

Tellames v. Isechal, 15 ROP 66 (2008)

**ESTHER TELLAMES,
Appellant,**

v.

**RIKEL ISECHAL,
Appellee.**

CIVIL APPEAL NO. 03-050
LC/H 01-581, 01-582, 01-584 to 587, 01589

Supreme Court, Appellate Division
Republic of Palau

Argued: March 31, 2008

Decided: April 1, 2008

Counsel for Appellant: Mark Doran

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Counsel for Appellee: Raynold Oilouch

BEFORE: C. QUAY POLLOI, Associate Justice Pro Tem; ALEX R. MUNSON, Part-Time Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Land Court, the Honorable J. UDUCH SENGEBAU SENIOR, Senior Judge; RONALD RDECHOR, Associate Judge; ROSE MARY SKEBONG, Associate Judge, presiding.

POLLOI, Justice:

Esther Tellames appeals the determination of a Land Court panel concerning ownership of three parcels of land: Lot No. 02H007-26A; Lot No. 02H007-26; and Lot No. 02H007-27. The Land Court panel awarded these parcels to Appellee Rikel Isechal as part of its determinations concerning approximately forty parcels of lands located in Ngardmau State. This appeal followed. For the reasons set forth below, we affirm.

BACKGROUND

Appellant, Esther Tellames, (“Tellames”) is the granddaughter of a man named Tmakeung and the daughter of Tmakeung’s daughter, Dirruchei. Tmakeung owned a parcel of land known as *Lmii* or *Oltebangel* and collected rents for that land during the Japanese period. This land has been identified as worksheet lot numbers 02H007-26A; 02H007-26; and 02H007-27. Tmakeung died in 1971 without a will, and Dirruchei was his oldest surviving female child. Dirruchei died in 1994. Tellames’ claims to the disputed land are based on the fact that Dirruchei acquired the property upon Tmakeung’s death, and, when Dirruchei died, Tellames acquired the

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property as Dirruchei's heir.¹ Appellee, Rikel Isechal, ("Rikel") is the daughter of a man named Isechal. Isechal's maternal uncle was Tmakeung. Isechal died in 1985, and his relatives held an eldecheduch soon thereafter to distribute property. Rikel's claim to the land is based on oral transfer to her at the eldecheduch of her father Isechal. The parties dispute certain facts surrounding the eldecheduch, and those facts formed the basis for the Land Court's conclusions concerning ownership of the lands at issue.

The Land Court found, as a matter of law, that Dirruchei inherited the land at the time of Tmakeung's death as his oldest living female child. However, in its factual findings, the Land Court found that Dirruchei attended the eldecheduch after Isechal's death in 1985, and that she, along with Isechal's other close relatives, distributed lots 02H007-26A; 02H007-26; and 02H007-27 to Rikel Isechal. Specifically, the Land Court found that Dirruchei attended the eldecheduch and did not object to the lands being given out to Rikel. Since the Court found that the land was given to Rikel at the eldecheduch in 1985, the Court went on to conclude that Dirruchei did not own the land when she died in 1994, and thus Esther Tellames could not have inherited it.

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STANDARD OF REVIEW

This Court reviews the Land Court's findings of fact for clear error. *Ibelau Clan v. Ngiraked*, 13 ROP 3, 4 (2005). Under this standard, 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. *Palau Pub. Lands Auth. v. Ngiratrang*, 13 ROP 90, 93 (2006). The Land Court's conclusions of law are reviewed de novo. *Id.*

DISCUSSION

A. The Land Court's finding that the land in question was distributed to Isechal at the eldecheduch was not erroneous.

Tellames argues that the Land Court erred in finding that Dirruchei consented to the transfer of her land at the eldecheduch for Isechal. Based upon testimony given at the hearing, the Land Court specifically found that Dirruchei was in attendance at the eldecheduch, was among those responsible for distributing property at the eldecheduch, and consented to the distribution of her land to Rikel. *See* Land Court Findings of Fact ¶¶ 8-9. Tellames does not argue that these factual findings were clearly erroneous. Rather, she raises two arguments challenging the legal effect of these facts.

First, Tellames claims that custom does not allow for the property of someone situated such as Dirruchei to be given out at an eldecheduch. Second, Tellames claims that even if

¹ Before the Land Court, Tellames had also claimed ownership as an heir and child of Tmakeung because she said Tmakeung adopted her when she was two months old. The Land Court found that argument meritless because at the time of Tmakeung's death, Esther Tellames was not his oldest surviving child. On appeal, Tellames only pursues the "heir of Dirruchei" theory of ownership.

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Dirruchei's property could be distributed, her silence could not be taken as consent since she was an ulechell and could not speak at the eldecheduch. Contrary to Tellames' assertions, the burden fell on Tellames to present clear and convincing evidence to the Land Court of the existence of these alleged rules of custom.

Proof of custom must be by clear and convincing evidence. *Iderrech v. Ringang*, 9 ROP 158,161 (2002). This usually occurs in the form of expert testimony. *In re Estate of Kemaitelong*, 7 ROP Intrm. 94 (1998). This Court has before recognized the ability of the Land Court to take judicial notice of matters of custom absent clear and convincing evidence to the contrary. *See Otobed v. Etpison*, 10 ROP 119 (2003) ; *Lakobong v. Itei*, 8 ROP Intrm. 87 (1999). The Land Court observed that property is distributed by relatives at an eldecheduch and found that in this case, the relatives of Isechal distributed the lot in dispute to Rikel. The court further observed that Dirruchei was among those relatives distributing property. Tellames claims on appeal that custom did not allow Dirruchei's land to be transferred and that Dirruchei, an ulechell, was not permitted to speak. As the party invoking the protections of a claimed rule of custom, Tellames should have been the one to come forward with clear and convincing evidence. However, she presented no proof of either claimed rule of custom. Accordingly, the Land Court's finding that the land was transferred under custom to Rikel must be upheld.

B. Tellames' contract-based arguments are barred.

Tellames raises two arguments rooted in theories of contract, namely, the statute of frauds and mistake of fact. The Court does not consider arguments raised for the first time on appeal. *See Rechucher v. Lomisang*, 13 ROP 169 143,149 (2006) ("Having failed to raise these issues [*i.e.*, adverse possession and statute of limitations] before the Land Court, . . . he is barred from raising them here."); *Kotaro v. Ngirchchol*, 11 ROP 235, 237 (2004) ("No axiom of law is better settled than that a party who raises an issue for the first time on appeal will be deemed to have forfeited the issue, even if it concerns a matter of constitutional law.") Tellames did not raise these arguments below and is therefore barred from raising them now.

CONCLUSION

For the foregoing reasons, the determination of the Land Court is affirmed.