

ROSE KEBEKOL ET AL.
V.
KOROR STATE PUBLIC LANDS AUTHORITY

Civil Appeal No. 13-020
Appeal from LC/B No. 08-296

Supreme Court, Appellate Division
Republic of Palau

Decided: March 6, 2015

Counsel for Kebekol et al. Siegfried B. Nakamura
Yukiwo P. Dengokl
Counsel for KSPLA Debra B. Lefing

BEFORE: R. ASHBY PATE, Associate Justice
HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem
KATHERINE A. MARAMAN, Part-Time Associate Justice

Appeal from the Land Court, the Honorable Rose Mary Skebong presiding.

[1] **Trial:** Standard of Proof
Appeal and Error: Harmless Error

The application of an incorrect standard of proof is a structural error that requires remand unless the outcome of the case clearly shows that the error was harmless, such as when a heightened burden of proof is imposed on a party who prevails nonetheless.

[2] **Trial:** Standard of Proof
Evidence: Presumptions
Land Court: Tochi Daicho

The Tochi Daicho presumption only extends to what the Tochi Daicho listing itself shows; any elements of a claim that are not addressed by the listing need only be demonstrated by the usual standard of proof.

[3] **Evidence:** Presumptions
Land Court: Tochi Daicho

The Tochi Daicho presumption of accuracy does not apply in a return of public lands claim, because such a claim requires conceding/contending that the land is public.

- [4] **Evidence:** Presumptions
Land Court: Evidence
Land Court: Tochi Daicho

While not presumed correct, a Tochi Daicho listing still may be relevant evidence in a return of public lands claim if it assists in deciding the claim or clarifies an element of the claim.

OPINION

Per Curiam:

Appellants Rose Kebekol and Katey Giraked separately appeal the Land Court's Findings of Fact and Determination of Ownership issued on November 12, 2013, which denied their return of public lands claims for Lot 181-12057 and found instead that Koror State Public Lands Authority owned the lot. For the reasons set forth below, the decision of the Land Court Division is reversed and the case is remanded for further proceedings consistent with this opinion.¹

BACKGROUND

This case involves a dispute over land identified as Lot 181-12057, which is located in Topside, Koror (the Lot) and which is currently held as public land by the Koror State Public Lands Authority (KSPLA). Appellants each brought return of public lands claims under Article XIII Section X of the Constitution of the Republic, alleging that they are the proper heirs to the previous lawful owners of the Lot and that the Lot only became public land as the result of a wrongful taking. However, Appellants' claims, while similarly situated, are in conflict with each other, because both claim the Lot under mutually exclusive facts.

In the case before the Land Court, Appellant Kebekol claimed that the Lot is part of land called *Takudel*, which is located on Tochi Daicho 399 and which was taken by the Japanese by force in 1914.² Tochi Daicho 399 lists a person named Iterir as the owner of the land. Kebekol claimed that, despite the wrongful taking, this land was originally Clan land held in Iterir's name, and that the Clan informally divided Iterir's land among four family members and heirs, one of whom was Kebekol

Disputing this claim, Appellant Giraked argued that the real land known as *Takudel* actually consists of entirely different lots than the one in question here. Giraked

¹ Although Appellant Giraked requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

² George Kebekol brings this claim in the name of his mother, Rose Kebekol. This bears no significance from a legal perspective, so they are referred to collectively as Appellant Kebekol.

submitted copies of Certificates of Title to different land described as Tochi Daicho 399, which, Giraked argued, has already been awarded to these four professed heirs of Iterir—including Kebekol—but which, she insisted, represent entirely separate lots.

Rather, Giraked claimed that the Lot is part of another larger land known as *Isngull*, which is within Tochi Daicho 247 and which belonged to her father before it was forcibly taken from him by the Japanese. Tochi Daicho 247 lists the land as public land under the control of the South Seas Islands Agriculture Station, a Japanese government entity. Giraked produced documentary evidence at trial showing that several related parcels of land, which are part of land called *Isngull* and which are listed in the Tochi Daicho as belonging to Ngiraked, had been previously awarded to her. Giraked claimed that this Lot should be similarly awarded.

Disputing this claim, Kebekol's response was similar to Giraked's above, that is, Kebekol insisted—and presented evidence purporting to show—that Giraked has already received several lots—TD 244, 245, and 246—of land known as *Isngull* in previous return of public lands claims. As such, Giraked disputed that this Lot is part of *Isngull*.

Finally, Appellee KSPLA contended that the land is situated within Tochi Daicho 247, and that the land, having been registered as public land in the Tochi Daicho and having been public land since at least that time, properly should remain public land.

Ultimately, the Land Court found that the Lot was within Tochi Daicho 247, but that neither Kebekol nor Giraked had successfully proven their return of public lands claims. As such, the Land Court issued a determination of ownership for KSPLA.

This appeal followed.

STANDARDS OF REVIEW

We review the Land Court's conclusions of law de novo and its findings of fact for clear error. *Rengiil v. Debkar Clan*, 16 ROP 185, 188 (2009). "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." *Id.* Where evidence is subject to multiple reasonable interpretations, a court's choice between them cannot be clearly erroneous even if this Court might have arrived at a different result. *Ngaraard State Pub. Lands Auth. v. Tengadik Clan*, 16 ROP 222, 223 (2009).

DISCUSSION

The Land Court heard evidence that the disputed land was either in Tochi Daicho 399 (Kebekol) or Tochi Daicho 247 (Giraked and KSPLA). The Land Court's finding, that the land is in TD 247, is supported by substantial evidence and is, therefore, not clearly erroneous. We turn now to the legal question of whether the Tochi Daicho presumption applied.

I. The Applicability of the Tochi Daicho Presumption

Having pursued only return of public lands claims, as opposed to superior title claims, Appellants contend that the Land Court erred by applying the Tochi Daicho presumption of accuracy and requiring them to rebut the presumption by clear and convincing evidence. Appellants contend that this presumption of accuracy is only applicable in superior title claims and in certain other narrow instances, which are not at issue here. Rather, they argue that the proper standard of proof for a return of public lands claim is to prove each element of the claim by a preponderance of the evidence. For the reasons outlined more specifically below, we agree and will remand the matter for application of the proper standard of proof.

[1] The application of an incorrect standard of proof is a structural error that requires remand unless the outcome of the case clearly shows that the error was harmless, such as when a heightened burden of proof is imposed on a party who prevails nonetheless. *See Bechab v. Anastacio*, 20 ROP 56, 62 (2013) (quoting *Whiteside v. Gill*, 580 F.2d 134, 139 (5th Cir. 1978) (“A misallocation of the burden of proof is harmless error where the record is ‘so clear that the allocation of the burden of proof would make no difference.’”). However, because the Land Court found that neither claimant met their burden, imposition of a higher standard of proof than is proper cannot be harmless in this case. *See Ngarameketii v. Koror State Pub. Lands Auth.*, 18 ROP 59, 63 (2011).

[2] The presumption in favor of the accuracy of the Tochi Daicho has a long history in this Court, and we have repeatedly upheld it for both “historical and policy” reasons because, given the continued passage of time, “first-hand witnesses [have] become more difficult to locate.” *Children of Ingais v. Etumai Lineage*, 20 ROP 149, 151 (2013) (quoting *Silmai v Sadang*, 5 ROP Intrm. 223–24 (1996)); *see also Ngiradilubech v. Timulch*, 1 ROP Intrm. 625, 629 (1989) (first holding that the presumption applied in the courts of the Republic). The presumption, however, has limitations. First, not all Tochi Daicho listings are given the same weight. *See, e.g., Mesebeluu v. Uchelkumer Clan*, 10 ROP 68, 70–71 (2003) (outlining why the Peleliu Tochi Daicho does not receive the same factual deference). Second, the presumption only extends to what the Tochi Daicho listing *itself* shows; any elements of a claim that are not addressed by the listing need only be demonstrated by the usual standard of proof. *Ngiradilubech*, 1 ROP Intrm. at 625.

It is undisputed that the Land Court ruled that “[t]he legal presumption that the [T]ochi [D]aicho listing for Koror is accurate and must be rebutted by particularly clear and convincing evidence applies to TD Lot 247.”³ Accordingly, Appellants

³ While it is clear that the Land Court required Appellant Giraked to rebut the Tochi Daicho presumption by clear and convincing evidence, it is unclear to what standard of proof the Land Court held Appellant Kebekol. The Land Court headed its Findings of Fact as being “[b]ased on the preponderance of the credible evidence,” suggesting that the claims were considered entirely under the preponderance standard. However,

contend that the Land Court applied the Tochi Daicho presumption improperly, extending it beyond the reach of what the listing itself shows and improperly weighing their claims against the presumption of accuracy. They rely primarily on *Palau Public Lands Authority v. Tab Lineage*, 11 ROP 161 (2004), in which this Court held that “a claimant seeking the return of land pursuant to Article XIII [of the Constitution] and § 1304 need not rebut the Tochi Daicho,” because “in a return of public lands case pursuant to Article XIII and § 1304, the claimant does not seek to challenge the government’s ownership of the land.” *Id.* at 168. The question raised by such a case is not who currently owns the land, as it would be in a quiet title claim where the presumption applies, or even who owned the land at the time of the Tochi Daicho survey, but “whether ‘the land became part of the public land . . . through force, coercion, fraud, or without just compensation or adequate consideration’ and whether ‘prior to that acquisition the land was owned’ by the claimant or his or her predecessors. *The Tochi Daicho does not answer either part of the question.*” *Id.* (quoting 35 PNC § 1304) (emphasis added) (alteration in original) (citation omitted).

- [3] We agree that the *Tab Lineage* holding applies here. While this Court has often listed the elements of a return of public lands claim as requiring solely that the claimant show that “(1) he or she is a citizen who has filed a timely claim; (2) [he or] she is either the original owner of the land, or one of the original owner’s ‘proper heirs;’ and (3) the claimed property is public land which attained that status by a government taking that involved force or fraud, or was not supported by either just compensation or adequate consideration,” the third enumerated element has, implied in the name of the claim itself, a sub-element—that the lands in question must be public. *Koror State Pub. Lands Auth. v. Giraked*, 20 ROP 248, 251 (2013) (quoting *Palau Pub. Lands Auth. v. Ngiratrang*, 13 ROP 90, 94 (2006)). Because a claimant cannot ask for the *return* of public lands without conceding that the government at some point took ownership of the lands, a Tochi Daicho listing that identifies the lands as public does not trigger the presumption of accuracy and its concomitant heightened standard of proof if the basis of return of public lands claim is that the taking preceded the Tochi Daicho survey. *See also Ngirausui v. Koror State Pub. Lands. Auth.*, 18 ROP 200, 204 (2011) (holding claimants in a return of public lands claim to the preponderance of the evidence standard despite an adverse Tochi Daicho listing); *Kerradel v. Ngaraard State Pub. Lands. Auth.*, 9 ROP 185, 185–86 (2002) (quoting *Carlos v. Ngarchelong State Pub.*

in a series of enumerated paragraphs under that heading, the Land Court proceeded to note that Appellant Giraked was required to rebut the Tochi Daicho presumption by clear and convincing evidence, yet makes no such mention with regards to Appellant Kebekol’s claims. Because the Land Court held at least one claimant to the clear and convincing evidence standard, and because we can find no reason in the record or the law why the Kebekol and Giraked claims would be subject to different standards of proof, we infer that the Land Court applied the clear and convincing standard to both claimants.

Lands. Auth, 8 ROP Intrm. 270, 272 (2001)) (distinguishing superior title claims, which have been subject to the Tochi Daicho presumption since “before the enactment of the Constitution,” from constitutionally-created return of public lands claims).

Although KSPLA actually concedes this crucial point about *Tab Lineage* in its briefing,⁴ it then argues that “the [*Tab Lineage*] Court determined that the Tochi Daicho listing[s] in return of public land claims are important in assisting the claimant’s burden of proof in showing that it owned the land prior to its taking.” But the portion of the *Tab Lineage* opinion relied upon by KSPLA only applies where the Tochi Daicho listing is *in the claimant’s name* and when the taking occurred after the Tochi Daicho survey. Because the Appellants in this case argue the existence of a taking *prior* to the Tochi Daicho survey, and because the Tochi Daicho listing for Tochi Daicho Lot 247 is not in a claimant’s (or any individual’s) name, the exception recognized in *Tab Lineage* is inapplicable here.

[4] What we noted in *Tab Lineage* is that the Tochi Daicho, despite not being given presumptive weight, may have some relevance, such as where it assists or otherwise clarifies a return of public lands claim. *Tab Lineage*, 11 ROP at 168 n.7. The Tochi Daicho listing for TD 399, for example, clearly supports Kebekol’s claim that TD 399 was property of Iterir prior to any taking that may have occurred following the Tochi Daicho survey. So, assuming Kebekol were shown to be the proper successor in interest to Iterir, this would be relevant to a return of public lands claim for TD 399. However, because the Land Court found that the Lot is part of TD 247, and because we find no error in that conclusion, the relevant Tochi Daicho listing for the Lot is TD 247, which lists the land as held by the Japanese Government—meaning that any taking, as Appellants allege, had already occurred *prior* to the Tochi Daicho survey. This is the essence of what *Tab Lineage* held, and we can see no factual basis here for distinguishing this case. That is, the Appellants here must concede that the Lot became public at some point in time in order to pursue a return of public lands claim at all; thus, they need not rebut the Tochi Daicho presumption by clear and convincing evidence.

We wish to make a final note about this issue regarding the proper standard of proof in these cases. Both KSPLA and the Land Court have cited to a portion of dicta contained in *Tmetbab Clan v. Koror State Pub. Lands Auth*, 16 ROP 91 (2008), which, on its face, contradicts the holding in *Tab Lineage*. That is, the Court in *Tmetbab Clan* indeed stated that, “[t]o meet the second element of a return of public lands claim, Appellant must overcome the Tochi Daicho, which states that Nanden [the land at issue in the

⁴ See Appellee’s Opp. 8–9 (quoting *Tab Lineage*, 11 ROP at 168 n.7) (“In determining this, the Court in [*Tab Lineage*] stated therefore that ‘the evidentiary standard for challenging a Tochi Daicho presumption of ownership is thus inapplicable in such cases.’”).

case] was owned by Masaichi Kochi. To overcome the Tochi Daicho’s presumption of correctness, a claimant must . . . show . . . evidence that . . . *would amount to clear and convincing evidence that the listing was wrong . . .*” *Id.* at 94 (emphasis added). However, this isolated statement, which implies that the clear and convincing standard should be applied with respect to one element of a return of public lands claim, but which we can find nowhere else in our case law,⁵ lacks precedential value. The portion of the opinion in which it is located focused on describing the basis for the Land Court’s opinion—it was not ruling on the validity of the Land Court’s application of the presumption. In fact, it could not have done so, because that portion of the Land Court’s opinion was not appealed.⁶ Indeed, the issue decided in *Tmetbab Clan* involved whether the Land Court improperly applied the prohibited doctrines of laches and stale demand in denying appellant’s return of public lands claims. After reviewing the record, this Court determined that the Land Court did not apply the prohibited doctrines and therefore affirmed the Land Court decision. *Id.* at 94. To the extent that *Tmetbab Clan* can be read to suggest the presumption applies in a return of public lands case, it is inconsistent with *Tab Lineage* and other cases correctly applying the law, and we hereby distance ourselves from this misleading dictum. Because the statement

⁵ In fact, *Tmetbab Clan* appears to be the only case cited by the parties or found by the Court in which the presumption was applied in a return of public lands case at all. *But c.f.*, *Ngirausui*, 18 ROP at 204 (cited by Appellee despite applying the preponderance of the evidence standard in a return of public lands claim against an adverse Tochi Daicho listing).

⁶ In the underlying Land Court case in *Tmetbab Clan*, the Land Court applied the Tochi Daicho presumption and found that claimants failed to present any evidence that the Japanese National listed in the Tochi Daicho as the owner of the land had wrongfully acquired the land—a fundamental element of a return of public lands claim—but the appellants did not contest this on appeal. *See also Ebilkou Lineage v. Blesoch*, 11 ROP 142, 144 (2004) (applying the presumption in a superior title claim, but quoted in *Tmetbab Clan* merely to explain the nature of the presumption). It is unclear from the record why, given our decision in *Palau Public Lands Authority v. Tab Lineage*, 11 ROP 161 (2004), the application of the presumption was not appealed (and consequently was not addressed by the Appellate Division). *Compare Palau Pub. Lands Auth. v. Ngiratrang*, 13 ROP 90, 93–94 (2006) (“At all times, 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 the requirements of [35 PNC § 1304(b)]”), *with Kerradel v. Ngaraard State Pub. Lands Auth.*, 14 ROP 12, 15 (2006) (“Because this is *not* a return of public lands case, Kerradel has the burden of showing by clear and convincing evidence that the Tochi Daicho listing was wrong.”) (emphasis added).

occurs in dicta and is not essential to the holding of the case, we decline to go so far as to overrule *Tmetbab Clan*.⁷

In any event, the controlling law on this issue is that “a claimant seeking the return of land pursuant to Article XIII [of the Constitution] and § 1304 need not rebut the Tochi Daicho,” because “in a return of public lands case pursuant to Article XIII and § 1304, the claimant does not seek to challenge the government’s ownership of the land.” *Tab Lineage*, 11 ROP at 168. Accordingly, the Tochi Daicho presumption should not have been applied in the context of these return of public lands claims, so we reverse the decision of the Land Court and remand for further review under the preponderance of the evidence standard. We note, however, that this instruction on remand in no way suggests that the Land Court is required to engage in a retrial of the case. The Land Court is to review the evidence in the record under the preponderance of the evidence standard, and, upon determining whether either Appellant has met her burden under this standard, issue a new Determination of Ownership.

II. Further Arguments on Appeal

Appellants also raise a number of dubious factual challenges and legal arguments on appeal, which this Court declines to address at length. Suffice it to say, factual challenges that amount to little more than conclusory statements about the Land Court’s discretionary task of weighing the evidence border on the frivolous. For example, claiming that (1) “the Land Court should have looked at the evidence presented and [found] that the land before it was part of the land known as Takudel and taken by Japan and their nationals,” (2) that “the evidence indisputably establish[es] that Ngiraked owned TD Lot 247 at the time it was taken by the Japanese Government,” (3) that the court, when considering a hypothetical possibility, “[found] or conclu[ded] that the Japanese acquisition of TD Lot 247 was made in a proper manner,” and (4) that the court’s alleged “finding or conclusion was the result of pure speculation,” belies a fundamental misapprehension of the nature of the standard of review on factual matters.

⁷ Although certainly misleading, the statement from *Tmetbab Clan* relied upon by KSPLA and the Land Court occurs in the text immediately after our Court’s correct statement of the law—“Appellant bears the burden of establishing by a preponderance of the evidence that he or she satisfies all the requirements of 1304(b).” *Tmetbab Clan*, 16 ROP at 94 (citing *Ngiratrang* 13 ROP at 93-94). Read in context—as opposed to selectively plucked from the paragraph—a more reasonable reading of the statement is as a broader reference, albeit ambiguous, to the relevance of the Tochi Daicho listing in a case involving an individual owner’s name appearing in the Tochi Daicho. Because *Tmetbab Clan* involved just such a listing—as opposed to a Tochi Daicho listing showing the land was held by a public entity, which is the case here as it was in *Tab Lineage*—*Tmetbab Clan* is distinguishable on this ground as well.

We note these factual arguments, unsuccessful as they may be, to remind the parties what we have stated on numerous occasions: “[w]here there are two permissible views of the evidence, the court’s choice between them *cannot* be clearly erroneous.” *Koror State Pub. Lands Auth. v. Giraked*, 20 ROP 248, 250 (2013) (quoting *Rengchol v. Uchelkeiukl Clan*, 19 ROP 17, 21 (2011) (citing *Ngirmang v. Oderiong*, 14 ROP 152, 153 (2007))) (emphasis added); *Isechal v. Umerang Clan*, 18 ROP 136, 142 (2011) (same); *Children of Masang Marsil v. Napoleon*, 18 ROP 74, 77 (2011) (same). *See also Ngirakesau v. Ongelakel Lineage*, 19 ROP 30, 34 (2011) (citing *Remeskang v. West*, 10 ROP 27, 29 (2002)) (“It is not clear error for the Land Court to give greater weight to certain evidence so long as one view of the evidence supports the fact finder’s decision.”); *Ebilkou Lineage v. Blesoch*, 11 ROP 142, 144 (2004) (quoting *ROP v. Ngiraboi*, 2 ROP Intrm. 257, 259 (1991)) (“It is not the appellate panel’s duty to reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence.”).

“Given the standard of review, an appeal that merely re-states the facts in the light most favorable to the appellant and contends that the Land Court weighed the evidence incorrectly borders on frivolous.” *Giraked*, 20 ROP at 250. While the Land Court erred when it applied a heightened burden of proof to Appellant’s claims, we do not see any indication that the Land Court improperly disregarded admissible evidence, relied on inadmissible evidence, came to an unsupportable conclusion, or otherwise did anything to leave us with “a definite and firm conviction that an error [of fact] has been made” as to any of the Land Court’s intermediate factual findings prior to its ultimate decision. *See Rengchol v. Uchelkeiukl Clan*, 19 ROP 17, 21 (2011). So, while Appellants are entitled to a review of their claims under the preponderance of the evidence standard, for which limited purpose we now remand this case, in the event that the Land Court determines Appellants also have failed to meet their burden under the preponderance standard this Court will not be inclined to hear further argument attempting to re-litigate factual issues already decided by the trial court.⁸ Even to the extent that some of these factual arguments may be supported by some evidence in the record, none constitute anything even resembling a potentially meritorious ground for appeal.

Moreover, Appellant’s legal arguments unrelated to the Tochi Daicho presumption, including, but not limited to, estoppel and res judicata, were either not presented to the Land Court in the underlying action or are so clearly unsupported by the record that they do not warrant serious consideration. Accordingly, we deem them waived or appropriate for dismissal without further discussion.

⁸ We would be remiss if we did not remind the parties of ROP R. App. Proc. 38, which provides that “[i]f the Appellate Division determines that an appeal is frivolous, it may award just damages, including attorney’s fees, to the Appellee.

CONCLUSION

Because the Tochi Daicho presumption does not apply to a return of public lands claim, the decision of the Land Court is **REVERSED**. The Land Court's findings and Determination of Ownership are **VACATED**, and the case is **REMANDED** for a review of the evidence and redetermination of whether either Appellant has met her burden under the preponderance of the evidence standard. Following such a determination, a new Determination of Ownership shall issue.