A to the public, their testimony is far from unequivocal regarding the nature and scope of the "gift." One could read Ngetwai Ederkeroi and Kmederang Schwartz's testimony as support for either a use right or an outright gift. Thus, the only evidence giving rise to an inference that a gift was intended is neither clear nor unequivocal. To the extent it could be argued that the Land Court made a separate factual finding of "donation" or "gift" (and the Court finds that it did not do so), the finding would be clearly erroneous.

[5]A proper application of the common law dedication to public use doctrine in the circumstances presented here could result in a finding that, as various witnesses testified and Itolochang's counsel represented to the Court at oral argument, the public has a right to use portions of 32H24-A as long as it continues to use the dock and abai areas for those purposes. *See* T.T. Vol. 2 at 136-38, 182-83, and 247. The Appellate Division has already determined, however, that the Land Court's jurisdiction is limited to determinations of title: "adjudications of possessory use claims . . . are not within that Court's statutory responsibility." *ROP v. Wally*, 10 ROP 85, 86 (2003). Thus, the Land Court does not have the power to declare the existence or non-existence of a servitude or easement. Should the Lineage fail to abide by its representations in this regard, NSPLA may seek relief in an appropriate forum.