Otiwii v. Iyebukl Hamlet, 3 ROP Intrm. 159 (1992)
IN THE MATTER OF THE APPEAL FROM THE LAND CLAIMS HEARING OFFICE (LCHO),

MARIA OTIWII,
Plaintiff/Appellant,

v.

IYEBUKEL HAMLET, et al.
Defendants/Appellees.

CIVIL APPEAL NO. 28-91
Civil Action No. 187-90

Supreme Court, Appellate Division
Republic of Palau

Appellate opinion
Decided: September 14, 1992

Counsel for Appellant: David Shadel

Counsel for Appellee: Roman Bedor

BEFORE: LOREN A. SUTTON, Associate Justice; ARTHUR NGIRAKLSONG, Acting Chief Justice; ALEX R. MUNSON, Part-time Associate Justice

PER CURIAM:

BACKGROUND

This action is a dispute over ownership of land known as Bares, which is in Iyebukel Hamlet, Koror, Palau. The key facts are that in August 1988, Appellant Maria Otiwii (Otiwii) filed a claim with the Land Claims Hearing Office (LCHO) asserting that Bares is her family land. Emiliano Ingereklii (Ingereklii) was the only adverse claimant and he claimed that Bares is owned by Bares lineage and that he is the rightful administrator. A hearing was held, and on March 19, 1990, the LCHO rendered its Adjudication and Determination holding that Bares is the land of Bares lineage with ⊥160 Ingereklii as administrator.

Otiwii timely appealed to the Trial Division of the Supreme Court. In conjunction with her appeal, she filed a motion to proceed in forma pauperis in order to obtain a free transcript of the LCHO hearing, and a motion for a trial de novo. Both requests were denied by order dated September 11, 1990. Thereafter, Otiwii paid for the transcript herself, briefs were filed, and the court rendered its decision affirming the LCHO determination regarding Bares but reversing the determination of ownership regarding other lands in dispute.

On August 26, 1991, Otiwii filed this appeal alleging:

1. The statute creating the LCHO is an unconstitutional delegation of judicial power to an administrative agency in violation of Article X of the Palau Constitution and the doctrine of separation of powers, and its decision is therefore void;

2. Otiwii was entitled to a trial de novo before the Trial Division pursuant to due process, statute and the court's inherent powers;

3. The court abused its discretion by failing to provide Otiwii, a poor person, with a free transcript of the LCHO proceedings; and

4. The court erred by not finding that Otiwii successfully rebutted the presumption that the Tochi Daicho is correct and that she is therefore the owner of Bares;

In opposition, appellee argued that the court correctly found that Otiwii failed to rebut the presumption that Tochi Daicho correctly lists Bares as Bares Lineage land with Otiwii as administrator, but took no position regarding the other issues asserted on appeal.

⊥161 ANALYSIS

A. Constitutionality of the LCHO

Article X, Section 1 of the ROP Constitution provides in pertinent part that:

"The judicial power of Palau shall be vested in a unified judiciary, consisting of a Supreme Court, a National Court, and such inferior courts of limited jurisdiction as may be established by law . . . ." (emphasis supplied).

Pursuant to Article X, Section 5 the judicial power extends to all matters in law and equity, which necessarily includes all matters concerning the ownership of land.

Otiwii alleges that by enacting 35 PNC § 1101 et seq., the Olbiil Era Kelulau (OEK) vested the LCHO with judicial power to determine land matters and that the LCHO exercises judicial power in carrying out its functions. This delegation and exercise of judicial power is allegedly unconstitutional because: 1) the LCHO is merely an administrative body and not a court authorized by Article X, Section 1 of the Constitution; and 2) the OEK's delegation of judicial power to an administrative body encroaches upon the jurisdiction of the unified judiciary in violation of Article X, Section 5 of the Constitution and the doctrine of separation of powers. ⊥162 Otiwii provides substantial support for the proposition that the LCHO exercises judicial power in carrying out its statutorily defined purpose, and that the exercise of judicial power by any body not authorized by Article X, Section 1 is unconstitutional. (Opening Brief, pp. 3-15).

What is missing from Otiwii's analysis, however, is meaningful support for her fundamental conclusion that the LCHO is an administrative body and not an inferior court of limited jurisdiction authorized by Article X, Section 1 of the Constitution. Otiwii glosses over an analysis of precisely what constitutes an inferior court of limited jurisdiction, arguing only that the failure of 35 PNC § 1101 et seq. to refer to the LCHO as a court, and its officers as judges, leads to the inescapable conclusion that it is not a court. This ignores a substantial body of authority holding that whether a body is a court depends upon its substance and not its name.

1. What's in a name?

In analyzing whether the LCHO is an administrative agency or an inferior court it is necessary to define what a court is and how it differs from an administrative body. The term "court" varies with the context in which it is used, but generally:

> "a court is a body in government to which the public administration of justice is delegated, being a tribunal officially assembled under authority of law, at the appropriate time and place, for the administration of justice, through which the state enforces its sovereign rights and powers, and consisting in its jurisdiction and functions and not its title or name."

21 C.J.S. Courts, sec. 2.

⊥163 "Whether a governmental agency is a court is determined not by its name or title, but by its organizational character, its purpose, and its function." 20 Am Jur 2d Courts, sec. 1. "For purposes of classification, the jurisdiction and functions rather than the name of a court determine its character." 16 Cal Jur 3d, sec. 6, *citing, Re Application of Hall* , 263 P. 295 (1927). "The character of a court is determined not by its name but by the nature of its jurisdiction and function." *Robertson v. Langford* , 273 P. 150, 155 (1928), *citing, City of Colton v. Superior Court*, 257 P. 909 (1927); *Ex Parte Soto* , 26 P. 530 (1891); *Ex Parte Baxter* , 86 P. 998, 999 (1906); *See also, Johnson v. State* , 87 A. 949, 950 (1897); *Kates v. Reading*, 235 N.W. 881, 882 (1931).

In *Ex parte Baxter, supra*, the court analyzed whether a court created by a city pursuant to a state constitutional amendment was unconstitutional because it did not use the precise name set forth in the amendment. The court compared the jurisdiction and function of the new court to that contemplated by the constitutional amendment and held that it was the same and therefore constitutional. To hold otherwise, stated the court "would be to grasp at the form and disregard the substance." *Id.* at 999.

In analyzing whether a body is a court or an administrative agency it is also essential to determine whether the body is within the executive, legislative or judicial branch of government:

> "Although factfinding bodies of merely administrative character are sometimes referred to as administrative "courts", a "court," in the proper technical meaning of that term, . . . may be distinguished from an administrative agency, even where

> an administrative agency, within the scope of its authority, makes findings ⊥164 of fact and determinations with regard to controverted matters. What essentially distinguishes a court from an administrative agency is that under [a] constitutional system of separation of the three branches of government, courts are part of the judicial, whereas administrative agencies are part of the executive, branch of the government." (emphasis added).

20 Am Jur 2d Courts, sec. 2, citations omitted.

2. The character, function and jurisdiction of the LCHO and its predecessor bodies.

In order to determine whether the LCHO is an Article X, Section 1 inferior court of limited jurisdiction, or an administrative agency exercising judicial power, it is therefore necessary to examine its character, function, jurisdiction and organizational status within the government of Palau. In doing so it is useful to trace the history of the LCHO and its predecessor bodies back to the time of the Trust Territory Code.

a. The Palau District Land Commission and its Successor, the Palau Land Commission.

The LCHO's predecessor, the Palau District Land Commission, came into existence under the Trust Territory government. Pursuant to 67 TTC 101 et seq., the jurisdiction and purpose of the commission was to systematically and promptly register land, to determine ownership and to adjudicate land claims. *Id.* Sec's 101, 108, 109. In order to carry out its functions, the commission had the power to issue subpoena, punish for contempt and administer oaths. *Id.* sec. 111. Its decisions were directly appealable to ⊥165 the trial division of the High Court. *Id.*, sec. 115. Members of the commission were appointed by the High Commissioner who had all executive, and final administrative responsibility over all inhabitants of the Trust Territory, including Palau. *Id.*, sec. 101; 2 TTC 51. The commission was under the administrative supervision of the chief of lands and surveys of the executive branch who, subject to the approval of the High Commissioner, had the power to prescribe implementing rules and regulations. *Id.*, sec. 102. In one published decision, the court in dicta refers to the commission as an administrative body. *Kumangai v. Ngiraibiochel*, 6 TTR 217, 221, 223 (1973).

When Palau adopted the National Code, the Palau Land Commission was created by 35 PNC 902 et seq., which was based largely upon 67 TTC 101 et seq.. The Palau Land Commission was structurally similar to the former Land Commission and had virtually the same purpose, but its members were appointed by the President of Palau instead of the High Commissioner, and it was under the administrative supervision of Palau's Chief of the Division of Lands and Surveys who was within the executive branch. 35 PNC §§ 902, 905.

b. The Land Claims Hearing Office

On February 16, 1987, the Palau Lands Registration Act, 35 PNC § 1101 et seq., became

effective as law and repealed 35 PNC § 902 et seq.. *See*, 35 PNC § 1128. This Act was the genesis of the Land Claims Hearing Office, and was for the purpose of effecting "a much needed ⊥166 reorganization of the Palau District Land Commission that was established under the Trust Territory administration" *Id.*, sec. 1102. The newly created LCHO differs in organization and structure from its predecessor bodies in the following material respects:

> 1) Administration and supervision authority was removed from the executive branch and placed under the National Judiciary. *Id.*, sec's. 1102, 1103(a);
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> 2) The positions of Senior Land Claims Hearing Officer and Land Claims Hearing Officer were created. *Id.*, sec. 1103(b);
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> 3) The power to appoint officers, previously exercised by the High Commissioner and then the President of Palau were modified to require Presidential appointment exclusively from a list of candidates compiled by the Judicial Nominating Commission with concurrence by the Chief Justice and the majority of the remaining justices. *Id.*, sec. 1103(c);
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> 4) The Chief Justice was granted the power to assign judges of the Court of Common Pleas to serve as hearing officers on a case by case basis. *Id.*, sec. 1103(e); and
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> 5) The power to remove a hearing officer became vested in the majority of the justices of the Supreme Court. *Id.*, sec. 1104(f).

The intent of the creators of the new LCHO in effectuating these changes was to depoliticize the process of adjudicating land claims and to correct constitutional deficiencies in the old process. *See*, House of Delegates Standing Committee on Judiciary and Governmental Affairs Standing Committee Report (H.S.C.R.) No. 29, Dec. 3, 1985, and H.S.C.R. No. 4, Dec. 30, 1985; Senate Standing Committee on Judiciary and Governmental Affairs Standing Committee Report (S.S.C.R.) No. 2-81, Dec. 27, 1985 and S.S.C.R. No. 2-149, Jan. 27, 1986. House Standing Committee Report No. 29, ⊥167 *supra*, clearly shows that the OEK was aware of the constitutional deficiency of having the adjudication of land claims under the supervision of the executive branch, and the changes necessary to constitutionally cure this defect, stating:[1]

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[1] The evolution and status of the LCHO is analogous to that of the Tax Court of the United States. In 1924, the U.S. Congress created the Board of Tax Appeals, which was "an independent agency of the Executive Branch" with jurisdiction to entertain tax deficiency petitions. 9 Moore's Federal Practice, parag. 213.02[1]. Its members were appointed by the President, they served for a term of years and were removable for limited reasons. *Id.* It was not a judicial tribunal. *Hutchings-Sealy Nat. Bank of Galveston v. C.I.R.*, 141 F.2d 422 (1944); *Old Colony Trust Co. v. Commissioner*, 49 S.Ct. 499 (1929); *Helvering v. Ward*, 79 F.2d 381 (1935); *Williamsport Wire Rope Co. v. United States*, 48 S.Ct. 587 (1928). In 1948, the name of the Board was changed to Tax Court of the United States, but its characterization as an independent agency of the Executive Branch was not changed. 9 Moore's *supra*. It was generally held that

> "The subject bill properly and constitutionally places land title adjudication under the jurisdiction of the judiciary . It provides a comprehensive system for resolution of title disputes in an efficient and economical manner without freezing the small person out of the process. Everyone is assured of a fair hearing on their claims even if they can not afford an attorney." (emphasis supplied)

The drafters' intent to form an inferior court of limited jurisdiction pursuant to the Constitution is borne out by the character, function and jurisdiction of the LCHO. Its mandate is ⊥168 to "hold hearings and make determinations of ownership" of certain lands in Palau. 35 PNC §§ 1101, 1104(a). In order to accomplish this mandate it has concurrent jurisdiction with the Trial Division of the Supreme Court limited to determining land claims. Its officers are vested with all powers and duties necessary to carry out this jurisdiction by conducting hearings and issuing determinations of ownership, including subpoena and contempt powers. *Id.*, sec. 1110(a), (b). They exercise these powers in accordance with the ROP Rules of Civil Procedure and Evidence. The function of determining land claims was moved from the administrative supervision and control of the executive branch to the judiciary and the officers vested with judicial powers are appointed just as judges are selected. All that is missing is the titles of "court" for the office and "judge" for the officers. Pursuant to the authorities presented above, however, the omission of these titles does not change the nature of the body: substance is the key.

The LCHO is an inferior court of limited jurisdiction created by law pursuant to Article X, Section 1 of the Palau Constitution.

B. Right to a trial de novo

On September 11, 1990, the trial court denied Otiwii's motion for trial de novo, stating:

> "There is no provision for granting such relief under either 14 PNC § 604(b) or 35 PNC § 1113. The decision of the Appellate Division in *Klai Clan v. Bedechal Clan*, Civil Appeal No. 7-89, decided June 23, 1990, is inapplicable to appeals from the Land Claims Hearing Office."

Otiwii alleges that the trial court erred as a matter of law when ⊥169 it held that 35 PNC § 1113 and 14 PNC § 604(b) contain no provision for a trial de novo on appeals from the LCHO.

We agree. Appeals from LCHO determinations are governed by 35 PNC § 1113, which provides:

> "A determination of ownership by the Land Claims Hearing Office shall be

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the change in name did not affect its function and powers as an agency and not a true court. *Id*, *citing, Hutchings-Sealy, supra*. In 1969 Congress established the Tax Court as a court of record under Article I of the U.S. Constitution and it was given limited power to cite for contempt and recourse to the U.S. Marshall's office to carry out writs, orders, process and demands. *Id.* The transference of the body from the Executive Branch to the Judicial Branch, and its grounding in the Constitution, changed its status from an administrative agency to a court of record.

> subject to appeal by any party aggrieved thereby to the Trial Division of the Supreme Court within 45 days . . . . Final decisions of the Trial division of the Supreme Court or the National Court may be appealed to the Appellate Division of the Supreme Court in the same manner and with the same effect as cases tried originally in the Supreme Court."

Section 1113 does not specifically set forth the standard of review to be applied in such appeals[2], but 14 PNC § 604(b) does, stating:

> "The findings of fact of the Trial Division of the high court or the Supreme Court in cases tried by it shall not be set aside by the appellate division of that Court unless clearly erroneous, but in all other cases the appellate or reviewing court may review the facts as well as the law." (emphasis added).

Pursuant to 14 PNC § 604(b), determinations on appeal from the LCHO fall within the "other cases" exception, and the trial division judge sitting in review of an LCHO determination has discretion to grant a trial de novo. *Iyechad Rurcherudel v. Ngiruchelbad Uchel* , (Civil Appeal No. 5-90, May, 1992), p. 2; *See also, Udui v. Temol*, (Civil Appeal No. 12-89, May, 1991), p. 5.

⊥170 The trial court erred as a matter of law when it held that there is no provision for the granting of a trial de novo on appeal from the LCHO. Section 604(b) does not, however, grant a trial de novo as a matter of right.

Had the trial court considered a motion for trial de novo on its merits, it would have been an abuse of discretion not to grant it. In reversing the LCHO determination as to lots which were adjudicated along with Bares, but which are not the subject of this appeal, the court found substantial errors in the LCHO's findings of fact. Most importantly, the court found that the record showed that Ingereklii's conflicting statements created a "serious credibility question" which in part lead to "an inexorable finding of clear error by the LCHO."

Despite the court's finding that Ingereklii's incredible testimony warranted reversal as to the other lots, the court relied in part upon his testimony to affirm the LCHO's holding that Otiwii failed to rebut the Tochi Daicho's presumption of correctness as to Bares. Under such circumstances, it was clearly erroneous for the court to selectively rely upon the LCHO's findings of fact and determinations as to the credibility of witnesses and a trial de novo should have been granted so the court could make its own credibility determinations.

C. Provision of Free LCHO Transcript

Otiwii alleges that her status as a poor person entitled her to a free transcript of the LCHO proceedings so she could pursue ⊥171 her civil appeal. Otiwii cites 28 U.S.C. sec. 1915

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[2] Under repealed 35 PNC 933(a), an aggrieved party could appeal a determination of the land commission to the trial division of the Supreme Court. Under subsection b thereof, such appeals were required to be "treated and effected in the same manner as an appeal from the Trial Division to the Appellate Division in a civil action . . . ."

and a string of United States cases as specifically requiring that "an appellant [is] entitled to a free transcript at governmental expense in civil matters on appeal." (Opening Brief, p.20). Section 1915 plainly states that it is discretionary and does not mandate that a free transcript be provided in civil matters. In addition, a substantial body of additional case law interpreting section 1915 uniformly holds that the provision of a free transcript in a civil appeal is discretionary and not a matter of right. *Ward v. Werner*, 61 FRD 639 (1974); *Ex parte Tyler*, 70 FRD 456 (1976). Otiwii also cites a number of U.S. cases regarding the due process rights of certain criminal defendants to a free transcript but those cases are inapposite to civil appeals.

There is neither a statute nor a Court Rule in Palau providing that an indigent civil appellant is entitled to a transcript at government expense. ROP App. Pro. 24 governs proceedings in forma pauperis, but makes no provision for a free transcript. It is therefore a matter of the court's discretion whether to provide a free transcript. Otiwii failed to meet her burden to prove that the trial court abused its discretion in refusing to provide a free transcript.
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D. Rebuttal of the presumption that the Tochi Daicho is correct

The holding that the trial court erred by not granting Otiwii a trial de novo, and the remand of this matter for such, renders this issue moot.

CONCLUSION

The LCHO is an inferior court of limited jurisdiction duly formed by an enactment of the legislature pursuant to Article X, Section 1 of the ROP Constitution.

Any party to an LCHO hearing who timely and properly appeals from an LCHO Adjudication and Determination, and who timely files a motion for a trial de novo, shall be entitled to have such motion heard on its merits pursuant to 14 PNC § 604(b), and the decision thereon is discretionary with the court. The court herein erred as a matter of law when it concluded that there was no provision for granting a trial de novo from an LCHO determination. Moreover, it would have been an abuse of discretion for the trial court to deny Otiwii's motion for a trial de novo had it been heard on its merits. This matter is, therefore, REMANDED to the trial division for trial de novo.

⊥173 Finally, no party to an LCHO proceeding has a right to a free transcript of LCHO proceedings on appeal and any decision to provide a free LCHO transcript is in the court's discretion.