

Rechebei v. Ngiralmau, 15 ROP 62 (2008)
ICHIRO RECHEBEI and BRERENG KYOTA,
Appellants,

v.

**ILAP SIS NGIRANGEANG NGIRALMAU, RDECHOR SANTOS NGIRASECHEDUI,
MERESBANG NGIRALMAU, NGOTEL SUKRAD, SEKLII NGIRALMAU, EBIL
ETUMAI RENGULBAI, MARTHA IECHAD DIRRAKLANG, NGIRAMETUKER,
OSIAOL MEREI, MENGEKONG SUGAR, DENGELEI NGIRALMAU,
ANEMARY EDEYAOCH, RIKEL DOKDOK, EMILIANA NGIRKIKLANG,**
Appellees.

CIVIL APPEAL NO. 06-043
Civil Action No. 05-032

Supreme Court, Appellate Division
Republic of Palau

Decided: February 14, 2008¹

Counsel for Appellants: J. Uduch Sengebau Senior

Counsel for Appellees: John K. Rechucher

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; C. QUAY POLLOI, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

This dispute over burial rights arose when Defendants-Appellants attempted to bury their sister on land in Airai called Smengesong, Cadastral Lot No. 016 N 05, listed in the Tochi Daicho as belonging to Smengesong lineage with Chief Ilapsis as trustee. Both parties sought a declaratory judgment in the Trial Division that they represent the senior strong members of Smengesong lineage who have the right to administer lineage property. The Trial Division held that Plaintiffs-Appellees were stronger members of the Lineage; the evidence supports this conclusion and we affirm the judgment.

BACKGROUND

Appellees sought a Temporary **163** Restraining Order to prevent Appellants from burying their sister on Smengesong Land, which was denied by the Trial Division in February 2005.

¹ Upon reviewing the briefs and the record, the panel finds this case appropriate for submission without oral argument pursuant to ROP R. App. P. 34(a).

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When Appellees sought to bury one of their relatives on the land, Appellants sought a similar TRO which was denied in August 2005, and the case proceeded to trial. The parties stipulated to certain facts and customary law governing most of the case in a joint pre-trial statement, and neither party disputes the additional customary law accepted by the trial court as established at trial as follows: Members of a lineage are ranked based on birth, adoption, and services to the lineage. Ochell members (children of female lineage members) are stronger than ulechell members (children of male lineage members). Adoption by a family outside the lineage can weaken one's status in a lineage, while adoption by a female member of a lineage can strengthen an ulechell's status relative to other ulechell members, but cannot render an ulechell member an ochell member. Adoption at an early age by a closely related family member (ideuekl ngalk) provides higher status than someone otherwise adopted (merrot a uach).

Both parties trace their ancestry to a female named Leleng. The trial court found that Appellees are children of the daughter of Ngerbol. Ngerbol was the daughter of Sukrad, who was a son of Leleng. The trial court found that one of Leleng's daughters, Ebulmau, adopted Ngerbol, thereby elevating Ngerbol's status and that of her children, including Appellees, above that of Appellants.

The trial court found that Appellants are children of the son of Belechel. Belechel was the son of Ngirduais, who was another son of Leleng. Appellants argued below that their father (son of Belechel) was adopted by Ebulmau² (daughter to Leleng, sister to Sukrad) and appellant Brereng argued that she was adopted by Bakas, who was the daughter of an adoptive brother (from the lineage of Ikidl) of Ebulmau's daughter Teblaol. The trial court held that even if these adoptions did in fact occur, Appellees would be the more senior members of Smengesong lineage because Appellees had a longer female adoptive line than Appellants, and because Brereng's adoption was through a different lineage. Based on birth, then, the trial court held that Appellees were the more senior members of the lineage.

Appellants also argued below that their contributions and services to Smengesong lineage render them higher-ranking members. The trial court held that both Appellants and Appellees performed services to Smengesong lineage. But whereas Appellees performed substantial services and participated in the major customs of the lineage, Appellants were unable to contribute as much. Appellant Ichiro is blind and therefore could not contribute money or labor, and Appellant Brereng contributes money to lineage customs only on occasion. Based on services, Appellees were held to be the stronger members of the lineage.

Both parties presented evidence of the various lineage customary titles they held over the years. The trial court found this evidence conflicting, favoring neither party. The trial court also heard evidence regarding who returned to the land upon the death of his or her father. Once again the court found that the evidence was **L64** in equipoise, because each party presented evidence demonstrating that the other party had been taken care of by relatives with Palauan money and land upon the death of each party's father.

² It appears Ebulmau and Olengachel are the same person: sister of Sukrad, daughter of Leleng.

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Finally, the trial court briefly discussed the testimony presented by Appellants that Ngermeu is a separate clan with a close relationship with Smengesong, rather than a separate lineage in the same clan as Smengesong. The Court noted that Appellants did not raise this issue in their pleadings, and held that, in any event, the argument failed for lack of proof.

The trial court concluded that the evidence regarding who held customary lineage titles, who contributed more to lineage services, and who returned to the lineage favored neither party. Based strictly on birth and services, the court held that Appellees were the senior strong members of Smengesong lineage with the rights to administer the burial grounds.

STANDARD OF REVIEW

This Court reviews the trial court's conclusions of law *de novo*. *Ngirmeriil v. Estate of Rechucher*, 13 ROP 42, 46 (2006). The lower court's findings of fact are reviewed for clear error. *Id.* Thus, 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. *Id.*

DISCUSSION

Appellants assert two points on appeal. First, they claim that when Silwai (the grandmother of Appellees' parents) died, her children left Smengesong for Silwai's village and relatives, and never returned to Smengesong. Appellants claim that because Ichiro remained at Smengesong, Appellants are the senior members of the lineage with authority to determine when Appellees have performed enough services to enable them to return as members of Smengesong Lineage.

Appellees correctly point to evidence that is sufficient to uphold the trial court's finding. Appellee Martha Iyechad testified that her grandmother Ngerbol (Silwai's daughter) lived at the house of Smengesong her entire life. After Ngerbol died, Martha and her mother Kitang both lived at Smengesong. At some point, Martha and her mother moved to Ngersung for a period of ten years, but while they were away they continued to fulfill their responsibilities and perform services for the lineage.

Furthermore, contrary to Appellants' assertion, the customary expert who testified at trial did not testify that "when Sukrad's children left to their mother's place, they no longer have rights to control over the properties and titles of . . . Smengesong Lineage." Appellants' Brief at 2. Rather, the expert testified in response to a hypothetical posed by counsel for Appellants, the factual basis of which was rebutted by Appellees' testimony as outlined above. The following is the expert testimony on which Appellants rely:

Q: Let's say . . . these children [referencing Appellees' grandmother] were still very small when [their mother, referencing Silwai] passed away. The children were still very small and received their children's money . . . from the relatives of **¶65** [their father]. Then they left to another area, to another village, to another

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clan, to their roots . . . where their mother originated from. And they lived there until they became older Under Palauan custom, these children who departed, if they ever wanted to return to this house, would they just come in and take over control or would they come in through those who remained, perform services until such time when they regain positions in the house?

A: No, that's very clear. They received their children's money and they went home. If they should wish to return, they may come but will start all over as members of the house. They don't just come in and take over control.

The hypothetical posed by counsel and answered by the customary expert is not applicable to this case. There is no evidence in the record that Appellees received their children's money and moved away, never to return. Rather, Appellee Martha testified that she lived in Smengesong for 42 years as a school teacher and left only for a period of ten years to live with her husband. Martha testified that her grandmother, Ngerbol, stayed at Smengesong her entire life, and her mother Kitang stayed at Smengesong until she was old and feeble. Because Appellants' claimed point of error is without merit, we affirm the Trial court's holding that Appellees are stronger members of Smengesong Lineage based on birth and services.

Appellants' second point of appeal is that the trial court erred when it ruled that Ngermeu is not a separate clan from Elokksimech Clan. On appeal, Appellants allege that the chieftitle Ilapsis is the title of the separate Ngermeu Clan. Because the certificate of title names Ilapsis as trustee of Smengesong Land and because Ngermeu is a separate clan from Smengesong, so the argument goes, the senior members of Smengesong Lineage have no control over the affairs of Ngermeu Clan, which are decided by the Ngermeu Ilapsis.

As the trial court noted, this issue was not raised by Appellants below until late in the trial. In their Answer in the Trial Division, Appellants sought a declaratory judgment "that Defendants [Appellants] are strong, senior ochell members of Smengesong Lineage and, as such, are vested with all right and authority under Palauan custom as ochell Lineage members." In the Joint PreTrial Statement filed before trial by both parties, the parties admitted that the sole issue before the trial court was "who, between Plaintiffs and Defendants, are the senior strong members of Smengesong lineage . . .". There was no mention of the argument that Ngermeu is a separate clan from Smengesong until late in the trial proceedings. Although it is well established that arguments not raised before the trial court are deemed waived on appeal, *see Soweï Clan v. Sechedui Clan*, 13 ROP 124, 129 n.5 (2006), because the trial court mentioned and considered this argument in its decision below, it was clearly raised at trial (albeit in closing arguments) and this issue cannot be considered forfeited as Appellees claim. Nevertheless, the argument is substantively meritless, and the trial court should not have considered it as it constitutes a variance **L66** from the pleadings.

The trial court concluded that Appellants presented evidence that Ngermeu is in a different clan from Smengesong, but found such evidence unconvincing. This finding by the trial court was not clearly erroneous. First, Appellants Brereng Kyota and Santos Ngirasechedui testified that members of Smengesong Lineage have complete control over the Smengesong land

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at issue in the case. There was also credible evidence presented that Ngermeu is a lineage of Eloklsumech Clan, rather than a separate clan as claimed by Appellants. Therefore, there was evidence to support the trial court's conclusion that "Defendants have not established that Ngermeu is a separate clan, or that Smengesong does not appoint its titles." Tr. Ct. Decision at 9. Furthermore, the Certificate of Title to Smengesong, Cadastral Lot No. 016 N 05, lists Smengesong Lineage as owner of the land. Both parties stipulated before trial that the land Smengesong is owned by Smengesong Lineage. For Appellants to stipulate as to which clan has control over Smengesong land before trial, but to argue at trial that Ngermeu Clan actually owns and controls the land constitutes an unfair surprise sprung on Appellees and a material variance in the pleadings. *See* 61 B Am. Jur. 2d *Pleading* § 920 (1999) ("It is a fundamental and vital principle of good pleading and practice that allegation and proof must correspond; that nothing can generally be proved that is outside the allegations; and that facts must be proved substantially as alleged."); *see also id.* §§ 922, 923.

CONCLUSION

The judgment of the trial court is affirmed.