The Children of Ngeskesuk v. Espangel, 1 ROP Intrm. 682 (1989)

THE CHILDREN OF NGESKESUK, ET AL.,
Appellants,

v.

ESEBEI ESPANGEL, ET AL.,
Appellees.

CIVIL APPEAL NO. 6-85
Civil Action No. 131-80/130-82

Supreme Court, Appellate Division
Republic of Palau

Appellate decision and order
Decided: September 18, 1989

Counsel for Appellants: Mariano Carlos

Counsel for Appellees: John K. Rechucher

BEFORE: MAMORU NAKAMURA, Chief Justice; LOREN A. SUTTON, Associate Justice; ARTHUR NGIRAKLSONG, Associate Justice.

NGIRAKLSONG, Associate Justice:

BACKGROUND

This case involves a title dispute over certain land in Ngerkebesang, Koror State. The *Tochi Daicho* numbers for the parcels of land are 1459 and 1460. The same lots were subsequently designated in the official cadastral map as lot nos. 007 A12, containing an area of 4,939.6 square meters and 007 A13, containing an area of 11,551.7 square meters, respectively.

The history of these parcels of land can be found in the cases of *Torul v. Arbedul*, 3 TTR 486 (1968), and *Ngeskesuk v. Solang*, 6 TTR 505 (1974).

The *Torul* case tells us that a long time ago, the parcels of ⊥683 land, including other parcels not relevant to this case, were owned by the Eluil Clan, one of the clans in Ngerkebesang. It is said that the Omrekongel Clan, also of Ngerkebesang, conquered Eluil Clan and took the ownership of the land.

Still a long time past, Ibedul Imedob made an arrangement with Espangel Kisekis, Chief of the Omrekongel Clan, for some people of Ngesias, Odesangel [now Peleliu State] to use the land while they were staying temporarily in Ngerkebesang. This arrangement gave Ibedul Imedob full ownership of the land. When the people of Ngesias returned home, the land was

returned or released to Ibedul Imedob.

Ibedul Louch, one of the successors of Ibedul Imedob, took control of the land and divided it among his adopted son Umong, daughter Ibuuch, step-daughter Ross and Dirrablong who was "like a child of Ibedul Louch." Subsequent to these conveyances or grants of leases under Ibedul Louch, a dispute arose between Ibuuch and her successors and Dirrablong and her successors as to the ownership of the land. This dispute resulted in litigation before the Japanese Courts where it was ruled that, among others, lot nos. 1459 and 1460 were owned by Dirrablong and her heirs.

However, historical events changed the ownership of the land in Ngerkebesang and elsewhere. After the last Japanese survey of about 1938-1941, the Japanese Government bought all the land that had not been previously acquired. Dirrablong and husband Seki sold the land to the Japanese Government in 1942. The Trust Territory Government became the successor in interest to these lands in 1945.

⊥684 Before 1962, the representatives of the various clans in Ngerkebesang discussed with the representatives of the Trust Territory Government for the return of the then public lands to the owners just before the Japanese Government acquired or bought the land. Nothing materialized from these discussions until September 5, 1962. On that date, the High Commissioner signed the Land Settlement Agreement and Indenture. The purpose of this Agreement was to restore the former rights to the land to the holders of such rights just before the Japanese Government took the land. A requirement in this Agreement was that the land rights must be subject to the customary land laws that existed at the time of taking to the extent that such customary laws still existed.

The *Torul* Court, after reciting the above history of the lands, ruled that the parcels of land in dispute, *Tochi Daicho* No. 1459 or lot no. 007 A12 and *Tochi Daicho* No. 1460 or lot no. 007 A13, were owned by the heirs of Dirrablong represented by Ngiramechelbang. The ownership of the land is "subject to all the obligations under Palau custom in effect at the time of the conveyance of said land to Japanese interests, to the extent that such custom is still in effect . . . ." *Torul*, at 494.

In 1971, Meyuns area, where the land is located, was designated as a registration area. The Palau District Land Commission held a hearing on the land. The Commission and the Land Registration Team concluded that the heirs of Dirrablong, on the basis of Palauan custom, are Dirralalou Bilung, Ebil Rengulbai, Ngiramechelbang Ngeskesuk, Marbou Renguuchel and Ridep ⊥685 Solang. The Land Commission issued the Determinations of Ownership to the heirs as owners in fee simple of the land on June 7, 1973.

Appellee Espangel did not appear at the hearing in 1971. He was at that time a member of the Koror Land Registration Team. When the Determinations of Ownership were issued, Appellee did not appeal. He was not a claimant before the Registration Team or at the Land Commission hearing.

Four of the heirs of Dirrablong, as decided by the Land Commission, appealed the

Commission's Determinations. The fifth heir, Ridep Solang, also objected to the Determinations. Solang claimed that all of the land was his by a will or as a gift. The *Ngeskesuk* Court held that the land was owned in fee simple by all the heirs as determined by the Land Commission. By a dictum, the *Ngeskesuk* Court characterized the ownership as "joint-tenancy." The *Nqeskesuk* decision was issued in 1974.

In May of 1977, the heirs of Dirrablong by a deed of transfer conveyed their fee simple interests in the land to the six children of Ngiramechelbang Ngeskesuk, namely; Ichiro Dengilius, Rirai Hesus, Risong J. Matsutaro, Charles M. Matsutaro, Thomas M. Matsutaro and Francis M. Matsutaro. The Deed was recorded at the office of the Clerks of Courts, Palau District, on October 31, 1977.

In 1981, Appellee Espangel and his son, Masao Esebei, began bulldozing on portions of the two lots. Appellee claimed he bought the land from Ngiramechelbang Ngeskesuk in 1968 after the *Torul* Court's Decision. [Appellee's Response Brief, at 2]. The ⊥686 Appellants filed this lawsuit to quiet their title. This case was consolidated with another case in which Ridep Solang sued Appellee Espangel over the same parcels of land. The *Solang* case does not concern issues before us.

At the trial a parcel split map was admitted in evidence, showing the two lots having been divided into three lots, nos. 007 A16, 007 A17 and 007 A18. Appellee prepared this split map to show his claim to lot no. 007 A16, which he claimed he purchased in 1968 and where his house has been located ever since, and lot no. 007 A17 which he claimed he bought in 1975 (Tr. 268).

TRIAL COURT RULINGS

The Trial Court made the following findings of fact and conclusions of law:

1. The heirs of Dirrablong held their fee simple interest to the land as joint-tenants;

2. The Appellants [children of Ngeskesuk] obtained the fee simple interest to the land by a Deed of Transfer in 1977 and hold the title as joint-tenants;

3. Appellee made a "deal" to acquire lot nos. 007 A16 and 007 A17 from Ngeskesuk presumably in one transaction in 1968 and with installment payments allotted over the years;

4. Appellee paid the amount of $8,100 for supposedly the entire lot nos. 007 A16 and 007 A17;

5. Ngeskesuk, as administrator and trustee of the land, had the authority to sell his 1/5th interest in lot nos. 007 A16 and ⊥687 007 A17;

6. Appellee is entitled to 1/5th interest in lot nos. 007 A16 and 007 A17, as successor in interest to Ngiramechelbang Ngeskesuk;

7. Appellee holds his 1/5th interest to lot nos. 007 A16 and 007 A17 as a tenant in common; and

8. Each of the Appellants owns an undivided 1/6th interest as tenants in common with respect to the remainder of the land, lot no. 007 A18.

THE ISSUES ON APPEAL

Appellants appeal the judgment of the Trial Court. The issues before us are:

1. Whether the Trial Court made an error in finding that Appellee made an arrangement to acquire title to lot nos. 007 A16 and 007 A17 from Ngeskesuk in 1968 after the *Torul* Court's Decision.

2. Whether the Trial Court made an error in awarding Appellee 1/5th undivided right, interest and title in lot nos. 007 A16 and 007 A17.

POSITION OF THE PARTIES

Appellants argue that there was no sale of the parcels of land to the Appellee and even if Ngiramechelbang Ngeskesuk attempted to sell the land, the sale was not effective pursuant to Palauan customary law. Under Palauan custom, family, lineage or clan land cannot be alienated unless a unanimous consent of at ⊥688 least the senior members of the family, lineage or clan is given. Ngeskesuk Ngiramechelbang did not obtain consent of anyone, if indeed there was a sale. Therefore, there can be no effective sale of the land.

Appellants further argue that Appellee, who claimed to have bought the parcels in 1968, did not record his claims, did not appear before the Land Commission hearing on the land in 1971, and did not appeal from the Land Commission's Determinations in 1973. Appellee is, therefore, bound by the Commission's Determinations.

Appellee argues that he bought lot nos. 007 A16 and 007 A17 in 1968. [1] Appellee Espangel was a bona fide purchaser and Ngiramechelbang Ngeskesuk, as a trustee of the land, had the authority to sell the land. In the alternative, Appellee argues that Ngeskesuk, at the very least, had the authority to alienate his 1/5th interest in the original lots, namely lot nos. 007 A12 and 007 A13.[2]

LEGAL ANALYSIS

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[1] Although the Trial Court treated the sale of the land to Appellee as one transaction that took place in 1968, Appellee argued there were two purchases. Appellee claims he bought lot no. 007 A16 in 1968 and lot no. 007 A17 in 1975. [Tr. 268]

[2] Lots 007 A16 and 007 A17 contains 5,640 square meters, more or less. A 1/5th of lots 007 A16 and 007A17, which is what the Trial Court awarded the Appellees, is 1,128 square meters, more or less. A 1/5th of lots 007 A12 and 007 A13 contains 3,298.26 square meters, more or less.

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SUFFICIENCY OF EVIDENCE

Rule 52 of ROP Rules of Civil Procedure provides that, "Findings of facts shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses." (*See also, Usui v. Nishizono* , Civil Appeal No. 5-85, Civil Action No. ⊥689 74-84 (1987) and *Riumd v. Delmel*, Civil Appeal No. 16-86, Civil Action No. 75-86 (1989)). The Trial Court believed the Appellee's story. "[T]he [C]ourt is inclined to believe his [Appellee's] story that a 'deal' was made with Ngiramechelbang Ngeskesuk to acquire what is now known as lots 007 A16 and 007 A17." [Trial Court Opinion, at 9].

Applying the "clearly erroneous" test to the Trial Court's finding that Ngeskesuk made an arrangement to sell lots 007 A16 and 007 A17 to the Appellee, we hold that the Trial Court's finding based on testimonies of witnesses is not clearly erroneous. We affirm the Trial Court's finding that Appellee made an arrangement with Ngeskesuk to acquire title to lots 007 A16 and 007 A17.

PALAUAN CUSTOMARY LAND LAW AND JOINT-TENANCY

As previously stated, the purpose of the Land Settlement Agreement and Indenture of 1962 was to restore former rights to the land subject to Palauan customary law. In the *Torul* case, Judge Furber held that the lots are owned by the heirs of Dirrablong subject to all the obligations under Palauan custom. There is no mention of joint-tenancy or any other form of co-ownership in the Land Settlement Agreement and Indenture or in the *Torul* case. The Deed of Transfer that conveyed the land to the Appellants states only that the donees hold a fee simple interest to the land.

⊥690 The Trial Court decided on its own to either ignore the Palauan customary land law or change it. In the process, the Trial Court also altered or misapplied the concept of joint-tenancy.

As a basis for its decision, the Trial Court began: "[n]o testimony was offered by any party with regard to the question of how the 'children of Ngeskesuk' hold. The Court is therefore free to make that determination. To hold it to be a joint tenancy with its consequent right of survivorship is probably closer to that which the'children' believe it to be, if asked." In the absence of testimony and since the issue was not properly before the Trial Court, we hold that the Trial Court is not free to engage in speculations, especially where speculations have substantial impact on the interests of the litigants.

Although joint-tenancy and family, lineage, or clan ownership are similar in that there is unity of ownership, that is where the similarity ends. Under Palauan custom, family, lineage, or clan land cannot be alienated without the unanimous consent of at least the senior members of the family, lineage, or clan. *Riumd, supra*, at 7 to 8; *Ngirchongerung v. Ngirturong*, 1 TTR 68, 71 (1953); *Riumd v. Chin*, 3 TTR 323 (1967); *Armaluuk v. Orrukem*, 4 TTR 474 (1969).

In a joint-tenancy, a joint tenant without the consent of the other tenants may destroy the

joint-tenancy by selling the property or a portion of it. Once a joint-tenancy is destroyed, the interest of the owners change. If, for example, there are 5 joint-tenants and one sells the property or his undivided share, ⊥691 the joint-tenancy is destroyed as to his interest. The other four joint-tenants remain as joint-tenants with respect to the 4/5th of the property. [3] The new owner becomes a tenant in common with respect to the 1/5th he bought.

There is no statute in Palau on the creation of joint-tenancy. In the United States where the concept of joint-tenancy comes from, the majority Rule does not favor the creation of joint-tenancy by implication or operation of law. 20 Am. Jur. 2d 180, Policy of the Law; Statutory Limitations and Restrictions, section 11 (1983). With the entire property going to the survivors, the American policy is against the creation of joint-tenancy. *Id.* Where a joint-tenancy has been sustained, the intention of the parties was shown by "a clear, satisfactory and convincing evidence." *Supra*, Creation, section 9. It has also been held that the intention of the parties to create a joint-tenancy must be "manifest" from an instrument. (*Kleeman v. Sheridan* , 256 P.2d 553 (1953); *Matthew v. Moncrief*, 135 F.2d 645, 648 (1943)).

With the foregoing, we hold that the Trial Court made an error in characterizing the ownership of the land as one of joint-tenancy when held by the heirs of Dirrablong and now as held by the Appellants. We hold that the heirs of Dirrablong held the land in fee simple according to Palauan custom. We ⊥692 further hold that the Deed of Transfer did not create a joint-tenancy and as such the Appellants hold a fee simple interest in the land according to Palauan custom. Accordingly, we declare the "arrangement" between Appellee and Ngeskesuk which purports to alienate 1/5th of lot nos. 007 A16 and 007 A17 to Appellee as invalid. [4] This Ruling of the Trial Court contravenes with Palauan custom on land ownership. We further hold that as the concept of joint-tenancy is foreign to Palau, it is only sustainable where the intention of the owners to create a joint-tenancy is clearly established by an instrument.

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[3] The Trial Court held that each of the 6 Appellants holds 1/6th interest in lot no. 007 A18 as "tenant in common", after characterizing the original tenancy as a joint-tenancy. The lot is unaffected by the sale of the parcels to Appellee. Thus, the Appellants, if the tenancy is joint, should remain as joint-tenants with respect to lot no. 007 A18. The Trial Court misapplied the joint-tenancy Rule.

[4] Our ruling does not foreclose remedies that may be available to the Appellee.

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EFFECT OF LAND COMMISSION'S CERTIFICATE OF TITLE, COURT JUDGMENT AND FAILURE TO RECORD

As provided by the history of this case, Appellants' interest in the land is well established going as far back as the decision of the Japanese Courts. The *Torul* Court's judgment was issued on April 9, 1968 holding that the Appellants' predecessors in interest owned the land. The *Torul* Court also held that Appellee's father, who was a party and claimed the land with others, had no rights of ownership in the land. The Land Commission issued its Determinations of Ownership on June 7, 1973, confirming the *Torul* Court's judgment. An appeal was taken from those Determinations. The *Ngeskesuk* Court on March 21, 1974, issued its judgment consistent with the decisions of the Japanese Court, *Torul* Court, Land Registration Team and the Land Commission. The Land Commission issued the Certificates of Title on July 8, 1974, to the heirs of Dirrablong. In May 1977, a Deed ⊥693 of Transfer conveyed the land to the Appellants who duly recorded their fee simple title on October 31, 1981. Although the Appellee was a Land Commission Judge at the time, he was not a claimant at the Land Registration Team and Land Commission proceedings on the subject land. He was not a party to the *Ngeskesuk* case. He has not been diligent in perfecting his claim to the land.

We hold, therefore, that since the Appellee chose not to be a claimant before the Land Commission proceedings regarding the land, he is bound by the Certificates of Title issued by the Land Commission on July 8, 1974.

> (a) After the time for appeal from a determination of ownership by a Land Commission has expired without any notice of appeal having been filed, or after an appeal duly taken has been determined, the Commission shall issue a certificate of title setting forth the names of all persons or groups of persons holding interest in the land pursuant to the determination, either as originally made or as modified by the Supreme Court, as the case may be.
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> (b) Such certificate of title shall be conclusive upon all persons who have had notice of the proceedings and all those claiming under them, and shall be prima facie evidence of ownership as therein stated against the world, . . .
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> 35 PNC § 941 (Then 6 TTC sec. 117).

CONCLUSION

We hold that the Trial Court made an error in characterizing the ownership of the land as one of joint-tenancy. We hold that the heirs of Dirrablong held the land in fee simple according to Palauan custom and that the same interest was effectively conveyed to the Appellants in 1977. Following Palauan custom on land ownership, we declare the sale of the parcels of land to the ⊥694 Appellee as invalid. Ngeskesuk did not have the unanimous consent of the heirs of Dirrablong to alienate any portion of the land. Appellee has no rights of ownership in the land. By so declaring, we are, however, not foreclosing remedies that may be available to the Appellee.

We further hold that since Appellee failed to protect his interests or claims to the land, he is bound by the final decisions of the Land Commission and the Court.

We affirm the Trial Court's holding that Appellee paid Ngeskesuk $8,100.00 supposedly for the entire lot nos. 007 A16 and 007 A17. We reverse the remainder of the Trial Court's Opinion and Judgment.

IT IS, THEREFORE, ORDERED THAT this case is remanded to the Trial Division of this Court to enter a judgment consistent with this Decision.