Koror State Pub. Lands Auth. v. Ngirmang, 14 ROP 29 (2006)

KOROR STATE PUBLIC LANDS AUTHORITY, and ESTATE OF JOSEPH NGIRACHELUOLOU,
Appellants,

v.

GABRIELLA NGIRMANG,
Appellee.

CIVIL APPEAL NO. 05-031
LC/B 01-506

Supreme Court, Appellate Division
Republic of Palau

Argued: November 17, 2006
Decided: November 29, 2006
⊥30
Counsel for Appellant KSPLA: Valerie Glynn Lowson and Keith Peterson

Counsel for Appellant Estate of Joseph Ngiracheluolou: Raynold B. Oilouch

Counsel for Appellee: Yukiwo Dengokl

BEFORE: LARRY W. MILLER, Associate Justice; KATHLEEN M. SALII, Associate Justice; J. UDUCH SENIOR, Associate Justice Pro Tem

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, Associate Judge, presiding.

SALII, Justice:

Appellants Koror State Public Lands Authority ("KSPLA") and the Estate of Joseph Ngiracheluolou[1] challenge the Land Court's determination awarding to Appellee Gabriella Ngirmang ownership of the land known as *Idelui*, comprised of Lot Nos. 015 B 04 and 015 B 05 in Ngermid Hamlet of Koror State.[2] Having considered the arguments of the parties, we affirm the determination of the Land Court.

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[1]The original Appellant, Joseph Ngiracheluolou, died while the appeal was pending. Appellant's counsel first submitted Joseph's sister Elizabeth Tatingal as a substitute, but then filed another motion to substitute Tatingal's brother Milan Isack. At oral argument, it was unclear who would substitute for Joseph, but it was made clear the family intended to continue the appeal. For our purposes, we will continue to refer to Joseph as the Appellant.

[2]*Idelui* is part of Tochi Daicho Lot 218, with Lot No. 015 B 04 corresponding to Tochi Daicho Lot 218-A-23 and Lot No. 015 B 05 corresponding to Tochi Daicho Lot 218-A-22.

BACKGROUND

Olngebang Lineage owned *Idelui* until 1920, when Mirair Rois, a senior female member of the lineage, gave the land to her daughter Maria Obkal. Any interest in the land held by Olngebang lineage or Rois terminated, leaving Obkal as the sole owner of the land. In 1939, the Japanese wanted the land for the Shinto Shrine and convinced Obkal to sell the land for 800 yen worth of Postage Savings Bonds that she redeemed for less than $3.00. The Land Court ruled that the sale was involuntary and did not result in just compensation or adequate consideration. In ⊥31 1956, Obkal filed a claim for the return of *Idelui*, but due to administrative oversights it was not processed.

Obkal died intestate in April 1971 and her eldest natural son Francisco Kikuch Ngiracheluolou succeeded to Obkal's interest in *Idelui* under Palau District Code § 801. Kikuch died intestate in April 1979. The Land Court found clear and convincing evidence that Gabriela Ngirmang, an ochell senior member of Olngebang Lineage, provided housing and care to both Obkal and Kikuch prior to their deaths.

Idelui is currently public land held in trust by KSPLA. Gabriela Ngirmang filed a claim to *Idelui* on October 14, 1988. Joseph Ngiracheluolou, Kikuch's son, filed a claim to *Idelui* on December 2, 1988. The Land Court held its first hearing in April 2002 with Associate Judge Salvador Remoket presiding, but after the second witness Judge Remoket learned that he was closely related to one of the claimants and recused himself. In August 2004, Associate Judge Salvador Ingereklii presided over the second hearing. The Land Court ruled that Olngebang Lineage should be entitled to succeed Kikuch's interest in *Idelui*, but since they did not file a claim they forfeited their interest. The Land Court found Ngirmang did not have a valid statutory claim because her interest as an heir of Rois or Olngebang Lineage terminated when Rois sold the land to Obkal. The Land Court found Joseph's statutory claim was also not valid because Kikuch was not a bona fide purchaser for value. The Land Court then applied custom and found that Ngirmang had a stronger claim than Joseph because she was a higher member of the lineage. The Land Court ruled that Ngirmang is the individual fee simple owner of *Idelui*.

STANDARD OF REVIEW

This Court reviews the Land Court's findings of fact under the clearly erroneous standard, under which the factual determinations of the lower court 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. *Tmiu Clan v. Hesus*, 12 ROP 156, 157 (2005). The Land Court's conclusions of law are reviewed *de novo*. *Id.*

DISCUSSION

A. Estate Proceeding

In 1988, Kikuch's war claim money was transferred to Joseph. *See In the Matter of the Estate of Francisco Ngiracheluolou*, Civil Action No. 275-88. In 2001, the case was reopened to

determine Kikuch's interest in Tochi Daicho Lot 719 and 721. This estate hearing held that "all interests, rights and claims of Decedent Francisco Ngiracheluolou in and to any real properties shall be owned by Petitioner Joseph Ngiracheluolou." Joseph claims that the estate proceeding decision makes him the proper heir of all of Kikuch's lands, including *Idelui*. The Land Court rejected this argument, noting that estate proceedings are not the same as quiet title actions. *See Saka v. Rubasch*, 11 ROP 137, 139 n.2 (2004) (noting that the judgment in a prior estate proceeding "only addressed the inheritance of [the] decedent's interest in the disputed lands, without determining whether [he] had any interest at all."). That is true, and it is quite correct that the estate case could in no circumstances have conclusively determined the ownership of *Idelui*. Had it been duly noticed, however, the estate proceeding *could* have barred Ngirmang from claiming *Idelui* as the heir of Kikuch, which is precisely the basis upon which it was awarded ⊥32 to her.

For two reasons, however, we believe that the estate proceeding did not provide Ngirmang with due notice. First, the filings made in that case never named *Idelui* specifically, but referred to an entirely different piece of land. Thus, although Joseph knew of his father's interest in *Idelui* at the time of the estate proceeding, he did not mention it in those proceedings.

Second, and more importantly, notice of the estate proceeding was by publication only and not by personal notice to Ngirmang. Joseph argues that publication is usually sufficient in estate proceedings; but notice by publication is not sufficient when there is a party or parties known to be interested in the matter. *See Mullane vs. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950), 58 Am. Jur. 2d *Notice* § 36 (2002). In this case, Ngirmang had not only filed her claim in 1988, but had intervened in a previous lawsuit filed by Joseph and his sister in 1993. In such circumstances, the failure of Joseph's counsel to serve Ngirmang personally[3] is another reason not to accord preclusive effect to the estate proceeding here.

B. Statutory Claims to *Idelui*

Joseph claims that the Land Court erred when it ruled that he had no claim to *Idelui* as an heir of Obkal and Kikuch.[4] Kikuch died without a will in 1979. In the absence of a valid will, a court looks next to the intestacy statute in force at the time of the decedent's death. *Diaz v. Children of Merep*, 11 ROP 28, 30 (2003). The inheritance law in effect that applied to intestate decedents was PDC §§ 801(c) and (d) (1975). This provision, essentially unchanged, is now codified at 25 PNC §§ 301(a) and (b). This Court has interpreted § 301(b) differently, but under either interpretation the statute does not apply and Joseph did not have a valid statutory claim to

[3]We do not know whether this failure was inadvertent or intentional. If it were shown that there was some calculated strategy to omit any mention of *Idelui* and to avoid service on Ngirmang for the purpose of making the preclusion argument, then counsel's action could border upon, if not cross into, the realm of the sanctionable. We reach no conclusion here, other then to observe that any such strategy was self-defeating for the reasons stated above.

[4]Ngirmang does not contest the Land Court's finding that she did not have a valid statutory claim to *Idelui* as heir or Rois or Olngebang Lineage.

the land.

Kikuch died without a will and had children, but because he was not a bona fide purchaser of value for *Idelui*, PDC § 801(c), the current 25 PNC § 301(a), does not apply in this case. PDC § 801(d), the current 25 PNC § 301(b), states that:

> (d) If the owner of fee simple land dies without issue and no will has been made in accordance with this Section or the laws of the Trust Territory or if such lands were acquired by means other than as a bona fide purchaser for value, then the land in question shall be disposed of in accordance with the desires of the immediate maternal or paternal lineage to whom the deceased was related by birth or adoption and which was actively and primarily ⊥33 responsible for the deceased prior to his death. Such desires of the immediate maternal or paternal lineage with respect to the disposition of the land in question shall be registered with Clerk of Courts.

Under the first interpretation of § 301(b), it only applies when the decedent has no will, no children, and is not a bona fide purchaser of value. *See Ysaol v. Eriu Family*, 9 ROP 146, 148-49 (2002) (Ngiraklsong, C.J., concurring). Under this interpretation, § 301(b) would not apply to this case because Kikuch had children. Then, as no inheritance statute would apply to the case, custom fills the gaps and would determine the ownership of the land. *See Bandarii v. Ngerusebek Lineage*, 11 ROP 83, 87 (2004).

The second interpretation applies § 301(b) in two distinct situations: (1) decedents without a will and without children or (2) decedents without a will with children but who were not bona fide purchasers of value. *Ysaol*, 9 ROP at 149-52 (Miller, J., concurring). Kikuch met the requirements of a decedent without a will with children but who was not a bona fide purchaser of value. The Land Court considered this enough and applied § 301(b). However, in *Delbirt v. Ruluked*, 10 ROP 41, 43 (2003), this Court found that meeting those elements by itself was not enough to apply the statute when neither party introduced evidence of a lineage's desires as to the disposition of the property. As the Land Court found that the Lineage has never discussed the disposition of *Idelui* and neither party introduced evidence of the lineage's desires in this case, the Land Court erred by applying § 301(b). However, that error is harmless as the proper course of action was to apply custom in the absence of the statute and the Land Court ultimately applied custom to determine the outcome of the case. Under either interpretation of the inheritance statute, the inheritance statute should not be applied to this case and Joseph has no valid statutory claim as an heir of Kikuch.[5]

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[5]During both hearings, Ngirmang testified that she claimed the land as the property of Olngebang Lineage and that she did not believe that either Obkal or Kikuch ever owned the property. In her written closing argument, Ngirmang also argued she was an heir of Rois. Joseph claims that Ngirmang improperly raised multiple claims of interest. However, we have held that, "It is possible that a person may believe that land is owned by a clan or lineage, but also have a colorable claim to individual ownership if it is found that the land is not owned by the clan or lineage. We see no reason why such a person should not be able to make both claims in the alternative." *Idid Clan v. KSPLA*, 9 ROP 12, 15 n.3 (2001). The Land Court did not err in allowing Ngirmang to argue multiple claims of interest.

C. Application of Customary Law

KSPLA argues that because the Land Court found that Olngebang Lineage was the proper heir to *Idelui* and neither other claimant had a better claim it should not have applied custom and the land should have awarded the land to KSPLA, citing *Masang v. Ngirmang*, 9 ROP Intm. 125 (2002). In *Masang*, we held that in a return of public lands case when none of the claimants are "the proper heirs" under the intestacy statute, the Land Court should not just pick one of the claimants but should return the land to the public lands authority. However, as discussed above, the Land Court erroneously applied the ⊥34 inheritance statute to find that Olngebang Lineage had an interest to the land. The statute does not apply and cannot be used to find the proper heir. Instead, the land could only be awarded through an application of custom. *Masang* is distinguishable from this case because there are no proper claimants other than Joseph or Ngirmang, and despite their invalid statutory claims they are able to submit valid claims to the land under custom. In a return of public lands case, when no heir exists under the inheritance statutes among the claimants and nonclaimants, then custom should be applied to decide which claimant owns the land. The Land Court properly looked to custom to determine ownership of the land.

D. Determining Ownership Through Custom

Joseph claims that the Land Court erred when it determined that Palauan custom gave Ngirmang a superior right of claim to *Idelui*. Specifically, he argues that the Land Court should not have accepted Ngirmang as an expert witness on Palauan custom and should instead have relied on the expert testimony of his witness. The existence of a claimed customary law is a question of fact that must be established by clear and convincing evidence and is reviewed for clear error. *See Masters v. Adelbai*, 13 ROP 139, 141 (2006).

Matters of custom must be resolved on the record of each case. *See Arbedul v. Emaudiong*, 7 ROP Intrm. 108, 110 (1998) (noting that "our longstanding determination to treat the existence and substance of custom as a matter of fact requires that the outcome of a case be decided on the basis of its own record."). In this case, the only evidence of custom was by two witnesses. The Land Court accepted Ngirmang as an expert witness on Palauan custom. She testified that only the ochell members of Kikuch's lineage had the authority to decide and dispose of *Idelui* and as the senior ochell member and tedlach the land would go to her. She also testified that she gave Palauan money to Joseph after Obkal's death and she testified that under custom that relegated Joseph to a lower status. Appellant's expert witness testified that under Palauan custom, when a person dies, his properties go to his children and if there are no children then to his closest relatives. The Land Court adopted Ngirmang's evidence of custom based on her testimony. Joseph argues that her testimony was self-serving and should have been believed, but it is well-settled that the trial judge is best situated to make credibility determinations of expert witnesses, and this Court will generally defer to those decisions. *Tmiu Clan v. Hesus*, 12 ROP 156, 158 (2005). At the hearing, Ngirmang was eighty-three years old, had learned custom throughout her life, and had served as an expert witness at another trial. There is nothing in the record to indicate that Ngirmang was not credible and we defer to the Land Court's acceptance of Ngirmang's testimony.

Joseph also argues that the Land Court should have adopted his version of customary law and that its application of custom was clearly erroneous. However, where there are two permissible views of the evidence as to proof of custom, the fact finder's choice between them cannot be clearly erroneous. *Saka v. Rubasch*, 11 ROP 137, 141 (2004). The Land Court was presented with two opposite interpretations of Palauan custom and ruled that Ngirmang's custom applied in this case. "[W]e are in no position to second-guess the trial court, who saw and heard both experts testify, in choosing to credit one over the other." *Id*. The Land Court's application of customary law was not clearly erroneous ⊥35 and the Land Court properly awarded *Idelui* to Ngirmang.

E. Judicial Conflict of Interest

For the first time on appeal, Joseph claims that the Land Court Judge Ingereklii had a close relationship to Ngirmang and should have disqualified himself from presiding in the case. Parties cannot seek review of alleged errors of the trial court when they made no objection to the Court's actions at the time. *Kotaro v. Ngirchechol*, 11 ROP 235, 237 (2004); *see also Nakamura v. Sablan*, 12 ROP 81, 82 (2005) (arguments raised for the first time on appeal are deemed waived.). As Joseph presents no exceptional circumstances why he did not raise the alleged error to the Land Court during the more than a year long proceedings, Joseph cannot raise the issue on appeal.

CONCLUSION

As no claimant to *Idelui* had a valid statutory claim, the Land Court properly applied custom to determine the ownership. Because the Land Court's determination finding of the terms of customary law is not clearly erroneous, it properly found that Ngirmang is the owner of *Idelui*. For these reasons, the Land Court's determination is affirmed.

MILLER, Justice, concurring:

I join the opinion of the Court in its entirety, including its resolution of KSPLA's appeal as to the applicability of *Masang v. Ngirmang*, 9 ROP 125 (2002), to the circumstances of this case. On an expansive reading of *Masang*, one could argue that the failure of Olngebang Lineage to exercise its authority to designate an owner of *Idelui* pursuant to 25 PNC § 301(b) bars both individual claimants from succeeding with their claims. I have no wish to read *Masang* expansively, however, because I believe it to have been wrongly decided in the first place.

Relying on the language of 35 PNC §1304(b),[6] *Masang* held that a claim for the return of

[6]Section 1304(b) provides in pertinent part:

The Land Court shall award ownership of public land, or land claimed as public land, to any citizen or citizens of the Republic who prove:

public lands by a relative or relatives of a deceased landowner must be rejected if it could be shown that some other relative who did not file a claim would have had a better claim under Palau's intestacy statute:

> [I]n other words, in cases where the evidence shows that the "proper heirs" did not file a claim, other claimants do not ⊥36 simply move up in the queue and prevail on the basis of being the most closely related persons who filed a timely claim.

9 ROP at 128. I disagree. In my view, where the other elements of a return-of-public-lands claim have been met, "the most closely related persons who filed a timely claim" *are* the "proper heirs" and should be awarded the land.

As I have stated elsewhere, I find the holding in *Masang* problematic in two respects. The first is the fact that it "announced a new rule of law that was not raised, much less advocated, by the parties before it, and that benefited a non-party who could have raised the issue, but had failed to do so." Decision and Order, *Masang v. KSPLA*, Civil Action No. 235-90 (Sept. 19, 2003), *appeal pending*, Civil Appeal No. 03-43. That, in itself, does not mean that the new rule is wrong, but it does suggest that its entitlement to *stare decisis* treatment is weak, and that it should not be immune from re-examination in an appropriate case.

But I also believe that the holding itself, even had it been reached after being properly raised and argued, was mistaken for several reasons: I do not think it is compelled by the statutory language on which the *Masang* Court relied, I do not think it accurately reflects the intention of the legislatures that enacted (and re-enacted) the statute, and I think it runs contrary to the policy embodied in Article XIII, Section 10, of the Constitution, which the statute was enacted to implement.

Taking these points in reverse order, I begin with the fact that Article XIII, Section 10, is a command to the national government to act swiftly to undo past injustice:

> The national government shall, within five (5) years of the effective date of this Constitution, provide for the return to the original owners or their heirs of any land which became part of the public lands as a result of the acquisition by previous occupying powers or their nationals through force, coercion, fraud, or without just compensation or adequate consideration.

There is no hint of stinginess or legalistic technicality in these words: Where land was

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> (1) that the land became part of the public land, or became claimed as part of the public land, as a result of the acquisition by previous occupying powers or their nationals prior to January 1, 1981, through force, coercion, fraud, or without just compensation or adequate consideration, and
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> (2) that prior to that acquisition the land was owned by the citizen or citizens or that the citizen or citizens are the proper heirs to the land . . . . All claims for public land by citizens of the Republic must have been filed on or before January 1, 1989 . . . .

wrongfully taken by a foreign power, the government has the duty to find the "original owners or their heirs" and give it back. The rule announced in *Masang*, as I have said, runs directly contrary to the intent of this provision. It comes into play, as in *Masang*, or as potentially applied in this case, *only* where it has already been determined that a land was wrongfully taken, and then, through the introduction of a legal technicality, serves to thwart the constitutional purpose by leaving the land in the hands of the government. There is no reason to believe that the framers of the Constitution, faced with the choice of returning the land to "the most closely related persons who filed a timely claim" and doing nothing, would have chosen the latter.

Second, to the extent that legislative intent is at issue, there is no reason to believe that the OEK that enacted §1304(b) had any different intention. To accept the holding in *Masang*, however, is to believe that the OEK meant to lay a trap for unsuspecting citizens by combining a strict time limit for the filing ⊥37 of claims with an equally strict limit on the persons eligible to file such claims. Under *Masang*, if only the "wrong" claimants filed a timely claim and even if the "right" claimant acted belatedly, everyone -- other than the government, that is -- loses.[7] There is no reason to believe that the OEK that originally enacted the statute, or the later legislatures that re-enacted it,[8] had such a purpose.

That leaves the plain language of the statute. It is true that there are certain cases where the language of a statute is so clear that we must put aside other indicators of legislative intent and public policy and enforce the statute as written. But there is no such clarity here that would compel us to interpret §1304(b), despite the constitutional purpose and in the absence of any other indication of legislative intent, as was done in *Masang*. To be sure, it is possible to read the words "proper heirs" to mean only the exact persons dictated by the intestacy statute. But it is not inevitable. The addition of the word "proper" could have been meant simply to ensure that a claimant show a true relationship to the original landowner, or, as between competing claimants, to ensure that the Court choose the one with the strongest claim. As the *Masang* opinion recognized, in all other land matters, we have directed the Land Court to "choose among the claimants who appear before it" even if, as sometimes happens, there is another person whose claim "might be theoretically more sound" but who failed to file a claim. *Ngirumerang v.*

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[7]It is important to recall that the decision in *Masang* was the second half of an appeal in which the Appellate Division had already rejected as untimely the claims of various persons who claimed to be the children of the original landowner. *See Adelbai v. Masang*, 9 ROP 35 (2001). The remand to discover whether he indeed had children was not for their benefit, but, if he did, to leave the land unreturned. *See* 9 ROP at 128-29 ("If on remand the Trial Division determines that Salii had adopted children, then title to the land should remain with KSPLA.").

It is also important to recognize that Palau's intestacy statute presents numerous interpretive problems, that had not been addressed in 1987, when the statute was first enacted, and that are only now being sorted out. *E.g., Bandarii v. Ngerusebek Lineage,* 11 ROP 83 (2004); *Delbirt v. Ruluked*, 10 ROP 41 (2003); *Ysaol v. Eriu Family*, 9 ROP 146 (2002). Indeed, *Masang* itself went on to discuss an aspect of 25 PNC §301(b) that had never been addressed by the Appellate Division. *See* 9 ROP at 129. Thus, the possibility that the "wrong" persons filed claims in 1988 is all too real.

[8]Section 1304(b) has remained largely unchanged over the years. The only significant change came with the enactment of RPPL 4-43 in 1996, which expanded the list of defenses unavailable to the government and thus made it *easier* for public lands claims to succeed.

Tellames, 8 ROP Intrm. 230, 231 (2000); *see Masang*, 9 ROP at 128 n.3. There is thus nothing extraordinary in finding that "the most closely related persons failed to file a timely claim" are "proper heirs" within the meaning of §1304(b).

I do not lightly advocate the overruling of recent precedent, and I recognize that "adhering to precedent 'is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.'" *Becheserrak v. ROP*, 7 ROP Intrm. 111, 118 (1998) (Miller, J., concurring in part and dissenting in part), quoting *Burnet v Coronado Oil & Gas Co.*, 52 S. Ct. 443, 447 (1932) (Brandeis, J., dissenting). But I believe that the circumstances in which the *Masang* holding was adopted, *see* p.2 *supra*, the unfairness of that holding, and the fact that no reliance ⊥38 interests will be affected by overruling it,[9] makes this an issue that can and should be set right when the Court has the opportunity to do so.

[9]Counsel for state public lands authorities and PPLA are entitled to, and surely will, rely on *Masang* as long it remains good law. But its overruling will not cause any special unfairness to them. As for claimants, one of the problems with *Masang* is that it was decided more than a decade after the deadline for filing claims had passed. No one has filed or failed to file a claim on the basis of its holding, and undoing that holding will only undo the unfairness of adopting it in the first place.