KSPLA v. Meriang Clan, 6 ROP Intrm. 10 (1996)

KOROR STATE PUBLIC LANDS AUTHORITY, NONA LUII, and PALAU PUBLIC LANDS AUTHORITY,
Appellants,

v.

MERIANG CLAN,
Appellee and Cross-Appellant.

CIVIL APPEAL NO. 3-95
Civil Action Nos. 210-90, 227-90, 242-90 & 275-90

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: November 15, 1996

Counsel for Appellant Koror State Public Land Authority: Antonio L. Cortes

Counsel for Appellant Nona Luii: William L. Ridpath

Counsel for Appellant Palau Public Lands Authority: Ariel Steele, (Scott Pinsky, on the brief)

Counsel for Appellee and Cross-Appellant Meriang Clan: Johnson Toribiong

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; JANET HEALY WEEKS, Part-time Associate Justice

BEATTIE, Justice:

Appellants Koror State Public Land Authority ("KSPLA"), Nona Luii ("Luii"), and Palau Public Lands Authority ("PPLA") appeal a Trial Division decision which affirmed a determination by the Land Claims Hearing Office ("LCHO") that certain property in the ⊥11 Meriang-Desekel area of Ngerbeched Hamlet, Koror State, [1] was seized from Appellee Meriang Clan by the Japanese Government and should therefore be returned to Meriang Clan. Meriang Clan cross-appealed, claiming that the trial court erred in rejecting its claim that it owned the buildings on the land as a result of the LCHO determination that it owned the land underlying the buildings. We affirm in part, reverse in part and remand for further proceedings.

The Palau Constitution requires the national government to "provide for the return to the original owners or their heirs . . . any land which became part of the public lands as a result of the acquisition by previous occupying powers or their nationals through force, coercion, fraud, or

[1] The property is known as Claim No. 90 on Division of Lands and Surveys Index Map of Koror Claims No. 4018/74 Sheet 1.

without just compensation or adequate consideration." Palau Constitution, Art. XIII, Sec. 10. Pursuant to that mandate, the legislature enacted 35 PNC § 1104(b), which provides in pertinent part that:

> The Land Claims Hearing Office shall award ownership of any public land, or land claimed as public land, to any citizen or citizens of the Republic of Palau who prove that such land became part of the public lands, or became claimed as part of the public lands, as a result of the acquisition by previous occupying powers . . . through force, coercion, fraud, or without just compensation, and that prior to such acquisition such land was owned by such citizen or citizens or that such citizen or citizens are the proper heirs to such land.

Luii and Meriang Clan filed claims to the subject property with the LCHO under § 1104(b), each claiming that the property was owned by them or their predecessors and was taken from them by the Japanese by force and without just compensation. It is not disputed that after World War II, the Trust Territory Government became the owner of property in Palau which had previously been owned by Japan, and that the Trust Territory Government conveyed its interest to the PPLA.

In the LCHO proceedings, KSPLA claimed that the property was conveyed to it by the PPLA and that neither Luii nor Meriang Clan presented sufficient evidence to sustain their burden under § 1104(b). Therefore, it claimed, the land is public land with title ⊥12 in KSPLA.[2] The PPLA was not a party to the LCHO proceedings, but intervened as a party to the appeal to the Trial Division.

The LCHO found that the subject property had been owned by Meriang Clan prior to the time that the Japanese forces came to occupy Palau, and that the Japanese Government took the land from Meriang Clan without the clan's consent and without just compensation. Accordingly, it determined that the property should be returned to Meriang Clan. On appeal, the Trial Division adopted the findings of fact of the LCHO and affirmed the LCHO's determination. Further, the Trial Division held that § 1104(b) does not require that buildings constructed on the seized land after seizure be returned to Meriang Clan, and held that it lacked jurisdiction to determine ownership of the buildings.

Appellants filed this appeal, contending that the Trial Division erred in failing to grant a trial *de novo*, that there was insufficient evidence to support the claim of Meriang Clan, and that the Trial Division erroneously adopted the LCHO findings of fact. Additionally, PPLA contends that the LCHO lacked jurisdiction to decide the case. Meriang Clan cross-appealed, contending that the Trial Division erred in holding that Meriang Clan did not become the owner of the buildings when it prevailed on its § 1104(b) claim to the land.

I.

[2] KSPLA is an entity created to, among other things, hold title to any public lands which Koror State receives from the PPLA. The PPLA is an entity created to, among other things, hold title to the public land in the Republic of Palau. 35 PNC § 210(b) and § 215(a).

We first address the PPLA's contention that the LCHO determination is void because it lacked jurisdiction to determine ownership of the property. The PPLA grounds its argument on Article X, Section 5 of the Palau Constitution, which provides in pertinent part that "The Trial Division of the Supreme Court shall have original and exclusive jurisdiction over . . . those matters in which the national government or a state government is a party." PPLA claims that it is the "national government" for purposes of Article X, Section 5, and that the Trial Division therefore had the exclusive jurisdiction to determine ownership of the property.

The Trial Division, after a thoughtful and reasoned analysis, concluded that the PPLA is not the equivalent of the national government for purposes of Art. X, Sec. 5, and held that the LCHO ⊥13 had jurisdiction to decide the matter. PPLA contends that the Trial Division erred in holding that the PPLA is not the equivalent of the national government for jurisdictional purposes.

We have not addressed this question before, [3] nor do we find it appropriate to do so here. The PPLA did not file or otherwise assert a claim to the subject property before the LCHO. It was therefore not a party to the LCHO proceedings. Because the PPLA was not a party before the LCHO, we see no reason to decide the question whether the LCHO would have had jurisdiction if the PPLA had been a party. We do not render advisory opinions. *See Koror State Government v. Republic of Palau*, 3 ROP Intrm. 127, 128-29 (1992).

II.

Having decided that the LCHO had jurisdiction to determine ownership of the property, we next address the question whether the Trial Division erred in failing to allow a trial *de novo*. The appellants' requests for a trial *de novo*[4] stemmed from the fact that a substantial portion of the testimony of Baules Sechelong, Meriang Clan's only witness, was not included in the transcript of testimony because it was not audible on the tape recording made of the LCHO proceedings. Also, there were numerous other instances where a word or phrase of testimony of various other witnesses were "indiscernible" or "inaudible" according to the transcript of testimony.

The Trial Division, while acknowledging that "the most compelling argument for a trial *de novo* or supplementation of the record is the presence of numerous gaps in the tapes of the hearing before the LCHO", denied the motions for trial *de novo* because the movants did not submit any statement or proof concerning the content of the omitted testimony.

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[3] In *KSPLA v. Diberdii Lineage*, 3 ROP Intrm. 305 (1993), we held that a state public land authority was not the equivalent of a state government for purposes of Art. X, Sec. 5.

[4] In addition to requesting a trial *de novo*, KSPLA also moved to supplement the record by having the witnesses who testified before the LCHO testify before the Trial Division. The motion was denied. Because that motion was essentially a request for a trial *de novo* or partial trial *de novo* and is governed by the same principles as those that apply to the motion for trial *de novo*, the motion will not be addressed separately in this opinion.

⊥14 We will not disturb the Trial Division's decision to deny a motion for trial *de novo* absent a showing that the Trial Division abused its discretion. *See Ngiratreked v. Joseph*, 4 ROP Intrm. 80, 83 (1993). Whether the Trial Division abused its discretion will depend upon the particular facts and circumstances of the case. The existence of severe deficiencies in the record is an important factor in determining whether to grant a trial *de novo*. *Klai Clan v. Bedechel Clan*, 2 ROP Intrm. 84, 88 (1990). The court below, while recognizing that deficiencies existed in the record due to the omitted testimony, concluded that a trial *de novo* was not warranted because the appellants could not point to "particular facts of importance to the resolution of [the case]" that were shown by the omitted testimony.

There is no Palauan precedent to look to for guidance in resolving the question of the scope of the Trial Division's discretion to deny a trial *de novo* where a substantial amount of testimony is missing from the record due to tape gaps. In the United States, however, the appellate rules of many courts deal with the procedure to be followed when faced with incomplete transcripts on appeals to those courts, and cases which apply such rules provide helpful guidance to the issue at hand.

In *Feldman v. Katz*, 325 P.2d 597 (Cal. App. 1958), the court reporter suffered a stroke and could not transcribe her notes of the trial proceedings, nor could any other reporter. The appellant, whose trial counsel was replaced by new counsel for the appeal, was unable to reconstruct the record and moved for a new trial. Opposition to the motion was on the grounds that the movant never submitted a proposed statement of facts. The motion for new trial was denied. On appeal, the court held that it was an abuse of discretion to deny the motion for new trial, holding that under the circumstances, there was no real possibility of movant's being able to submit an agreed statement of facts. Similarly, in *Fickett v. Rauch*, 187 P.2d 402 (Cal. 1947), the court held that, where the court reporter had died, it would be unreasonable to require the appellant to prepare an agreed statement from insufficient data and the denial of a new trial was an abuse of discretion.

Ordinarily, the mere fact that a portion of the transcript is missing due to no fault on the part of the appellant will not in itself entitle him to a trial *de novo*. It is not unreasonable to first require him to make a reasonable effort to supplement the record with an agreed statement of facts or some offer of proof concerning the missing testimony unless it would be impractical under the circumstances of the case.

⊥15 While in the majority of cases it will be reasonable, and perhaps desirable, for a court reviewing an LCHO decision to require some showing or offer of proof which indicates that omitted testimony is material to the issues presented before granting a trial *de novo*, the circumstances of the individual case may prevent the ability to make such a showing. A party may normally be expected to recall his own testimony or perhaps even the testimony of witnesses called by him in support of his claim. A party may be less likely, however, to recall the testimony given by other parties in support of other claims. The task of recall is doubtless made more difficult if the movant was not represented by counsel before the LCHO in that counsel is much more likely to recognize what testimony is material to the issues and to take notes. An appellant faces similar difficulties if he is represented on appeal by an attorney other than the one

who represented him before the LCHO. *See United States v. Selva*, 559 F.2d 1303, 1306 (5th Cir. 1977) (holding that when a criminal defendant is represented on appeal by counsel other than his trial counsel, it is not reasonable to require him to "articulate the prejudice that may have resulted from the failure to record a portion of the proceedings.").

Clearly, the greater the quantity of missing testimony, the greater is the likelihood that it contained evidence material to the appeal. In the instant case, a substantial portion of the testimony of Baules Sechelong, the only witness called by the prevailing party before the LCHO, is missing. In the Trial Division proceedings, the appellants could not recall what Baules Sechelong said four years earlier before the LCHO.[5] Hence, they could not make any good faith representation to the Trial Division that would show that the missing testimony would bring forth facts important to the resolution of the appeal.[6] It follows that they ⊥16 could not reconstruct the record by agreement. None of the appellants was represented by counsel before the LCHO except for Luii, and the counsel she had for the LCHO hearing did not represent her on the appeal to the Trial Division at the time the motions for trial *de novo* were filed pursuant to the Trial Division's orders establishing the time limits for the filing of motions for trial *de novo* and supplemental briefs.[7]

Considering the totality of these circumstances--and we emphasize that our decision today is not based on any one of the above factors singly, but rather on the accumulation of factors--we hold that it was an abuse of discretion to deny appellants the opportunity to at least cross-examine Baules Sechelong to fill in the tape gap in his testimony. In contrast to the dissent, we do not discount the importance of cross-examination testimony to an appeal. Often the appellate court will need to review the entire testimony of a witness, both direct and cross-examination, in order to determine whether the lower tribunal's decision is supported by the evidence. Although the dissent concedes that Baules' missing cross-examination testimony may have contained admissions damaging to his claim--and notes that appellants were able to mount an attack on his credibility even without the missing testimony--it speculates that it is unlikely that the cross-examination was damaging.[8] While it is true that a lower court's findings are not

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[5] The passage of four years between the LCHO hearing and the motion for trial *de novo* stemmed in part from the fact that the Trial Division initially vacated the LCHO determination, holding that the LCHO lacked jurisdiction over the matter because KSPLA was a party. That decision was appealed to this Court, reversed, and remanded to the Trial Division for further proceedings, which resulted in the judgment which is the subject of this appeal. *See KSPLA v. Diberdii Lineage*, 3 ROP Intrm. 305 (1993).

[6] The dissent finds it noteworthy that in 1990 KSPLA and Luii filed briefs arguing the merits of the case notwithstanding the missing testimony. We do not think it is remarkable that counsel tried to make the best argument they could using those portions of the record that were available instead of abandoning any argument on the merits. In any event, the filing of those briefs did not, as the dissent concedes, bar them from seeking and obtaining a trial *de novo*.

[7] We find no support in the record for the dissent's conclusion that Luii obtained new counsel as a "strategy decision" or that, indeed, it was at her behest that her original attorney withdrew from representing her after the appeal was filed.

[8] The dissent's observation that "there is no reason to believe that the Trial Division's reluctance to reweigh the evidence would have been overcome by the missing testimony" is

often disturbed based upon some admission or contradiction elicited on cross-examination, it is certainly not unheard of,[9] and we see ⊥17 they should be in this case.

With regard to the other tape gaps, they were minor in length, consisting of just a word or phrase for the most part, and did not preclude meaningful review of the LCHO decision. Accordingly, we find no error in the refusal to allow appellants to take additional testimony from other witnesses.

CONCLUSION

The Trial Division's denial of the motion for trial *de novo* is REVERSED insofar as it prevented appellants from cross-examining Baules Sechelong to compensate for the failure to record his LCHO cross-examination testimony, and the case is REMANDED to the Trial Division for further proceedings which shall allow appellants to cross-examine Baules Sechelong on the testimony he gave before the LCHO. Such cross-examination is all that is required as supplementation of the record, but the Trial Division may, in the exercise of its sound discretion, permit any further supplementation it deems appropriate. After listening to the cross-examination and considering such other supplementation it may choose to allow, the Trial Division shall review the LCHO decision based upon the record of the LCHO proceedings as supplemented. We AFFIRM those portions of the Trial Division decision that rejected the PPLA claim of lack of jurisdiction and that denied the motions for trial *de novo* insofar as the movants sought supplementation of the record beyond the cross-examination of Baules Sechelong. In view of these rulings, we need not address the other issues raised by appellants.

MILLER, Justice, dissenting in part:

I concur in Part I of the majority opinion. For the reasons set forth herein, however, I respectfully dissent from Part II of that opinion, and from the judgment remanding this case for a further hearing and decision. I would instead affirm the Trial Division's decision to deny a trial de novo.[10]

⊥18 The majority opinion correctly states that whether to grant or deny a trial de novo is a matter of discretion, and that we may reverse only if the Trial Division abused that discretion.

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puzzling. Even where the circumstances make it reasonable to require the party requesting a trial *de novo* to make some showing that the missing testimony was material, there is no authority of which we are aware that supports the dissent's suggestion that the test of materiality is whether inclusion of the lost testimony in the record would have resulted in a different outcome in the Trial Division.

[9] *See, e.g., Omrekongel Clan v. Ikluk*, 6 ROP Intrm. 4 (1996), where we reversed a Trial Court finding concerning customary use rights, largely due to the fact that the prevailing party's expert witness contradicted himself on cross-examination.

[10] Had my view prevailed, we would be required to address the other issues raised by appellants as well as appellee's cross-appeal. Since it has not, I follow the majority in deferring that discussion to another day.

The majority also recognizes that although deficiencies in the record may be a reason for exercising that discretion, such deficiencies do not require that it do so -- it is still a matter of discretion. Where we part company is on the question whether the Trial Division abused its discretion in denying a new trial here.

It bears emphasis that the Trial Division did not deny appellants' requests outright. Rather, it directed them to identify what testimony they believed was missing from the record and why that testimony was significant, indicating its willingness to reconsider its ruling "[i]f the parties can point to testimony regarding particular facts of importance to the resolution of this appeal." Order, March 1, 1994, at 2. It seems to me that this was an eminently sensible way to proceed. There is no purpose to holding a trial *de novo* to re-hear missing testimony absent some demonstration that the testimony could affect the outcome of the appeal, much less a statement of what the testimony consisted of.[11]

The majority does not question the use of this procedure as a general matter. It acknowledges that "in the majority of cases it will be reasonable, and perhaps desirable, for a court reviewing an LCHO decision to require some showing or offer of proof which ⊥19 indicates that omitted testimony is material to the issues presented before granting a trial *de novo*." Nevertheless, it finds that, at least with respect to particular testimony, the circumstances of this case required that an exception be made. I do not believe that the factors on which the majority relies, taken singly or on the whole, warrant such an exception. With respect, while I certainly agree that the Trial Division could have taken the route that the Court now mandates, [12] I do not believe that its failure to do so was an abuse of its discretion.

Appellants' lack of legal counsel before the LCHO is entitled to no special weight here. The only individual appellant, Nona Luii, was represented by counsel at the LCHO hearing. Of

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[11] The Trial Division's approach is in accord with a recent U.S. appellate court decision on the subject:

> "We conclude that an appellant seeking a new trial because of a missing or incomplete transcript must 1) make a specific allegation of error; 2) show that the defect in the record materially affects the ability of the appeals court to review the alleged error; and 3) show that a [Fed. R. App. P.] Rule 10(c) proceeding has failed or would fail to produce an adequate substitute for the evidence. We believe these factors would be presented only in rare circumstances."

Bergerco, U.S.A. v. Shipping Corp. of India, 896 F.2d 1210, 1217 (9th Cir. 1990). The Rule 10(c) proceeding referred to requires an appellant, where a transcript is unavailable, to "prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection," and to serve it on the appellee to review for objections.

[12] I should be quite clear that while I do not believe the Trial Division was required to hold a trial *de novo* or take additional evidence, neither do I believe that it was forbidden to do so. *Cf. Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 918 (7th Cir. 1994) ("When an issue is governed by a deferential standard of review, such as abuse of discretion, the implication is that two district judges who reached the opposite result in identical cases might both be affirmed.").

the governmental appellants, PPLA, of course, did not even appear and is entitled to no solicitude here. And KSPLA, which obviously had the means to retain counsel, should not now be heard to argue that its decision not to do so has made its appeal more difficult.

Nor do I believe that it should matter that Luii was represented by different counsel by the time her motion for a trial *de novo* was filed. In the first place, the Trial Division file reveals that the same counsel who represented Luii at the LCHO also filed her notice of appeal and her original brief on appeal (which, as discussed below, did not seek a trial *de novo* or make any complaint about the state of the record), and that the substitution did not come about until sometime between the Trial Division's original decision vacating the LCHO determination on jurisdictional grounds and the proceedings on remand after our reversal of that decision. *See* Majority Opinion at 10 n.5.

In any event, the decision whether to retain new counsel is a matter of strategy, requiring a balancing of the perceived benefits against the known costs, an obvious one of which is new counsel's unfamiliarity with the prior proceedings. A party who has made that choice [13] should live with its consequences, and certainly ⊥20 should not be entitled to special consideration because of it.[14]

That four years had passed between the hearing and the appellants' motions is also insufficient, in my view, to require a different result. The transcript in this case was completed in August 1990, just five months after the LCHO hearing. Nothing prevented the parties and their counsel from acting at that time, when memories were still fresh, to memorialize any critical omissions from the record. Again, while I believe that the Trial Division had the discretion to take into account the passage of time, I would not limit its discretion where, as I believe is the case here, due diligence could have obviated the difficulties caused by that delay.

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[13] It is appropriate to note that Luii's former counsel is not deceased and is still a member of the Palau Bar. Luii has not argued, and there is nothing in the record to suggest, that he abandoned his representation of her, or that the change of counsel was not her decision.

[14] *Feldman v. Katz*, 325 P.2d 597 (Cal. App. 1958), although supportive of the majority's position, is perhaps distinguishable on its facts: the trial had lasted four days, no transcript at all was available, and, although appellate counsel had sought the assistance of trial counsel, the latter had declared himself unable to recall all of the factual and evidentiary disputes that had arisen at trial. *See* 325 P.2d at 601.

United States v. Selva, 559 F.2d 1303 (5th Cir. 1977), is, obviously, a criminal, and not a civil, appeal, and therefore involves considerations not present here. Most important, perhaps, is the right of a criminal defendant, and the appellate court itself, to raise certain "plain errors" even though they were "not brought to the attention of the court". *See* ROP R. Crim. Pro. 52(b). Trial counsel -- who, by definition, missed them the first time around -- may be of little assistance in bringing such errors to the attention of appellate counsel. *See Selva*, 559 F.2d at 1306 ("[T]o require new counsel to establish the irregularities that may have taken place would render illusory an appellant's right to notice plain errors or defects, . . . , and render merely technical his right to appeal.").

It is particularly noteworthy in this regard that both Luii and KSPLA filed briefs in this matter in 1990. *See* Opening Brief by Appellant Kerekur Clan, filed November 9, 1990; Opening Brief of Appellant Koror State Government, filed November 19, 1990. Although both raised the jurisdictional issue on which the initial Trial Division decision was based, both also argued that the LCHO had erred on the merits. Neither party requested a trial de novo nor made any suggestion whatsoever that the LCHO transcript was deficient. I do not mean to suggest that either party was barred by that omission from seeking this remedy after the case was remanded. I do, however, strongly believe that their delay in ⊥21 doing so should not work to their advantage now by excusing their non-compliance with the Trial Division's request for specificity.[15]

Finally, I do not believe that the fact that the lost testimony was that of the successful claimant's only witness requires a different result. To the extent that the omitted testimony was direct testimony by Baules Sechelong in support of the claim of Meriang Clan, and insofar as Meriang was faced with a challenge by appellants to the sufficiency of the evidence supporting the LCHO's determination in its favor, *see* Order, June 16, 1994, at 9-10, it would seem to me that any prejudice arising out of that omission fell on Meriang and not the appellants here.

As far as the cross-examination of Baules is concerned, the injury to appellants from its omission from the transcript is entirely speculative. I do not question the importance of cross-examination, but its importance is primarily at trial before the finder of fact, and not on appeal. Here, there is no suggestion that the appellants were denied the opportunity to fully cross-examine Baules before the LCHO, which had the primary responsibility for assessing his credibility. Even with a deficient record, appellants were able to mount an attack on Baules' credibility before the Trial Division.[16] Not surprisingly or inappropriately, the court was loath to "second guess" the LCHO's determination in this regard. Order, June 16, 1994, at 7; *see Remengesau v. Sato*, 4 ROP Intrm. 230, 233 (1994) ("[T]he trial court should consider and may give weight to the fact that the LCHO heard and observed the witnesses and accepted one version of events rather than another."). There is no reason to believe that the Trial Division's reluctance to reweigh the evidence would have been overcome by the missing testimony, and we should not second guess its decision -- fully aware of the scope of its discretion, *see* Order at 6 (citing *Ngiratreked v. Joseph*) -- not to hear additional testimony before arriving at its judgment.

It is, of course, possible that the cross-examination of ⊥22 Baules that is now lost included admissions damaging to his claim. This seems unlikely, since no such admissions were alluded to in the closing statements that are part of the transcript. But even to speculate about that possibility is to come full circle in this discussion. If significant admissions were made that could have affected the outcome of this case, then it is not too much to ask that the appellants bring them to the attention of the court. Even at a remove of four years, if Baules gave away the

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[15] PPLA did not file any brief in 1990. But again, that is because it failed to appear at the hearing, failed to file any appeal, and did not even seek to intervene until 1994. Plainly, it is in an even worse position to suggest that the passage of time entitles it to special consideration.

[16] *See* Order, June 16, 1994, at 6: "[L]arge portions of appellants' briefs and oral arguments were devoted to pointing out factual discrepancies in the testimony given by Baules Sechelong and conflicts between his testimony and the record in Civil Action No. 105."

store during the LCHO hearing, there ought to be someone who remembers it.

Having properly rejected the last jurisdictional challenge to the LCHO's determination, we ought now to consider the Trial Division's affirmance of that determination on its merits, and not further delay the resolution of this case. I respectfully dissent.