Tarkong v. Mesebeluu, 7 ROP Intrm. 85 (1998)

BASILISA TARKONG,
Appellant,

v.

AUGUSTINE MESEBELUU,
Appellee.

CIVIL APPEAL NO. 3-97
Civil Action No. 94-95

Supreme Court, Appellate Division
Republic of Palau

Argued: May 15, 1998
Decided: June 25, 1998

Counsel for Appellant: Johnson Toribiong, Esq.
Counsel for Appellee: William L. Ridpath, Esq.

BEFORE: LARRY W. MILLER, Associate Justice; ALEX R. MUNSON, Part-Time Associate Justice; and JANET H. WEEKS, Part-Time Associate Justice.

MILLER, Justice:

In this appeal, the Trial Division upheld a determination by the Land Claims Hearing Office that the ownership of property called Ollaolmalk, located in Melekeok State, should be awarded to appellee.[1] We affirm.

BACKGROUND

Kodep Brel, who died intestate in 1992, inherited Ollaolmalk from his father. Kodep owned the property in fee simple. Appellant Basilisa Tarkong is Kodep's adopted sister. Appellee Augustine Mesebeluu is one of Kodep's nine children.

Before the LCHO, Tarkong claimed ownership of one-half of the property based on an oral promise by Kodep to her in August 1995 when Kodep was hospitalized. She alleged that Kodep made the promise because she and Kodep were adopted children of the former owner of the property. The promise was never put in writing.

Mesebeluu claimed ownership based on a decision by Kodep's maternal clan during the omengades/omengkad el blals (post-funeral ceremony) held for Kodep. Mesebeluu contended that, at Kodep's request, he had provided financial assistance of approximately $1500 to Kodep to pay the legal bills in the earlier proceedings in which Kodep had regained title to the property.

[1] The land is designated as Cadastral Lot No. 016 C 20, Tochi Daicho Lot No.331.

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See generally Brel v. Ngiraidong, 3 ROP Intrm. 107 (1992).

The LCHO concluded that Mesebeluu was the successor-in-interest to Kodep's interest in Ollaolmalk. The ruling was based on a determination that the clan decision made during Kodep's omengades was consistent with the provisions of 39 PNC § 102(d) [2] ⊥86 governing the disposition of Kodep's land.

The Trial Division affirmed the LCHO determination, noting that the alleged promise from Kodep to Tarkong was not in writing and that no deed had been executed. It determined that Tarkong's claim was not valid because the Statute of Frauds requires the existence of a written instrument to create an interest in real property.

The Trial Division also rejected Tarkong's argument - raised for the first time on appeal - that Kodep's paternal lineage was primarily responsible for Kodep prior to his death, and that the maternal lineage therefore had no authority to award the property to Mesebeluu. Although the Trial Division inferred from the record that Tarkong was incorrect about the role of the paternal lineage, it rejected Tarkong's argument on the grounds that she waived it by not raising it below.

ANALYSIS

Tarkong's principal contention on appeal is that the Trial Division erred to the extent it held that her new legal argument could not be raised for the first time on appeal. We agree with this contention as a general matter. In the circumstances of this case, however, we believe that the trial court was correct in rejecting that argument.

In refusing to consider Tarkong's argument, the trial court cited *Sugiyama v. Ngirausui*, 4 ROP Intrm. 177, 179 (1994), and *Koror State Government v. Republic of Palau* , 3 ROP Intrm. 314, 322 (1993). As she correctly points out, both of these cases involved Appellate Division review of Trial Division decisions and thus do not necessarily resolve whether new legal issues may be raised or considered on appeals from the LCHO to the Trial Division. We have repeatedly made clear -- in contrast to the clearly erroneous standard governing Appellate Division review of the Trial Division's factual findings -- that the Trial Division has a great deal of discretion in reviewing LCHO findings. [3] While we have perhaps been less explicit on this

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[2] 39 PNC § 102(d) states, in pertinent part:

> If the owner of fee simple land dies without issue and no will has been made . . . or if such lands were acquired by means other than as a bona fide purchaser for value, then the land in question shall be disposed of in accordance with the desires of the immediate maternal or paternal lineage to whom the deceased was related by birth or adoption and which was actively and primarily responsible for the deceased prior to his death.

Since Kodep inherited Ollalolmalk, he acquired the land by means other than as a bona fide purchaser for value.

[3] "The Trial Division may adopt in whole or in part the LCHO findings, may disregard

point,[4] we ⊥87 believe that the same discretion exists as to the consideration of new legal issues, whether raised by the parties or by the Court itself.[5]

Notwithstanding the foregoing, we believe that the Trial Division was correct in refusing to consider Tarkong's argument that Kodep's paternal lineage was entitled to dispose of ollaolmalk pursuant to § 102(d). As the trial court noted, although Kodep's paternal lineage gathered together at the same time as his maternal lineage, the paternal lineage did not discuss the property. Indeed, as is clear from the record and the arguments before this Court, Kodep's paternal lineage had not taken any action with respect to the land at the time Tarkong first made her argument to the trial court and still has not done so. Whether or not this inaction supports the inference that the paternal lineage itself recognized that the maternal lineage was the proper one to dispose of the property, as the trial court suggested, we believe that the lineage's failure to act is dispositive here for two reasons.

First, we believe Mesebeluu is correct to argue [6] that the lineage's failure to act leaves Tarkong without standing to raise this argument. It would be one thing if the paternal lineage had met and decided that Tarkong should receive the land. It is quite another where there has been no meeting and there is no way of knowing how the lineage would choose to dispose of the land. We do not believe a party has standing to raise an argument where, even if the argument

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them altogether and make its own findings based on the existing record (trial de novo on the record), may make its own findings based on evidence and testimony presented in a new trial (trial de novo), or may proceed with any combination of the above." *Diberdii Lineage v. Iyar*, 5 ROP Intrm. 61, 62 (1995).

[4] In *Ngowakl v Ngoakl*, 5 ROP Intrm.150,15152 (1995), we noted that, in the Trial Division, the appellee had successfully argued "for the first time that his father died on March 15, 1964 and that, pursuant to Palau District Code section 801 (c) as it existed at the time of death, he is the proper heir to the land." Our affirmance drew no distinction between the property of acceptance of the new factual evidence (the date of death) and its consideration of the new legal argument (the applicability of 801) to which that fact was material.

In *Wasisang v. Remeskang*, 5 ROP Intrm. 201,201 (1996), we rejected appellant's argument that "the trial court should be reversed because [it] *sua sponte* applied § 801 . . . to determine the ownership of the disputed property." Instead, we held that "there is nothing to prevent the trial court from applying the relevant law to the facts on an appeal from the LCHO, regardless of whether it was briefed by the parties." *Id.* at 202.

[5] In a footnote, the Trial Division seemed to suggest that an appellant could only raise new legal arguments in conjunction with a motion for a trial de novo. While new arguments may often depend on new facts, that is not necessary the case. Here, for example, Tarkong plausibly contends that her legal argument is viable on the basis of facts already present in the LCHO record.

[6] Notably, Mesebeluu's contention in this regard is not a new argument but was presented to the Trial Division as an alternative basis for rejecting Tarkong's new theory. *See* Appellee's Brief in Civil Action No.94-95, September 29,1995, at 4 ("Another flaw in Tarkong's new theory is that she has no standing to raise this issue.").

were accepted, it is entirely speculative that she would succeed in her claim.[7]

Second, and relatedly, we believe that the failure of the paternal lineage to assert its right to dispose of the land constitutes a waiver of that right. We accept the contention of Tarkong's counsel at oral argument that, as a ⊥88 matter of custom, the lineage was not required to make any disposition immediately after Kodep's death. Nevertheless, the LCHO proceeding that gave rise to these appeals was not held until more than two years later. That proceeding was initiated by Mesebeluu's claim, which relied on the action taken by Kodep's maternal lineage. If the paternal lineage wished to assert its own right to dispose of the land or to select someone other than Mesebeluu to receive it, we believe that it was required to do so in time for it or its designee to file a claim with the LCHO. Thus, even were Tarkong otherwise entitled to assert the rights of the lineage here, its claim would be barred.

The decision of the Trial Division awarding the land Ollaolmalk to appellee Augustine Mesebeluu is accordingly AFFIRMED.

[7] That Tarkong herself is a member of the lineage does not change this result. Tarkong's claim before the LCHO was solely on her own behalf and not on behalf of any lineage. A party who makes a claim on one basis cannot prosecute her appeal on another. Moreover, as noted below, the fact that the lineage failed to file its own claim for the land before the LCHO bars it from now asserting a claim, whether represented by Tarkong or anyone else.