Ngaraard State Pub. Lands Auth. v. Tengadik Clan, 16 ROP 222 (2009)

NGARAARD STATE PUBLIC LANDS AUTHORITY AND PALAU PUBLIC LANDS AUTHORITY,
Appellants,

v.

TENGADIK CLAN,
Appellee.

CIVIL APPEAL NO. 07-038
LC/E00-310, 312, 313, and 315

Supreme Court, Appellate Division
Republic of Palau

Decided: August 18, 2009[1]

Counsel for Appellants: Kevin N. Kirk

Counsel for Appellee: Oldiais Ngiraikelau

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

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

PER CURIAM:

Appellants appeal the Land Court's conclusion that Tengadik Clan owns the lands known as *Chelechuus*, *Tebadeldil*, *Manga*, *Kesebekuu*, and *Kedesau*. Because we cannot find that the Land Court's findings are clearly erroneous, we **AFFIRM** its Determination of p.223 Ownership.

BACKGROUND

The lands at issue in this case are *Chelechuus*/*Manga*, *Kesebekuu*, *Tebadeldil*/*Kedesau*, and *Omesiil*. These lands are part of Tochi Daicho Lot No. 61 and Tract No. 11-420 and are depicted as Worksheet Lot Nos. 003 E 02-A, B, C, and D on BLS Worksheet No. 003 E 002. All the lands are located in Choll County, Ngaraard State. In 1980, the Palau District Land Commission determined that these lands were government property. A certificate of title to the lands was granted to the Palau Public Lands Authority in 2005.

[1]None of the parties requested oral argument pursuant to ROP R. App. P. 34(a).

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The Land Court held a return-of-public-lands hearing regarding the lands at issue in 2007. Six parties filed timely claims to all or part of the lands and appeared at the hearing. These claimants were (1) Besebes Osarch, (2) Remoket Ngirasowei, (3) Riosang Salvador, (4) Sadang Silmai, (5) Meketii Clan, and (6) Appellee Tengadik Clan. Appellants Palau Public Lands Authority ("PPLA") and Ngaraard State Public Lands Authority ("NSPLA") also appeared at the hearing.

The Land Court issued a Determination of Ownership on August 10, 2007. In it, the Land Court found that the lands had an actual owner before being taken by the Japanese government, that the Japanese government obtained the lands through improper means, and that Appellee was the original owner of the lands. Consequently, the Land Court awarded all the lands at issue to Appellee. Appellants timely appealed, arguing that the Land Court's findings were not supported by sufficient evidence.

STANDARD OF REVIEW

We review Land Court factual findings for clear error. *Rechirikl v. Descendants of Telbadel*, 13 ROP 167, 168 (2006). "Under this standard, if the findings are supported by evidence such that a reasonable trier of fact could have reached the same conclusion, they will not be set aside unless this Court is left with a definite and firm conviction that an error has been made." *Id.* Importantly, "[i]t is not the appellate panel's duty to reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence." *Kawang Lineage v. Meketii Clan*, 14 ROP 145, 146 (2007). Where there are two permissible views of the evidence, the Land Court's choice between them cannot be clearly erroneous. *Sambal v. Ngiramolau*, 15 ROP 125, 126 (2007) (citing *Baules v. Kuartel*, 13 ROP 129, 131 (2006)). Unless the Land Court made a clear error, the Appellate Division cannot reverse, even if it would have weighed the evidence differently. Put simply, Land Court determinations are affirmed so long as the factual findings are plausible. *Kawang Lineage*, 14 ROP at 146. We review Land Court legal conclusions *de novo*. *Singeo v. Secharmidal*, 14 ROP 99, 100 (2007).

DISCUSSION

A. Burden of Proof in Return-of-Public-Land Proceedings

Before turning to the merits of the appeal, we first address some issues that need to be p.224 clarified. First, during the closing arguments before the Land Court, counsel for one of the claimants stated that in a return-of-public-lands proceeding, the government cannot rely on the fact that the Tochi Daicho lists the property as public land; instead "[t]he government must show how it became public lands." Tr. at 433 ln. 4-7. Likewise, this attorney argued that the burden is on the government to show "how the Japanese Government came to own these public lands" and that the burden can shift to the government to prove that public land was acquired by means other than force, coercion, fraud, or without just compensation or adequate consideration. Tr. at 434 ln. 8-10, 26-28; 435 ln. 1-2.

It is incorrect, however, to place the burden of proof on the government in a return-of-

public-lands proceeding. The applicable statute, 35 PNC § 1304(b), states that 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*" that they are the original owners and that the land became public in a prohibited fashion. 35 PNC § 1304(b) (emphasis added). Likewise, this Court has held that "the burden of proof remains on the claimants, not the governmental land authority, to establish, by a preponderance of the evidence, that they satisfy all requirements of the statute." *Palau Pub. Lands Auth. v. Ngiratrang*, 13 ROP 90, 94 (2006). Although it is true that a claimant in a return-of-public-lands proceeding need not rebut a Tochi Daicho listing in the government's favor, *Palau Pub. Lands Auth. v. Tab Lineage* , 11 ROP 161, 168 (2004), this does not shift the burden of proof to the government. It merely means that the claimant will not have to overcome the Tochi Daicho presumption in meeting her burden of proof.

We are also troubled by Appellee's counsel's suggestion that once it is determined that public land was acquired wrongfully, the Land Court must award the land to one of the private claimants. At closing, Appellee's counsel stated that "[i]f the Court finds that the land was wrongfully taken, it must look to us, the claimants in front [of] him, and award the land to one of us." Tr. at 449 ln. 5-7. Presumably, counsel was relying on the principle that the "Land Court can, and must, choose among the claimants who appear before it." *Rusiang Lineage v. Techemang*, 12 ROP 7, 9 (2004) (quoting *Ngirumerang v. Tellames* , 8 ROP Intrm. 230, 231 (2000)).

But this principle does not mean that the Land Court is obligated to award public land to a private claimant solely because the court has determined that the land was acquired wrongfully. Such a conclusion would conflict with § 1304(b), which requires that a claimant prove, by a preponderance of the evidence, both that the land was acquired wrongfully *and* that he or she is the original owner or an heir of the original owner. If none of the claimants can prove the ownership element, then the land will remain with the government, no matter how wrongful its acquisition. While the principle discussed in *Rusiang* is designed to prevent the Land Court from awarding property to someone who failed to file a claim, it does not absolve claimants in return-of-public-lands proceedings from meeting their burden of proof . *See Rusiang* 12 ROP at 9 (noting that the Land Court "cannot choose someone who did not [claim the land], even though his or her claim might be theoretically p.225 more sound").

On a related note, there was some discussion of bifurcating the Land Court hearing so that the court would first hear argument regarding whether the lands at issue were acquired wrongfully. If the court concluded that the lands were acquired wrongfully, the claimants argued, they should have an opportunity to mediate their dispute about who owned the land. Tr. at 3-12. The Land Court properly denied this motion. We point out, however, that the assumption underlying the bifurcation idea is flawed. The assumption is that once the Land Court determines that public land was wrongfully acquired, one of the private claimants must be the owner, and thus the private claimants should be allowed to settle the ownership matter among themselves. This is wrong because, as noted above, ownership is something that the court must determine based on the preponderance of the evidence. The private claimants cannot agree who gets what portion of public land; they must each try to persuade the court that he or she was the owner of the land prior to its acquisition by an occupying power. Were the court to allow the

parties to mediate the ownership issue, the government would be deprived of the opportunity to argue, as it did in this case, that none of the private claimants has met her burden of proof.

B. Sufficiency of the Evidence

That being said, Appellants' primary argument is that the Land Court's findings of fact are not supported by sufficient evidence. Specifically, Appellants assert that there was insufficient evidence that the Japanese government acquired the lands at issue wrongfully and that Appellee owned the land prior to its acquisition by the Japanese. In Appellants' words, the testimony of Appellee's witnesses was "equivocal at best," and the Land Court's findings of facts "are not supported by a quantum of evidence wherein any other reasonable trier of fact could have reached the same conclusion." Op. Brief at 6, 10. "[T]he thin soup of evidence relied upon by the Land Court cannot," Appellants contend, "leave this court with a definite and firm conviction that an error has not been made." [2] Op. Brief at 10. Appellants also object to the Land Court's "wide-ranging" findings regarding a Japanese land survey. Finally, Appellants maintain that the Land Court erred by failing to consider that the lands at issue might have been public land before being acquired by prior occupying powers.

Having reviewed the entire record, we hold that the Land Court's findings of fact are not clearly erroneous. As for the first 35 PNC § 1304(b) element, there was evidence that the Japanese acquired the land at issue without paying any compensation or consideration. The claimants' witnesses uniformly testified that they had never heard that the Japanese paid for any land in the region known now as *Manga*. Besebes Osarch testified that there were no fair negotiations between the Japanese and Palauans p.226 regarding the lands at issue. Tr. at 27, ln. 25-28; 28, ln. 1-19. Etibek Sadang testified that he never heard anything about the Japanese purchasing the lands at issue. Tr. at 42, ln. 3-9; 53, ln. 12-18; 54, ln. 10-15. According to Tadao Ngotel, "this is something I will raise my hand to state that there was not a single penny offered to the people of Choll for this Manga, or to the chiefs or clans or private individuals." Tr. at 65, ln. 24-27; *see also id.* at 60, ln. 4-7 61, ln. 14-17. Riosang Salvador also testified that the Japanese did not ask for permission to use the lands, and he never heard that money was paid for the lands. Tr. at 128, ln. 1-27; 129, ln. 1-3; 134, ln. 23-26. Thus, when the Land Court found that the lands at issue were "taken without any proper explanation or understanding with the state, or with the villagers, or the lineages (families) or clans that owned the land," there was evidence to support this finding. Det. of Own. at 8.[3]

The Land Court also based its "wrongful acquisition" finding on evidence regarding the methods in which the Japanese surveyed the lands at issue. The Land Court stated that during a land survey conducted from 1923 to 1926, the Japanese segregated individual lands from government land based on whether or not individual Palauans were actively using the lands.

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[2]By stating that the Court must have a "definite and firm conviction that an error *has not* been made" to uphold the Land Court, Appellant misstates the applicable standard of review. Rather, to reverse a Land Court factual finding, the Court must be left with a definite and firm conviction that an error *has* been made. *See Rechirikl v. Descendants of Telbadel*, 13 ROP 167, 168 (2006).

[3]The page numbers refer to the English translation of the Determination of Ownership found in the appellate case file. This translation was performed by court staff and approved by Judge Ingereklii.

Det. of Own. at 7. "[M]ost of those lands where people resided in, and those that had plants on them, or were being cultivated by individuals, were subdivided and given to them, and unoccupied or unused lands went to the Japanese government." *Id.* In addition, the Land Court noted that "Japanese government personnel congregated and met with the council of chiefs of Palau and informed them about the arrangement for lands in Palau, and what could be used by the Palauans and what could not be used as they were the government's property." *Id.*

Appellants criticize these findings as being "wide-ranging" and unsupported by the evidence before the court. Op. Brief at 8-9 ("Again, where all of this appears in the record of evidence is not readily apparent.") The exhibits and testimony, however, belie this criticism. Land Tenure Patterns, a book introduced into evidence without objection, describes a land survey made by the Japanese from 1923 to 1926, the purpose of which was to separate private land from the public domain. Office of the Staff Anthropologist, Trust Terr. of the Pac. Islands, *Land Tenure Patterns* 310 (1958), Tengadik Clan Ex. 1. "In the year following completion of this survey, the chiefs and other Palauan representatives were called together by the Japanese officials and a proposal was made to declare lands within the emplanted markers 'temporary government lands.'" *Id.* The problem with this "temporary government land," however, was that "considerable areas of clan lands had been included within government markers." *Id.* To rectify the problem, Japanese officials "initiated hearings on lands claimed by the various clans, but in a short time abandoned the hears [sic] altogether and claims appear to have been disregarded." *Id.* "Within ten years," the book states, "the designation of 'temporary' was also dropped." *Id.*
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The findings of the Land Court are also supported by Trust Territory Policy Letter, P-1, apparently introduced by Appellants. Trust Terr. of the Pac. Islands, Office of the Deputy High Comm'r, Trust Territory Policy Letter, P-1 ¶ 6 (1947). In a section titled "Public Domain," the letter states that rulings by the "Germans and Japanese, which treated as public domain those land areas which were not used continuously by native people, violate some Micronesian concepts of ownership, since the resources of such 'no man's land' were usually recognized by the natives as belonging to some specific community or group." *Id.*

This documentary evidence is supported by witness testimony. According to the witnesses the Japanese did not so much survey the land as assign ownership based on visible use. Etibek Sadang testified that he heard that during the Japanese surveys, Palauans were told to claim land by clearing forested areas with machetes. Tr. at 44, ln. 16-22. According to Mr. Sadang, once the Palauans exited the forest and attempted to claim lands at the top of hills, the Japanese would stop them and prevent them from claiming the land. Tr. at 44, ln. 22-28; 45, ln. 1-5; 47, ln. 1-6. Tadao Ngotel testified that his father told him that the Japanese would tell people where to survey their land, and the people were too afraid to disagree. Tr. at 59, ln. 1-8. Besebes Osarch stated that "[t]hey just put down the cement [markers] and said this what you are using and this is what we are using." Tr. at 99, ln. 11-19.

In light of this evidence, it was not clearly erroneous for the Land Court to conclude that the Japanese took the lands at issue without just compensation or adequate consideration. We recognize that the evidence was not overwhelming. Few of the witnesses had any firsthand knowledge about the events they described, some of the witnesses contradicted themselves, and

much of the testimony came from the claimants themselves and was thus self-serving. That being said, we are prohibited from reweighing the evidence. It is enough that a reasonable fact finder could, as the Land Court did, find that the lands at issue were acquired wrongfully.

This deferential standard of review also leads us to conclude that it was not clearly erroneous for the Land Court to find that the lands at issue were owned by Appellee. The Land Court based its finding on testimony that Appellee used the lands at issue, particularly an area known as Ralm Tengadik (Tengadik Water). Det. of Own. at 13. The Land Court also looked to statements made by Ngeseur, a seventy-seven year old woman, that the land *Manga* is the property of Tengadik Clan. *Id.* Moreover, the Land Court noted that Tengadik Clan is one of the original clans of Choll and thus likely had property there. *Id.*

There is evidence supporting the Land Court's findings. Besebes Osarch testified that a place named Ralm Tengadik existed within *Manga*. Tr. at 94, ln. 4-14. Riosang Salvador stated that "this property is a property of Tengadik." Tr. at 123, ln. 15-22. According to Mr. Salvador, he learned this information from his mother's uncle. Tr. at 124, ln. 4-6. He also testified that although no one lived on the lands at issue, Tr. at 151, ln. 15-25, members of Appellee used Ralm Tengadik for bathing and drinking. Tr. at 158, ln. 22-25. Etibek Sadang, p.228 when asked if he had ever seen anyone other than members of Meketii Clan use the land at issue, answered "[t]here was, Tengadik." Tr. at 180, ln. 0-24; *see also* Tr. at 214, ln. 16-22 ("My uncle, Tutii, said that what they refer to as their land area or ' *ngesechelir*' is where they [Tengadik Clan] had landed."). He also testified to the existence of Ralm Tengadik. Tr. at 195, ln. 11-28. Wilbert Ngirakamerang, who claimed the lands at issue for Appellee, stated that he claimed the lands because he heard from the older rubak of Choll that it was Appellee's land. Tr. at 251, ln.7-8.

There are also the statements made by Ngeseur. Ngeseur did not appear at the hearing. Rather, Etibek Sadang testified to a conversation he had with Ngeseur previously. According to Mr. Sadang, Ngeseur said that she had heard that *Manga* belonged to Appellee. Tr. at 401, ln. 19-27. In between hearing dates, counsel for other claimants spoke with Ngeseur on the phone. He confirmed that were she called to testify, Ngeseur would say that she had heard that *Manga* was owned by Appellee. Tr. at 408, ln. 7-28; 409, ln. 1-18. Likewise, a witness for Appellants spoke with Ngeseur. Tr. at 412, ln. 1-3. This witness, Mr. Kual, confirmed Ngeseur's statements. He pointed out, however, that she assumed the property was Appellee's because the water there was called Tengadik water. Tr. at 416, ln. 25-28; 417, ln. 1-9; *see also* Tr. at 423, ln. 23-26 ("Rather she denied knowledge of most everything about that, except to say that she's heard from older people that there is Tengadik water there, so from having overheard these things, she assumed that it must belong to the people of Tengadik.").

Again, there was testimony that contradicted the above statements. Appellants made a strong case that none of the claimants met their burden of demonstrating that they were the original owners of, or rightful heirs to, the lands at issue. Nevertheless, whether the evidence is described as "thin soup" or "thick soup," there certainly was evidence supporting the Land Court's decision. We will not reweigh the evidence, and we defer to the credibility determinations made by the lower court. The Land Court's findings were plausible, and this is

sufficient under the clearly erroneous standard of review. Moreover, the Land Court did not improperly ignore the possibility that the lands at issue had always been public land. Appellants raised this argument, and the Land Court apparently did not find it persuasive.

CONCLUSION

The Land Court's Determination of Ownership is **AFFIRMED**.