Obak v. Bandarii, 7 ROP Intrm. 254 (Tr. Div. 1998)

THOMAS B. OBAK,
Plaintiff,

v.

IKELAU BANDARII, MUTSUO DELKUU,
ISIMANG BANDARII, and JOHNSON BANDARII,
Defendants.

CIVIL ACTION NO. 98-23

Supreme Court, Trial Division
Republic of Palau

Issued: August 4, 1998

BEFORE: LARRY W. MILLER, Associate Justice.

In October, 1992, the Land Claims Hearing Office determined that the lands at issue in this case were owned by plaintiff Thomas Obak and defendant Ikelau Delkuu, who is also known as Ikelau Bandarii. Ikelau subsequently executed a document transferring her interest in the lands to her children defendants Isimang Bandarii, Mutsuo Delkuu and Johnson Bandarii. On the basis of this document, the Land Court issued certificates of title naming as owners Thomas, Isimang, Mutsuo and Johnson. When the Land Court refused Thomas's request to cancel the certificates and to issue new ones naming only himself and Ikelau, he commenced this action and has now moved for summary judgment. It is his contention, based primarily on prior case law, that Ikelau had no authority to transfer any interest in the lands except with his concurrence. Ikelau dis-agrees, and has submitted the affidavit of an expert in Palauan custom to the effect that a joint owner is permitted to transfer her interest in land to another person, especially, as here, to her children.

⊥255 It is worthwhile to set forth some basic propositions of both Western and Palauan customary land law. On the one hand, there is no question that under Anglo-American property law, while a joint owner of a piece of land cannot transfer the whole land without the agreement of all joint owners, she has the ability to transfer her undivided [1] interest in the property to another person or persons. This is true whether the original ownership is one of joint tenancy or tenancy in common.[2] In this case, we would say that Ikelau has transferred her one-half interest to her children, leaving Thomas and the children as tenants in common, Thomas with his one-half interest in the land, and each child with a one -sixth (one-third of the original one-half) interest.[3]

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[1] "Undivided" denotes that the land is not physically divided, but that each co-tenant owns a proportional interest in the land as a whole.

[2] The only difference is that a transfer by one joint tenant is said to destroy the joint tenancy and create a tenancy in common.

[3] To this extent, as the Court believes defendants' counsel to have agreed at a status

On the other hand, it is clear that under Palauan custom, there are some forms of group ownership as to which no individual has any right to transfer either the whole or even a part interest in the property. Thus, it is by now indisputable that land owned by a clan or lineage cannot be transferred except upon the agreement of the senior strong members of the clan or lineage.[4] It is important to emphasize that clan members cannot be said to own partial interests in the land: not only can one clan members not transfer the land on his own, he alone cannot transfer any part of the land, whether during his lifetime or upon his death. Thus, if the lands in question were clan lands, Ikelau could not transfer anything to her children; they might have an interest in the land as members of the clan, but the owner of the land would be the clan and only the clan.

The question, then, is how to treat joint ownership under Palauan custom where the land is not clan or lineage or even family land. Thomas relies on those cases which appear to treat multiple ownership the same as clan or lineage land to the extent of declaring that one co-owner cannot alienate any portion - even his own - without the consent of all co-owners. The leading case in this regard is *Children of Ngeskesuk v. Espangel*, 1 ROP Intrm. 682 (1989), which involved land jointly-owned by five co-owners, and which clearly states that a sale by one of them was not only ineffective to transfer the land as a whole but also did not convey his one-fifth interest. 1 Intrm. at 692. If *Ngeskesuk* were all that was before the Court, it would grant Thomas's motion without hesitation. For three reasons, however, the Court is not prepared to do so.

First, at least two later cases cited by Thomas follow *Ngeskesuk* to the extent of declaring that one co-owner cannot sell the whole land without the consent of all co-owners, but they do not address (probably because no party argued) whether it would have been possible to transfer a partial interest. *Rengulbai v. Solang*, 4 ROP Intrm. 68, 72 (1993) (holding "purported transfer . . . ⊥256 ineffective . . . because it was not signed by all of the heirs"); *Ngeltengat v. Ngiratecheboet*, 4 ROP Intrm. 240, 242 (1994) (citing *Rengulbai* for the proposition that "for a transfer of property to be effective, it must be agreed to by all the heirs who share ownership"). The Court raises this distinction because at least one case that was decided between those two and another decided more recently raise that possibility. *See Miner v. Delngelii*, 4 ROP Intrm. 163, 168 n. l (1994) ("Because Kabino was not made a party to this lawsuit, it is not possible to decide at this time whether the "Land Sale" document transferred his one-fifth interest in Mimai."); *see also Wally v. Sukrad*, 6 ROP Intrm. 38, 41 n.9 (1996) ("While a co-owner may sell his undivided share of the land, he may not sell he land or a portion of it without the agreement of all co-owners").[5]

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conference, the certificates of title should at least be changed to reflect that Thomas retains his one-half interest in the property and not a one-quarter interest as they now suggest. Assuming that Thomas and Ikelau started out with equal interests, Ikelau certainly cannot expand her interest from 50% to 75% simply by giving her portion to her children.

[4] The same has also been said, although in only one case of which the Court is aware, *see Riumd v. Tanaka*, 1 Intrm. 597 (1989), of "family" land.

[5] For better or worse, the one common denominator of all of these cases is that this Court was a member of all of the appellate panels, and the author of *Wally*.

Second, there are other cases that, while not questioning the specific proposition at issue in *Ngeskesuk*, hold, either implicitly or explicitly, that the interests of joint owners of land pass separately upon their respective deaths. *Rengulbai, supra* 4 ROP Intrm. at 74 (1993) ("the disposition of the deceased heirs' share of the 10 lots is governed by 39 PNC § 102(d)"); [6] Wally. supra 6 ROP Intrm. at 40 (same re Palau District Code §801(c)); *Smau v. Emilian*, 6 ROP Intrm. 31, 36 (1996) (concluding that appellant and appellee succeeded to the respective interests of their fathers). That joint interests may be passed separately after death differentiates co-ownership from clan or lineage ownership and at least raises the question whether and why the situation should be different during a co-owner's lifetime.

Third, and most fundamentally, defendants have submitted an affidavit of an expert who, as stated earlier, affirms that, contrary to *Ngeskesuk*, a co-owner of land held under Palauan custom is entitled to transfer her interest in the land. One of the peculiarities of our early determination to treat custom and customary law as facts to be proven, *Udui v. Dirrecheteet* , 1 ROP Intrm. 114 (1984), is the possibility that two different courts may determine the content of custom differently on the basis of the different records before them. Compare Decision, *Ngiraloi v. Trolii*, Civil Action No. 468-93 (April 24, 1995) (J. Hoffman) with Decision, *Ngiraloi v. Estate of Tell* , Civil Action No. 440-95 (June 7, 1996) (J. Miller). To that extent, although there are probably some customary matters that have attained the status of law, [7] issues of custom - if not agreed to - must generally be proven anew in each case in which they arise. Here, the Court does not believe that the principle stated in *Ngeskesuk* is so firmly established that the Court must accept it even in the face of a proffer of expert testimony to the contrary.

For all of these reasons, Thomas's motion for summary judgment is denied. A status conference to set a trial date is hereby scheduled for August 11, 1998, at 1:30 p.m.

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[6] Indeed, this result in *Rengulbai*, which involved the same lands as *Ngeskesuk*, was dictated by *Ngeskesuk's* holding that the heirs did not own the lands as joint tenants.

[7] A prime example is the rule, stated earlier, requiring senior strong member approval of clan or lineage land transfers.