Yangilmau v. Carlos, 7 ROP Intrm. 169 (1999)

FLORENTINE YANGILMAU,
Appellant,

v.

MARIANO W. CARLOS, et al.,
Appellees.

CIVIL APPEAL NO. 13-97
Civil Action No. 64-93

Supreme Court, Appellate Division
Republic of Palau

Argued: December 7, 1998
Decided: February 26, 1999

Counsel for Appellant: Yukiwo P. Dengokl
Counsel for Appellees: Mariano W. Carlos

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; R. BARRIE MICHELSEN, Associate Justice; LARRY W. MILLER, Associate Justice

MICHELSEN, Justice:

INTRODUCTION

This appeal involves an action for trespass by Florentine Yangilmau against Mariano Carlos, his nephew. In approximately 1992, Carlos began constructing a house for his mother, Quadalupe, who is Plaintiff's sister. As the construction was nearing completion, Plaintiff complained to Carlos that the house encroached on land identified as Lot 1718-b in the Tochi Daicho and demanded that the addition be dismantled. The portion of Lot 1718-b in question is adjacent to the lot used by Plaintiff for his residence, and Plaintiff testified that at all material times herein, he used the disputed portion of the land to raise crops. Carlos counter-claimed against Yangilmau for expenses incurred as a result of Yangilmau threatening the workers building the house with arrest.

Both parties claim rights on the property as heirs of Tahaserimeng, who died in the early 1950's. The land is within the area called Echang, which is part of the 1962 Land Settlement Agreement between the Trust Territory Government and the clans of Ngerkebesang ("1962 Settlement"), the terms of which have been frequently litigated. *See, e.g., Torul v. Arbedul* , 3 TTR 486 (Tr. Div. 1968); *Espangel v. Tirso* , 2 ROP Intrm. 315 (1991); *Lulk Clan v. Estate of Tubeito*, 7 ROP Intrm. 17 (1998).

The Trial Division held that both Yangilmau and Carlos are entitled to use Lot 1718-b

pursuant to the 1962 Settlement, and that the slight encroachment of the house onto that lot was sufficiently minor to deny Yangilmau's request for destruction of the house. The Trial Division also held that neither party had sufficiently proven a case for money damages. Judgment was entered in favor of Defendant on the complaint, and for Plaintiff on the counterclaim.

Both parties appeal. Yangilmau appeals from the finding that his right to use of the property was non-exclusive, and Carlos appeals from the Trial Division's failure to find that the lot in question is owned jointly by the heirs of Tahaserimeng. Neither party argued that the Trial Court erred in finding that they had not sufficiently proven a case for damages. We affirm in all respects.

⊥170 DISCUSSION

A. Appellant Yangilmau's Contentions

Yangilmau's principal assignment of error is that the Trial Division erroneously held that his use of the disputed portion of lot 1718-b was non-exclusive. Yangilmau bases his claim of exclusive possession of the land on two arguments: (1) that Pulo Anna custom entitles him, as oldest male heir of Tahaserimeng, the previous owner of the land, to half of his ancestor's lands, and (2) that the 1962 Settlement was intended to award exclusive possession of lands in Echang to those using the lands as of the time of its signing. In addition, Yangilmau contends that the Trial Division erred in finding that Carlos' encroachment on the property was "slight."

1. Claim of Pulo Anna custom

Both parties begin with the assertion that lot 1718-b was owned by Tahaserimeng, one of the original settlers from the Southwest Islands, and an ancestor of both Yangilmau and Carlos. [1] Yangilmau contends that, as oldest male heir of Tahaserimeng, Pulo Anna custom entitles him to a full half of Tahaserimeng's lands. Yangilmau offered his own testimony at trial regarding this issue, and introduced a German book on land ownership that appears to support this point. Carlos disputed whether there was such a custom and presented other witnesses who testified that Pulo Anna custom required a deceased's heirs to share the deceased's property equally.

This Court requires customary law to be proven by clear and convincing evidence, usually through the testimony of expert witnesses. *Udui v. Dirrecheteet* , 1 ROP Intrm. 114 (1984); *Ngirmang v. Qrrukem* , 3 ROP Intrm. 91 (1992); *Remoket v. Omrekongel Clan* , 5 ROP Intrm. 225 (1996). In this case, neither side introduced expert witness testimony.

Based on the record, the Trial Division found that the parties had failed to prove the existence of any custom by clear and convincing evidence. This finding is not clearly erroneous. The evidence at trial was inconclusive, since much of the testimony, including the translation of the German book, referred to the disposition of land to a person's natural children. Here, Tahaserimeng died without children of his own, and both Yangilmau and Carlos claim

[1] Tahaserimeng's nephew, Albis, is the father of both Yangilmau and Quadalupe, and is the grandfather of Carlos.

inheritance of his lands as descendants of Tahaserimeng's nephew, Albis. Absent clear and convincing evidence that Pulo Anna custom entitled use of the land to the exclusion of his sister, Quadalupe, Yangilmau's first assignment of error is unfounded.

2. Claim under the 1962 Settlement

Yangilmau's other argument for exclusive rights to use lot 1718-b arise from his interpretation of the 1962 Settlement. Yangilmau bases his right upon a long-expired Trust Territory lease of the disputed property to Jacob, Tahaserimeng's brother and Yangilmau's adoptive father, and upon Yangilmau's continued, uninterrupted use of the lot to the present time. Yangilmau interprets the Settlement Agreement to confer upon each resident the exclusive right to possess "the particular land he or she occupied ⊥171 or used when the 1962 Agreement was signed." Yangilmau cites no authority for this proposition, save the language of the document itself.

The phrasing of the 1962 Settlement does not support such a narrow reading. It reads, in pertinent part:

> . . . no provision of this Deed shall be construed to effect, retroactively or otherwise, or to rescind, revoke, cancel, alter, or change in anywise whatsoever, the rights and interests of any person, family, lineage or clan residing on or using or having members residing on or using that part of the premises herein granted known as "E-ang" . . . in and to the continued peaceful possession, occupancy, and use of the said lands for an indefinite period in the future, and the Grantees do hereby expressly covenant and agree further with the Government that the said residents shall and may continue for an indefinite period in the future to peaceably possess, occupy, and use lands within the area known as "E-ang" without any suit, trouble, molestation, eviction or disturbance by the Grantees, their heirs, successors and assigns, or any other person or persons claiming through, from, or under the same . . . .

The language of the 1962 Settlement nowhere mentions "exclusive" possession of Echang lands by those holding them in 1962. Rather, the entire covenant is phrased in general terms, giving "any person" residing in Echang at the time the right to use "said"-- i.e. Echang-- lands. We agree with the Trial Division's statement that the "Land Settlement Agreement does not suggest how land use rights are allocated among the Echang residents."

Although the 1962 agreement made no reference to exclusive possession, the Trial Division nevertheless held that, for practical purposes, Yangilmau was entitled to reasonably exclusive possession of the lands he has been using. The Trial Division held that "the intent of the 'Echang Covenant' was that the Echang residents not unreasonably interfere with their neighbors' use and enjoyment of their property. Thus, where, as here, a person is farming the same land his relatives farmed in 1962, there should be no unreasonable interference." This holding was not error, and thus, Yangilmau could recover in trespass only if Carlos' intrusion onto lands being used by Yangilmau was "unreasonable."

3. Appeal of finding that encroachment was "slight."

Yangilmau's only other assignment of error is that ". . . it was unreasonable and erroneous for the trial court to conclude the encroachment was slight," citing several pages transcript. Yangilmau bases this contention on his testimony that the construction resulted in the destruction of 3 banana trees, 20 taro plants, and 10 sis plants, and thus, due to the large number of plants destroyed, the encroachment could not be considered ⊥172 "slight." The Trial Division's finding that the encroachment was "minuscule interference with Yangilmau's farming," is a factual finding reviewable under a "clearly erroneous" standard. *Osarch v. Wasisang*, 7 ROP Intrm. 82 (1998).

The record indicates that the Trial Division correctly characterized the actual encroachment of the completed house as indeed "minuscule." A map introduced into evidence by Yangilmau indicates the house encroaches on only a fraction of the land claimed by Yangilmau. Moreover, while Yangilmau testified that the plants were destroyed by Carlos' bulldozing the site before building,[2] there is no indication that at least some of the land could not now be re-planted. Yangilmau has not appealed the finding that he offered no evidence on the value of the damaged plants.

Based on the entire record, it cannot be said that the Trial Division's characterization of the encroachment as "minuscule" was clearly erroneous, particularly in light of the fact that Yangilmau's right to exclude other heirs of Tahaserimeng is not as expansive as he has claimed. Thus, the decision of the Trial Division entering judgment in favor of Carlos on the complaint is affirmed.

B. Appellant Carlos' Contentions

Appellant Carlos' sole assignment of error is that the Trial Division failed to affirmatively find that title to lot 1718-b belongs collectively to the heirs of Tahaserimeng. Carlos requests a remand of the matter to the Land Court for monumentation and hearing. Carlos never requested such relief in his pleadings. His counterclaim against Yangilmau sought only money damages as relief. In his complaint, Yangilmau never contended that he has title to the property; he only alleges that he has had "lawful exclusive possession and use" of it for several years. There is no occasion to determine who holds the underlying title to lot 1718-b, since the issue before the Court is only whether the use right conferred by the 1962 Settlement is exclusive.

Thus, Carlos' sole assignment of error is rejected, and his appeal is therefore denied.

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[2] Carlos testified that no plants were present before the site was bulldozed. The trial file contains a copy of Yangilmau's responses to interrogatories, which were filed as part of this action in 1993. In these responses, Yangilmau denies that any of his crops were destroyed by Carlos in the construction of the house. However, the responses were not introduced into evidence at trial, nor was Yangilmau cross-examined on this point.