KOROR STATE PUBLIC LANDS AUTHORITY
Appellant,

v.

NGERMELLONG CLAN,
Appellee.

CIVIL APPEAL NO. 11-042
LC/B 04-098 & 04-099

Supreme Court, Appellate Division
Republic of Palau

Decided: October 31, 2012

[1] **Constitutional Law**: Constitutional Avoidance

Judicial restrainet requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.

[2] **Land Commission/LCHO/Land Court**: Claims

A claimant may claim the same land, in the alternative, under both a superior title and a return of public lands theory.

Counsel for Appellant: Mark Jesperson
Counsel for Appellee: Raynold B. Oilouch
BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

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

PER CURIAM:[†]

Appellant Koror State Public Lands Authority ("KSPLA") appeals the Land Court's determination of ownership of Worksheet Lots 40428 and 40429 in favor of Ngermellong Clan. Because the Land Court's determination was not clear error, we affirm.

I. BACKGROUND

Lots 40428 and 40429 are located in Ngerkesoaol Hamlet in Koror State. The Tochi Daicho numbers for the lots could not be reliably ascertained during the hearing below. Most of the claimants to the lots agreed that the lots do not correspond to any Tochi Daicho listing. One claimant, not party to the appeal, contended that Lot No. 40428 is part of Tochi Daicho Lot 460, but Lot 460 has no listed owner so was not helpful in ascertaining prior ownership.

During the proceedings before the Land Court, Ngermellong Clan's principle witness, Yukiko Basilio testified in support of the Clan's claim to the lots, which were originally claimed by her now-deceased uncle, Ocheraol. She testified that the lots were the site of her lineage's principal house site.[1] According to Basilio, her family told her that the lands were taken by the Japanese military

[†] EDITOR'S NOTE: Readers are advised that this case was in part overruled by implication due to conflicting language in the later cases *Klai Clan v. Airai State Public Lands Authority*, 20 ROP 253 (2013), and *Idid Clan v. Koror State Public Lands Authority*, 20 ROP 270 (2013). The Appellate Division recognized this in a subsequent case, slated for publication in the next volume of this Reporter, *Koror State Public Lands Authority v. Idid Clan*, 22 ROP ____, Civ. App. No. 14-005, slip op at * 5 n. 2 (May 26, 2015).

[1] Ngermellong Clan and Iwesei lineage "are the same people."

during World War II. Although she was only three by the end of the war, Basilio recounted her memories of a constructed cave being located on the land. She also stated that "[i]t was never sold . . . no one has ever said it was sold so it continues to be our property." She further testified that she knew of no compensation whatsoever being paid for the land and that the land was taken without her family's knowledge. KSPLA presented evidence that it (or the prior Trust Territory government) maintained the lots as public land. This evidence was unrefuted.

The Land Court, in its Decision on August 3, 2011, first considered the appropriate legal standard to apply to the matter. In its discussion, the court noted that there are at least two possible avenues for a private claimant seeking title to a particular piece of land occupied by the government. A claimant may pursue a superior title theory. Under this theory, the claimant would attempt to show that the public occupant of the land is not the owner. In a case in which the Tochi Daicho listing is entitled to a presumption of accuracy, the burden on the private claimant would be to show by clear and convincing evidence that the listing was incorrect. However, in a case such as this, where the Tochi Daicho is not in play, the government and the claimant are, as the court put it "on equal footing," and the court must decide who has superior title by a preponderance of the evidence. A claimant may also pursue a return-of-public-lands theory. In such a case, the private claimant admits that public title is proper, but argues that the land was wrongfully taken and the claimant is a proper heir to the prior owner. In return-of-public-lands cases, the burden is on the claimant to show that the requirements of 35 PNC § 1304(b) are met.

The Land Court found that this framework for analysis was in tension with the Constitution. Our Constitution requires the return of wrongfully taken public land. Article XIII, section 10 provides that "[t]he national government shall . . . provide for the return to the original owners or their heirs of any land which became part of the public lands as a result of the acquisition by previous occupying powers . . . through force, coercion, fraud, or without just compensation or adequate consideration." By statute, public lands include all land "owned or maintained" by the government. The unusual result of the statutory language and the framework for adjudicating disputes over publicly-maintained land is that cases in which land is "public" actually have a higher burden for private claimants than typical title disputes. The court concluded that this result is acceptable with respect to publicly-*owned* lands, but not publicly-*maintained* lands.

The Land Court reasoned that the statutory definition, as applied to cases involving public maintenance rather than public ownership, was unconstitutional because the statutory definition's wide scope ensured that more private claims against public land authorities would fail because of the onerous requirements of 35 PNC § 1304(b). In essence, the court concluded that, in cases in which public ownership is not presumed because of the Tochi Daicho listing,[2] the government land authority must "show[] to the satisfaction of [the c]ourt by a preponderance of the evidence that the lands

[2] There are several reasons why there may be no Tochi Daicho listing to support the government's case that land is public. There may be no corresponding Tochi Daicho entry for the land, there may be no entry at all, or the land in dispute might be in Peleliu, where there is no presumption of Tochi Daicho accuracy. *See Kikuo v. Ucheliou Clan*, 15 ROP 69, 76 (2008).

at issue are public lands," specifically publicly *owned* lands. In terms of the legal framework articulated above, this would mean that a private claim to land that is not listed as government-owned in the Tochi Daicho would be assumed at the outset to be a claim of superior title unless and until the government made a showing by a preponderance of the evidence that it owned the land.

Applying its newly-crafted standard, the Land Court nevertheless ruled in KSPLA's favor, holding that, by the preponderance, of the evidence the lots were public land. Thus, the private claimant bore the burden of showing that the elements of 35 PNC § 1304(b) were met.

However, the court ultimately ruled against KSPLA, finding that the statutory requirements were met for return of the lots to Ngermellong Clan. Crediting Basilio's testimony, the Land Court found that there was strong evidence that the Japanese military took the land for military use during the war. The court noted that the very fact that the land was put to military use "should, per se, suffice to meet the element of" forceful taking. Additionally, the court found that, even if the taking was not forceful, Basilio's testimony was sufficient to show that it was taken without compensation.

KSPLA appeals, contending (1) the Land Court erred in determining that the statutory definition of "public lands" was unconstitutional, and (2) the Land Court committed clear error in suggesting that a showing of military use of the land was sufficient to show that land was wrongfully taken.

II. STANDARD OF REVIEW

This Court reviews the Land Court's findings of fact for clear error and its legal conclusions *de novo*. *Palau Pub. Lands Auth. v. Ngiratrang*, 13 ROP 90, 93 (2006). This Court will reverse the Trial Division only if the findings "so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion." *Ngerusebek Lineage v. Irikl Clan*, 8 ROP Intrm. 183, 183 (2000).

III. ANALYSIS

A. Constitutionality of 35 PNC § 101[3]

[1] This case is not an appropriate vehicle for testing the constitutional limits of the statutory definition of "public land." First and foremost, the court found in *favor* of KSPLA on this issue, concluding that the lots were public land under even the court's definition. [Dec. 35] "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445-46 (1988); *see also Davidson v. Office of the Special Prosecutor*, 16 ROP 214, 218 (2009) (Constitutional issues should be avoided if relief may be granted on other grounds.). Here, our opinion on the matter would be merely a rumination on the Land Court's reasoning. Even if we

[3] We note that neither party appears to have notified the Republic that "the constitutionality of an[] act of the Olbiil Era Kelulau," specifically, 35 PNC § 101, has been "question[ed]." Palau R. App. P. 44. The party questioning the constitutionality of the act is required to issue such notification. Here, that would be the Appellee. Absent such a notification, we will not hold any legislation unconstitutional. In such cases, the Republic is, in essence, a necessary party.

agreed completely with KSPLA, our ultimate conclusion would be the same as the Land Court's—that Lots 40428 and 40429 were public land. Where a positive decision by this Court would not afford a litigant any additional relief as compared to the lower court, a "constitutional decision would [be] unnecessary and therefore inappropriate." *Lyng*, 485 U.S. at 446.

Additionally, there is a clear cut alternative path to affirming the Land Court, which avoids the thorny constitutional issue. The court held that, in cases in which the Palau Administration is not listed as the Tochi Daicho owner, a land authority must first show that it is the owner of the land before the court may apply the return-of-public-lands statute. This rule is consonant with our holding in another case we issue today, *KSPLA v. Wong*, Civ. App. No. 12-006, slip op. at 6 (____. ___, 2012). In *Wong*, we held that, absent clear evidence of government ownership, a private claim should be treated as a claim of superior title. In such cases, some maintenance of the land by the government will be probative of government ownership, but not dispositive.

[2] This rule does not run afoul of the definition of public land found in 35 PNC § 101 because that section only applies if a claimant pursues a return-of-public-lands theory. *See* 35 PNC § 1304(b) ("The Land Court shall award ownership of public land . . . to any citizens [who make a showing of wrongful taking and are proper heirs of the original owners]."). KSPLA suggests that a claimant may not pursue a superior title and return-of-public-lands theory simultaneously. However, we have long-recognized that claim of superior title is a separate, and occasionally overlapping, path to awarding land to a private claimant over the objection of a putative government owner. *See, e.g., Kerradel v. Ngaraard State Pub. Lands Auth.*, 9 ROP 185, 185-86 (2002). If it becomes apparent that the government is the true title-holder, a claimant may attempt to argue that the land became government-owned or -maintained by the wrongful acts of a colonial power. 35 PNC § 1304(b).[4]

This understanding of the applicable law is consonant with our precedent and does not undermine the statutory language or the constitutional imperative on the government to return wrongfully taken public lands. We affirm the Land Court on that basis.

B. Taking of Lots 40428 and 40429

KSPLA's next argument is that the Land Court erred in its application of the return-of-public-lands statute to the facts of this case. The statute requires a private claimant to show that the land at issue was taken "through force, coercion, fraud, or without just compensation or adequate consideration." 35 PNC § 1304(b). KSPLA contends that it was an error of law for the court to enunciate a per se rule that land taken for military use was necessarily taken by force. Although the court stated that evidence of military use "should" be sufficient for a

[4] KSPLA also suggests that the pursuit of a superior title claim should not be considered as an alternative to a return-of-public-lands theory because KSPLA has different defenses available to it under each theory. However, because the two theories are analytically distinct, KSPLA may pursue its defenses against a claim of superior title that are forbidden under a claim for return of public lands. *See* 35 PNC § 1304(b)(2). If it prevails on such a defense, the superior title claim is defeated and the burden is on the claimant to meet the statutory requirements for return of public lands. In other words, just as a claimant may pursue both theories, KSPLA may pursue all defenses available against each theory.

showing of a forceful taking, it went on to make clear that it credited Basilio's testimony that she had "no knowledge" of any compensation being paid for the land.[5] We need not affirm the Land Court's proffer of a per se rule in order to affirm its ultimate conclusion that military use of the land, combined with Basilio's testimony regarding compensation, is sufficient to show by a preponderance of the evidence that the land was wrongfully taken and is subject to return under 35 PNC § 1304(b). The Land Court did not commit clear error in rendering this finding. *See Ngiratrang*, 13 ROP at 93.

IV. CONCLUSION

For the foregoing reasons, we **AFFIRM.**

[5] KSPLA further submits that it was error for the Land Court, which admitted that Basilio could have no memory of events that occurred when she was a toddler, to nonetheless credit her testimony. However, Basilio's testimony was based not on her own memories of the Japanese occupation, but of her family history. This was proper because there is no hearsay rule applied to the Land Court. *See* Land Ct. R. P. 6 (all relevant evidence admissible).