ANASTACIA NAPOLEON,
Appellant,

v.

CHILDREN OF MASANG MARSIL,
Appellee.

CIVIL APPEAL NO. 08-031
LC/B 04-84

Supreme Court, Appellate Division
Republic of Palau

Decided: November 4, 2009[1]

[1] **Appeal and Error:** Preserving Issues

The Appellate Division typically will not consider issues raised for the first time on appeal. If a party fails to raise an issue below, she prevents the trial court from considering it and generally forfeits the argument.

[2] **Appeal and Error:** Preserving Issues

The Appellate Division's review on appeal is normally confined to the record, meaning it cannot consider evidence presented for the first time on appeal.

[3] **Evidence:** Judicial Notice

A court may take judicial notice of an adjudicative fact, whether requested or not, at any stage of the proceeding. A properly noticeable fact must not be subject to

[1] The panel finds this case appropriate for submission without oral argument, pursuant to ROP R. App. P. 34(a).

reasonable dispute, meaning it is either (1) generally known within the territorial jurisdiction of the court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

[4] **Appeal and Error:** Preserving Issues; **Evidence**: Judicial Notice

An appellate court has reasonably wide discretion to take judicial notice of a properly noticeable fact. The appellate court, however, should ensure that it is not unfair to a party to the case and does not undermine the trial court's factfinding authority. Although an appellate court typically should decline to take judicial notice of a fact that could have been presented to the lower court, it is not precluded from doing so and may exercise its discretion accordingly.

[5] **Appeal and Error:** Preserving Issues; **Evidence**: Judicial Notice

Judicial notice should not be invoked frequently to supplement a record on appeal or to subvert a trial court's role as the finder of fact.

[6] **Evidence:** Judicial Notice

That a fact is judicially noticeable does not necessarily mean that a court should also take judicial notice of the inferences a party hopes will be drawn from that fact.

Counsel for Appellant: J. Uduch Sengebau Senior

Counsel for Appellee: Mark Doran

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; ALEXANDRA F. FOSTER, Associate Justice.

Appeal from the Land Court, the Honorable C. QUAY POLLOI, Senior Judge, presiding.

PER CURIAM:

Appellant Anastacia Napoleon, on behalf of the Ngedlau Lineage, challenges the Land Court's April 24, 2008, decision awarding fee simple ownership of a parcel of land to the children of Masang Marsil.[2] Specifically, Napoleon claims that the Land Court clearly erred in finding that the disputed parcel was part of a Tochi Daicho lot owned by Masang, rather than an adjacent lot purportedly owned by the Ngedlau Lineage. To support her argument, Napoleon raises an issue not presented to the Land Court, accompanied by a Certificate of Title submitted for the first time on appeal. Despite our proven reluctance to consider issues for the first time on appeal, we will take judicial notice of the Certificate of Title, which potentially stands in direct tension with the Land Court's determination, and therefore remand this matter to the Land Court for further proceedings.

BACKGROUND

[2] The children of Masang consist of George, Sam Yoyo, Toribiong, Emiliana, and Florian. For simplicity, we will refer to the Appellees solely as "Masang," unless referring to a specific individual.

This dispute concerns competing claims to a parcel of land in Ngerkesoaol Hamlet, Koror State. The property in question, commonly known as *Ngedlau*, is identified as Lot 182-523 on Worksheet No. 04-B-001, as prepared by the Bureau of Lands and Surveys (BLS). Napoleon claimed below that this lot corresponds with either Tochi Daicho Lot 439 or 441, which the Ngedlau Lineage received in 1994 during the distribution of properties in the Estate of Masang Marsil. Masang argued that the lot is a part of its land in Tochi Daicho Lot 440.

The Land Court heard the case on April 16, 2008. Anastacia Napoleon was not present at the hearing, but she executed a power of attorney to Maria K. Mira, who appeared in her stead. Mira was the sole witness supporting Napoleon's claim. She introduced a stipulation regarding the distribution of the Estate of Masang Marsil, which conveyed "Tochi Daicho Lot No. 441 or 439" to the Ngedlau Lineage. To establish the location of these lots, Mira testified that a BLS representative told her that BLS Lot 182-523 is part of either Tochi Daicho Lot 439 or 441. Mira did not know the boundary of the adjacent lot, Tochi Daicho Lot 440, nor was she certain whether the land she claimed was part of Tochi Daicho Lot 439, 441, or both. She also claimed that the Ngedlau Lineage had always owned the land in Lot 182-523, and that she, her mother, and her grandmother had each lived on the land at various times.

Masang presented evidence that questioned the existence of Tochi Daicho Lots 439 and 441 altogether. Masang's counsel stated that there is no listing for these two Tochi Daicho lots, and the Land Court, after reviewing its own Tochi Daicho compilation, concurred but indicated "that it is incomplete with relevant pages missing." LC/B No. 04-84, Decision at 3 (Land Ct. Apr. 24, 2008). The Land Court subsequently determined that Lot 439 did in fact exist, relying on two Japanese maps, attached to Masang's Exhibit 10, that show Tochi Daicho Lot 439 adjacent to Lot 440. The boundaries of the relevant lots, however, remained in dispute.

Masang presented two witnesses, Lalii Markub and Sam Yoyo Masang. Markub, who owns land in the vicinity and claimed to know the history of the land, stated that BLS Lot 182-523 is part of *Ngedlau* and belongs to Masang as a portion of Tochi Daicho Lot 440. Sam Yoyo Masang also testified that BLS Lot 182-523 was a part of *Ngedlau*, which belonged to his family. Sam was born in *Ngedlau* and currently lives there, and he claimed that Urimch, Napoleon's mother, asked the Masang family for permission to build a house on the disputed land.

Masang also introduced documents suggesting that BLS Lot 182-523 is a portion of Tochi Daicho Lot 440. Among them were the two Japanese maps attached to Masang's Exhibit 10. Both maps indicate that Tochi Daicho Lot 439 is a plot of land bordered by Lot 440 on the northwest and a road on the southeast, although each map is hand-drawn and without coordinates. Tochi Daicho Lot 439 appears to correspond primarily to BLS Lot 182-524, commonly known as *Ongitekei*, which is adjacent to Lot 182-523 and also bordered by the road on the southeast. Furthermore, Masang produced a Land Acquisition Record from 1974, which included a sketch showing the land between the road and Masang's land in Tochi Daicho 440 as being claimed by Obaklubil, a member

of the Ngedlau Lineage. Based on these maps, Lot 182-523 appears to be at or near the border of Tochi Daicho Lots 439 and 440. As for Tochi Daicho Lot 441, Mira produced no evidence of its existence or location.

After considering this evidence, the Land Court concluded that, although Tochi Daicho Lots 439 and 441 existed and referred to property somewhere, they did not encompass BLS Lot 182-523. The court noted that Mira had produced no evidence to connect the lot to Tochi Daicho Lot 439, other than an alleged statement to that effect by a BLS representative. Rather, the court determined that Lot 182-523 was a portion of Tochi Daicho Lot 440. The court cited testimony from Sam Yoyo Masang, as well as the Japanese maps and the 1974 Land Acquisition Record indicating that Tochi Daicho Lot 439 referred to the land adjacent to the road (BLS Lot 182-524). The Land Court determined that Masang's Tochi Daicho Lot 440 was split at some point into two BLS Worksheet lots: Lots 182-522 and 182-523.

Consequently, on April 24, 2008, the Land Court issued a determination of ownership of BLS Lot 182-523 in favor of the children of Masang. Napoleon now appeals.

ANALYSIS

Napoleon challenges the Land Court's factual findings, which we review for clear error. *Sechedui Lineage v. Estate of Johnny Reklai*, 14 ROP 169, 170 (2007). We will not set aside the findings so long as they are supported by evidence such that any reasonable trier of fact could have reached the same conclusion, unless we are left with a definite and firm conviction that an error has been made. *Rechirikl v. Descendants of Telbadel*, 13 ROP 167, 168 (2006). We review the Land Court's conclusions of law *de novo*. *Sechedui Lineage*, 14 ROP at 170.

Napoleon's primary contention on appeal relates to an issue not raised before the Land Court. She argues that the entire area of Tochi Daicho Lot 440 is approximately the same as the recorded area of BLS Lot 182-522, which undisputedly belongs to Masang and is adjacent to Lot 182-523. To support this argument, Napoleon attached to her opening brief a Certificate of Title for BLS Lot 182-522, issued on May 9, 2005, and registered at the Clerk of Courts on May 11, 2005. The document indicates that the "*Land known as 'Ngedlau' and located in Ngerkesoaol Hamlet (Formerly shown as Worksheet Lot No. 182-522)*" contains an area of 568 square meters, more or less. According to multiple exhibits that Masang introduced at trial, Tochi Daicho Lot 440 is recorded as having an area of 162.3 tsubo, which equates to approximately 537 square meters.[3] The implication of this information, if accurate, is that Tochi Daicho Lot 440 could not possibly encompass *both* BLS Lots 182-522 and 182-523, meaning Tochi Daicho Lot 440 must correspond only to Lot 182-522. This is in direct tension with the Land Court's ruling below.

Masang correctly notes in his response brief that this issue was not raised or litigated before the Land Court. Although the court had evidence of the size of Tochi Daicho Lot 440, neither party introduced evidence

[3] One tsubo equals approximately 3.305785 square meters.

pertaining to the size of BLS Lot 182-522 or 182-523. Napoleon produced this evidence for the first time in her opening appellate brief.

[1, 2] This Court typically will not consider issues raised for the first time on appeal. *Rechucher v. Lomisang*, 13 ROP 143, 149 (2006); *see also Ngerketiit Lineage v. Ngerukebid Clan*, 7 ROP Intrm. 38, 43 (1998) (collecting cases). If a party fails to raise an issue below, she prevents the parties and the trial court from considering it and generally forfeits the argument. *See Kotaro v. Ngirchechol*, 11 ROP 235, 237 (2004). Likewise, our review is normally confined to the record, meaning we cannot consider evidence presented for the first time on appeal. *Ucheliou Clan v. Alik*, 8 ROP Intrm. 312, 314 (2001); *see also Pedro v. Carlos*, 9 ROP 101, 103 (2002). We have also held that the Land Court does not clearly err by failing to take evidence into account that was never introduced at trial. *See Otobed v. Ongrung*, 8 ROP Intrm. 26, 27 (1999) (citing *Estate of Etpison v. Sukrad*, 7 ROP Intrm. 173, 175 (1999)).

[3] Competing with the principles regarding the scope of our appellate review, however, is a tribunal's authority to take judicial notice of certain facts. Rule 201 of the Palau Rules of Evidence states that a court may take judicial notice of an adjudicative fact,[4] whether requested or not, at any stage of the proceeding. ROP R. Evid. 201(b), (c), and (f).[5] A properly noticeable fact must not be subject to reasonable dispute, meaning it is either (1) generally known within the territorial jurisdiction of the court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ROP R. Evid. 201(b).

Under the second category, the Certificate of Title that Napoleon presented on appeal would have been be a proper subject of judicial notice by the Land Court during the proceeding below. The Certificate of Title is matter of a public record, and its accuracy cannot reasonably be questioned, particularly having been certified by a Land Court judge, recorded by the Land Court Registrar, and registered at the Clerk of Courts. The question is whether the Certificate of Title is a proper subject for judicial notice on appeal.

[4] An appellate court has reasonably wide discretion to take judicial notice of a properly noticeable fact. *See* 29 Am. Jur. 2d *Evidence* §§ 46, 154; *see also Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989); *Melvin v. Nickolopoulos*, 864 F.2d 301, 305 (3d Cir. 1988). In doing so, however, the appellate court should ensure that it is not unfair to a party to the case and "does not undermine the trial court's factfinding

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[4] Although courts have defined "adjudicative" facts in a number of ways, the term generally means "facts that are specific to the particular case and are typically required to be established by evidence, or facts that are relevant to a determination of the claims presented in a case." 29 Am. Jur. 2d *Evidence* § 29. The size of BLS Lot 182-522 is an adjudicative fact.

[5] Unlike the other Rules of Evidence, Rule 201(f) states that judicial notice may be taken at any time in the proceeding, meaning that Rule 201 applies to an appeal.

authority." 29 Am. Jur. 2d *Evidence* § 46. Although an appellate court typically should decline to take judicial notice of a fact that could have been presented to the lower court, *see id.*, it is not precluded from doing so and may exercise its discretion accordingly.

Other appellate courts have taken judicial notice of matters of public record, *see, e.g.*, *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741 n.6 (9th Cir. 2006) (holding that it "may take judicial notice of court filings and other matters of public record"), and in cases where information not in the record was "most relevant and critical to the matter on appeal," *Coil*, 887 F.2d at 1239 (taking judicial notice of appellees' subsequent guilty pleas, in which they admitted to committing arson that undermined a settlement agreement in the civil proceeding). Our Court has also taken judicial notice of certain facts on appeal, although none that were determinative.[6]

With these principles in mind, we turn to Napoleon's appeal. Masang is correct that under our general rule, Napoleon forfeited her argument regarding the relative sizes of Tochi Daicho Lot 440 and BLS Lot 182-522 by failing to raise the issue before the Land Court. However, given the unique circumstances of her case, and in the interests of truth and justice, we will exercise our discretion under Rule 201 to take judicial notice of the Certificate of Title that Napoleon attached to her opening brief. First, the document and the information therein are proper subjects of judicial notice because they are capable of ready determination by resort to a source whose accuracy cannot reasonably be questioned. Second, unlike many cases in which this issue might arise, the Certificate of Title, on its face, suggests a conclusion that is in direct tension with the Land Court's determination. Masang offered no substantive response to this apparent conflict, only arguing that Napoleon forfeited the issue by failing to raise it below. Third, Napoleon was acting pro se and was not even present at the trial. She gave power of attorney to Maria Mira, a non-lawyer, to appear on her behalf, but Mira did not appear particularly knowledgeable about Napoleon's claims. This does not wholly excuse the failure to produce the Certificate of Title, but we find this fact relevant to whether we should take judicial notice.

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[6] *See Lin v. Republic of Palau*, 13 ROP 55, 60 (2006) (no floating fish markets in Palau); *Idid Clan v. Olngebang Lineage*, 12 ROP 111 (2005) (certain number of square feet equals certain number of acres; used to confirm a typo in land records); *Wolff v. Republic of Palau*, 9 ROP 104, 105 n.1 (2002) (filing for writ of habeas corpus in another proceeding); *Ngerketiit Lineage v. Ngerukebid Clan*, 7 ROP Intrm. 38, 42 n.7 (1998) (existence of, and arguments made in, a prior related case); *Republic of Palau v. Decherong*, 2 ROP Intrm. 152 (1990) (a memorandum from the Chief Justice of the Palau Supreme Court to the Palau Attorney General and Public Defender); *In re Sugiyama et al.*, 1 ROP Intrm. 282, 285 (1985) (proximity of Guam to Palau); *cf. Arbedul v. Rengelekel A. Kloulubak*, 8 ROP Intrm. 97, 99 (1999) (declining to consider a pretrial order from a related proceeding that appellants attached to their brief because it was not part of the trial record, but noting that even if the Court took judicial notice of it, it was not helpful); *Heirs of Drairoro v. Dalton*, 7 ROP Intrm. 204, 206 (1999) (acknowledging appellate court's ability to take judicial notice of contents of Tochi Daicho, but refusing to do so).

[5] Finally, this Court's role is, at least in part, to facilitate the quest for truth and ultimately to reach a fair and just determination of the disputes before it. We do not intend that judicial notice will be invoked frequently to supplement a record on appeal or to subvert a trial court's role as the finder of fact.[7] In this case, however, the Certificate of Title undeniably calls the Land Court's determination into question, and a complete adjudication of this property dispute should occur with this information before the trial judge. This is particularly so in a case such as this, where no witness or exhibit definitively laid out the proper ownership of BLS Lot 182-523, and the Land Court assigned the lot Appellees based on limited information. We do not fault the Land Court for failing to consider evidence not presented to it, and taking judicial notice on appeal in this case does not undermine the lower court's factfinding authority.

We therefore take judicial notice that a Certificate of Title, numbered LC 564-05, in the name of the Estate of Masang Marsil, was recorded at the Land Court on May 9, 2005, and registered at the Clerk of Courts on May 11, 2005. We also take judicial notice that this Certificate of Title describes the property owned by the Estate of Masang Marsil as follows: "*Land known as 'Ngedlau' and located in Ngerkesoaol Hamlet (Formerly shown as Worksheet Lot No. 182-522).*" Finally, we take judicial notice that this Certificate of Title states that the area of the above-described property is "*568 square meters*, more or less."

[6] Although we take notice of the Certificate of Title, we do not find this additional information to be conclusive of the proper ownership of BLS Lot 182-523. That ultimate determination is for the Land Court as the trier of fact. "[T]hat a fact is judicially noticeable does not necessarily mean that a court should also take judicial notice of the inferences a party hopes will be drawn from that fact." 29 Am. Jur. 2d *Evidence* § 32. We have taken judicial notice of the *existence* of the Certificate of Title, not the implications of the information contained therein. Masang did not have an opportunity to consider or challenge this information, and he must be afforded that chance.

For these reasons, we will remand this matter to the Land Court for further proceedings. Although the Land Court cited evidence to support its determination, the record, supplemented by the 2005 Certificate of Title, leaves us with "a firm conviction that an error has been made." *Rechirikl*, 13 ROP at 168. On remand, the Land Court shall consider the description of the property in the Certificate of Title, in light of the evidence produced at trial. The Land Court may, but is not required to, take additional evidence regarding the proper ownership of BLS Lot 182-523. After further proceedings, the Land Court should issue any additional factual findings, as well as a new determination of ownership, which may or may not reach the same outcome as the first. Apart from these specific directives, the Land Court shall have broad discretion in handling this case on remand.

[7] Of course, a judicially noticeable fact must not be the subject of reasonable dispute, a requirement which should automatically limit the number of appeals in which this issue might arise.

CONCLUSION

We find it appropriate, given the circumstances of this case, to take judicial notice of the 2005 Certificate of Title for *Ngedlau*, formerly BLS Lot 182-522. This public record potentially stands in direct conflict with the Land Court's determination that BLS Lot 182-523 is a portion of Tochi Daicho Lot 440, belonging to Masang. For these reasons, we VACATE the Land Court's April 24, 2008 Determination of Ownership, and REMAND for further proceedings consistent with this opinion.