Espangel v. Tirso, 2 ROP Intrm. 315 (1991)

ESEBEI ESPANGEL,
Appellant/Cross Appellant,

and

UCHELIOU CLAN,
Appellant/Cross Appellant,

v.

VALENTINE TIRSO, et al.,
Appellees-Appellants.

CIVIL APPEAL NO. 11-87
Civil Actions Nos. 43-82; 44-82; 45-82, 46-82, 47-82, 48-82, 49-82, 50-82, 51-82, 52-82, 53-82, 54-82, 55-82 and 106-83 (Consolidated)

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: May 16, 1991

Counsel for Ucheliou Clan: J. Roman Bedor, T.C.

Counsel for Esebei Espangel: Johnson Toribiong

Counsel for Valentine Tirso, et al.: Mariano W. Carlos

Counsel for Florentine Yangirmau: Yukiwo P. Dengokl

BEFORE: MAMORU NAKAMURA, Chief Justice; LOREN A. SUTTON, Associate Justice; FREDERICK J. O'BRIEN, Associate Justice.
⊥316
PER CURIAM:

I. BACKGROUND

In 1904, a typhoon struck the low-lying islands of Pulo Anna, Merir and Hatohobei. These islands, along with Sonsorol and Helens Reef, comprise the Southwest Island group of the Republic of Palau archipelago.

The German Government, which occupied the Palau archipelago in 1904, sent the German schooner "Biant" to provide assistance. Approximately 150 persons from Merir and Pulo Anna (hereinafter known as "settlers") boarded the Bicant and were transported to Koror,

where they were placed temporarily in a government compound. Because considerable land in Arkebesang Island was not under cultivation, Espangel Ewatel, Chief of the Omrekongel Clan, and the German Commander, Winkler, decided to locate the settlers there. The descendants of these settlers now claim land on Arkebesang Island as heirs, donees, and devisees of members of the original group transported to Koror in 1904.

During land hearings conducted by the Government of the Empire of Japan, which occupied the Palau archipelago from 1917 until 1945, it was determined that the settlers and their descendants held the land at issue in this case in fee. ("Translation of Japanese Land Documents," Film Roll No. 25 Vol. I, Doc. Serial No. 8A-225-8A-314 8A-225-8A-314). The results of the hearings were then recorded in the *Tochi Daicho*.

Most of the settlers and their descendants were forced ⊥317 off the lands in question during World War II when the Japanese Government took the land temporarily for military use. The Japanese Government promised to return the lands to the settlers or to pay for the lands seized. When the United States Government became Administering Authority for the Micronesian islands as trust territories after World War II, it stood in place of the Japanese Government, and had control over most of the land on Arkebesang Island. In 1962, the Trust Territory Government quit-claimed most of the Arkebesang land in favor of the clans and those claiming "through, from, or under" the clans. The settlers do not appear to have attended the negotiations surrounding the quit-claim.

The former Palau Land Commission held formal hearings (Hearing No. 38) in 1980 and ruled that the descendants of the original settlers held the lots in question in fee. Appeal was taken to the Trial Division of the Palau Supreme Court, which reversed the Palau Land Commission in part. From the decision of that trial court all parties have appealed.

We reverse the trial court, reinstate the rulings of Palau Land Commission Hearing No. 38, and remand a portion of this case to the trial court for evidentiary proceedings to clarify ownership of those problem parcels identified in Attachment "B" of this Opinion.

II. DISCUSSION

The primary issue in this case is the weight that should be accorded to evidence drawn from the listings in the ⊥318 *Tochi Daicho* . It is a matter of record that the surveys and determinations of ownership in the *Tochi Daicho* for Babeldaob and Koror were carried out by personnel of the South Seas Bureau, an agency of the then occupying Japanese Government, and were performed in a manner which our courts have recognized entitles the listings in the *Tochi Daicho* to credibility and the presumption of accuracy. *Baab v. Klerang* , 1 TTR 284, 286 (T.T. High Ct., Tr. Div. 1955); *Owang Lineage v. Ngiraikelau* , 3 TTR 560, 565 (T.T. High Ct., Tr. Div. 1968). The presumption in favor of the *Tochi Daicho* is a strong one, despite the fact that the survey was not completed until 1941. *Baab v. Klerang, supra*, at 286.

With respect to issues which were, as here, in controversy at the time the listings were made, the presumption in favor of the *Tochi Daicho* is particularly strong. *Id.*

When the listing in the *Tochi Daicho* is for individualownership(s), as here, the rebuttal evidence must be particularly clear and convincing. *Baab v. Klerang, supra* , at 286. See, *Ngirudelsang v. Itol* , 3 TTR 351, 354-356 (T.T. High Ct., Tr. Div. 1967); and *Osima v. Rengiill and Rechesengel*, 2 TTR 151, 152 (T.T. High Ct., Tr. Div. 1960) See also, *Elechuus v. Kdesau*, 4 TTR 444, 447, 450 (T.T. High Ct., Tr. Div. 1969).

Most recently, this Court reaffirmed the "clear and convincing" standard for rebuttal of listings in the *Tochi Daicho*:

⊥319 We feel no hesitation in holding . . . [I]n accordance with . . . wealth of precedent, . . . except for Peleliu and Angaur, the *Tochi Daicho* is presumed to be correct, and . . . the burden is on the party contesting a *Tochi Daicho* listing to show by clear and convincing evidence that it is wrong . . . . (Emphasis added).

Ngiradilubech v. Timulch , Civil Appeal No. 5-86-A, (Civil Action No. 124-80), Opinion at 5, (May 22, 1989).

The Trial Division of the Palau Supreme Court, acting as appellate court from the Palau Land Commission hearing which found in favor of the settlers, mistakenly found that the Japanese Government hearings were predicated upon a form of adverse possession," *Kutermalei v. Esebei Espangel v. Teresa Tirso* , Civil Action No. 106-83, Opinion and Judgment at 16. Because possession by the settlers was not hostile, (at least a "use" right had admittedly been given to them), the trial court concluded that there was no adverse possession. Therefore, the basis for the decision in the Japanese hearings was incorrect, and the listing of the settlers as owners in fee in the *Tochi Daicho* was likewise incorrect.

The trial court apparently misunderstood the reasoning behind the conclusions of the Japanese hearings. The land was not awarded to the settlers on the basis of adverse possession. The land in dispute was awarded in fee to the settlers in part based on a Japanese version of equity which focuses on productive use or occupancy of the land and does not turn on hostile possession.

⊥320 Because adverse possession was not the underlying basis for the decision of the Japanese hearings, the trial court erred in invalidating the Japanese determination for failing to meet the requirements for adverse possession. *See*, "Translation of Japanese Documents," Film Roll No. 25, Vol. I at 2-3.

In addition to long and continuous use of the land by the settlers, the decision of the Japanese hearings was based on testimony of witnesses, the fact that the land had been uncultivated prior to the arrival of the settlers, long-term lack of active opposition by the clans, and the actions of the (previous) German Administration. "Translation of Japanese Land Documents," Film Roll No. 25, Vol. I at 2-3. *See Ngiruchelbad v. Trust Territory* , 2 TTR, 631, 635, (T.T. High Ct., App. Div. 1961).

The clans came forward with little evidence to reinforce their claim that the Japanese hearings lacked due process of law.

> When . . . a case boils down to a "swearing contest" between an approximately equal number of witnesses, and the evidence on each side is internally consistent, the party challenging the presumption has not rebutted the presumption by clear and convincing evidence. (Emphasis added)

Ngiradilubech v. Timulch, supra, at 5.

Additionally, we note that, except in instances when due process of law has been denied, it is not advisable for a court to overturn judicial decisions made by a previous ⊥321 occupying power. 45 Am. Jur. 2d *International Law* § 34 (1969); *See also Ngiruchelbad v. Merii* , 2 TTR 631, 636 (T. T. High Ct., App. Div. 1961); *Jatios v. Levi* , 1 TTR 578, 584 (T.T. High Ct., App. Div. 1954).

Hence, the decision of the Japanese hearings that the settlers owned the lands in question in fee should stand, and the presumption of correctness of the *Tochi Daicho* listing has not been rebutted, contrary to the trial court's finding.

Also at issue is the effect of the "1962 Trust Territory Land Settlement Agreement and Indenture" (the "1962 Agreement") between the clans and the Trust Territory Government, by which the Trust Territory Government, successor in interest to the defeated Japanese Government, divested itself of most of the lands in dispute.

The clans claim that the 1962 Agreement "returned" the lands to them in exchange for guarantees that would allow the settlers occupying certain Echang land to remain there in perpetuity.

Documents submitted to the trial court show part of Echang confirmed, seemingly in perpetuity, to the settlers and their descendants. In addition, memoranda relating to the 1962 Agreement indicate that the Trust Territory Government entered into the 1962 Agreement in part because of its concern about the settlers and Echang. See Exhibit B, Land Settlement and Indenture, 1962.

There is no support, however, for the clans' ⊥322 contention that the clans were to receive all of the disputed lands in return for giving a use right to certain Echang land to the settlers. The 1962 Agreement grants land to all those who "[claim] through, from, or under said clans . . . their heirs, successors and assigns . . . ." Exhibit B, Land Settlement and Indenture, 1962. The settlers say their claims are "through" or "under" the clans via Espangel Ewatel's grant to them in fee, confirmed by the Japanese hearings and the listings in the *Tochi Daicho*. There is no evidence that the 1962 Agreement traded the settlers' claims to the disputed land for their separate claims to certain other Echang land.

Additionally, there is nothing in the record to show that the settlers were party to the 1962

Agreement. The trial court noted that the 1962 Agreement appeared to be lacking in due process of law as to the settlers, even while it recognized their existence and one of their claims to Echang. *Kutermalei v. Esebei Espangel v. Teresa Tirso* , Civil Action No. 106-83, Opinion and Judgment at 21.

The Trust Territory Government inherited the defeated Japanese Government's obligation to pay for or to return the lands seized to those persons occupying the land prior to its seizure. "[T]he conqueror should be bound to fulfill the obligations of the conquered state." 45 Am. Jur. 2d *International Law* §§ 34, 35 (1969).

⊥323 The Japanese Government had promised to pay the settlers for the land, or to give it back to the settlers, *Kutermalei v. Esebei Espangel v. Teresa Tirso* , Trial Transcript at 875. Under the 1962 Agreement, the Trust Territory Government did return the land to the settlers, as those claiming "though, from, or under" the clans. *See* 45 Am. Jur. 2d *International Law* at § 34.

> [T]he court holds that the agreement and indenture in question must be construed to restore the rights in the land to those who had acquired such rights directly or indirectly from or under any of the clans named and who last held those rights Prior to . . . Japanese interests , or to those who would be their successors in interest had there been no such transfer to Japanese interests. (Emphasis added).

Torul v. Arbedul, 3 TTR 486, 491 (T.T. High Ct., Tr. Div. 1968).

Finally, the compromise solution created by the trial court, in which much of the land in question was to be jointly administered by a committee, headed by the Chief Justice of the Palau Supreme Court, was in error because adequate legal relief is available. *See* 27 Am. Jur. 2d *Equity* § 1 (1969). Even if legal relief were inappropriate or inadequate, the trial court's (equitable) solution would still be troublesome because of the protracted supervision by the Court that would be required. 27 Am. Jur. 2d *Equity* § 106 (1969).

III. CONCLUSION

The cumulative weight of 1) the long term cultivation of the disputed lands by the settlers, 2) the decisions in the ⊥324 Japanese hearings, 3) the listings in the *Tochi Daicho*, 4) the 1962 Agreement, and 5) the decisions by the Palau Land Commission leads this Court to conclude that the decision of the trial court must be, and hereby is, REVERSED, and the findings of the Palau Land Commission are reinstated.

The parcels of land listed in Attachment A, below, are hereby awarded in fee to the individuals indicated next to each parcel.

Significant errors in numbers and in land areas as reported in the trial court and as supplied by the parties made it necessary for this Court to carefully verify the listings against official records and maps to insure accuracy. Because of inconclusive official records, this Court must remand the parcels listed in Attachment B by tentative cadastral and *Tochi Daicho* numbers

to the trial court for further findings of fact consistent with this Opinion.

ATTACHMENT "A"

TOCHI DAICHO	CADASTRAL NO.	AREA (SQ. MTRS)	AWARDED TO
1742	024 A 13	463.9	Faustinio Triso
1743	024 A 14	464.0	Erminia Tomisang
1748	024 A 15	181.7	Yangilmau Florentine
1747	024 A 18	632.0	Yangilmau Florentine
1744	024 A 19	272.8	Erminia Tomisang
1741	024 A 20	777.0	Erminia Tomisang
1737	024 A 21	857.3	Erminia Tomisang
1745	024 A 25	802.7	Yangilmau Florentine
1746	024 A 26	1,232.6	Yangilmau Florentine
1734	025 A 08	20,228.5	Kuterbis Kutermalei
1733	025 A 10	1,951.4	Kuterbis Kutermalei
1732	025 A 11	3,668.6	Yangilmau Florentine
1731	025 A 13	4,036.8	Erminia Tomisang
1757	025 A 15	4,637.9	Erminia Tomisang
1756	025 A 16	2,796.9	Rosamunda Tubeito
1739	025 A 18	2,584.3	Valentin Triso
1755	025 A 17	6,933.0	Rosamunda Tubeito
1728	025 A 21	4,387.5	Teresa Triso
1724-1	026 A 02	8,353.0	Francisca Ierago
1724-3	026 A 03	1,765.9	Quadelupe Carlos
1724-2	026 A 05	10,829.5	Quadelupe Carlos
1715	026 A 06	948.2	Kuterbis Kutermalei
1710	026 A 09	10,060.4	Teresa Triso
1711	026 A 10	4,802.7	Teresa Triso
1718-1	026 A 11	6,544.8	Teresa Triso
1718	026 A 12	6,790.9	Teresa Triso
1717	026 A 13	909.6	Teresa Triso
1716	026 A 14	263.3	Teresa Triso
1603-B	027 A 01	4,739.0	Kuterbis Kutermalei
1603-A	027 A 18	55.0	Kuterbis Kutermalei
1692	028 A 01	6,788.0	Modesto Petrus
1695	028 A 02	1,881.0	Rosamunda Tubeito
1696	028 A 03	1,572.0	Rosamunda Tubeito
1698	028 A 04	1,943.0	Maria Kintoki
1699	028 A 05	108.0	Modesto Petrus
1704-2	028 A 06	67.0	Modesto Petrus
1704	028 A 07	27.0	Modesto Petrus
1703	028 A 09	1,764.0	Modesto Petrus
1604	028 A 11	2,252.0	Gracia Jonas
1706	028 A 14	1,243.0	Rosamunda Tubeito

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1697	028 A 15	2,748.0	Maria Kintoki
1694	028 A 16	6,447.0	Maria Kintoki
1693	028 A 17	1,668.0	Rosamunda Tubeito

1. Lots 1704 and 1703 were two separate lots but on the cadastral map they were merged and then subdivided into lots having different cadastral numbers. See, Determination of Ownership Nos. 1102, 1103, and 1105.

ATTACHMENT "B"

The Court hereby remands the following tentative Cadastral Nos., possibly corresponding to the following listed *Tochi Daicho* Nos. and parties, to the trial court for further findings of fact consistent with this Opinion:

Cadastral No.	T.D. No.	Party
025 A 01	1726 or 1729	Undetermined
025 A 12	1735 or	Guadulupe Carlos
	1736	Modesto Petrus
026 A 01	1729 or	Kuterbis Kutermalei
	1726	Arkebesang Hamlet/Espangel as trustee
028 A 18	1707 or	Rosamunda Tubeito
	1708	Yangilmau Florentine