

JUDGMENT

It is ordered, adjudged, and decreed, that:-

1. The plaintiff have and recover from the defendant the sum of \$2,057.75 together with interest thereon from date hereof until paid.
2. The defendant company is entitled to repossess the materials, if they may be found and identified, it employed in the construction of the plaintiff's house.
3. The plaintiff is awarded costs provided by law.

DIRALEMAU ELECHUS, Plaintiff

v.

MAD KDESAU, Defendant

Civil Action No. 381

Trial Division of the High Court

Palau District

December 5, 1969

Action to determine rights in land in Melekeok Municipality, Palau District. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, denied relief to the plaintiff holding that individual ownership as listed in *Tochi Daicho* had not been overcome by evidence in case and was controlling as to such lands and that as to remainder of land in question it was held in trust under the land law custom and any disposition of it would have to be in accordance with the custom.

1. Palau Custom-Generally

That a custom may be subject to certain exceptions is not unusual in application of Palauan custom to a specific set of facts.

2. Palau Land Law-Japanese Survey-Rebuttal

In order to overcome the presumption of the correctness of the *Tochi Daicho* listing there must be a clear showing that the determination is wrong.

3. Palau Land Law-Use Rights

Land may not be held by a clan *ulechel* member as against *ochel* members or at least without the consent of all *ochel* members of the clan, if it is clan land, or of the lineage, if it is lineage land.

4. Palau Land Law-Use Rights

Where *ochel* holds lands received to replace other lands for the benefit of and to transfer to certain persons at her death, she could not transfer such lands without the consent of all the *ochel* members as such would be an invalid transfer which could not be sustained under the custom.

5. Palau Land Law-Transfers--Specific Performance

Specific performance of transfer of interests in land is not a part of Palauan custom since "equivalent" land may be substituted.

6. Palau Land Law-Japanese Survey-Presumptions

However parties themselves regarded Palauan custom as governing control over land in question, court was bound by the effect of the *Tochi Daicho* listing that it was transferred to defendant as his individual land and such action cut off the interests of the clan and lineage members.

7. Courts--High Court

Trial Division of the High Court is bound by decisions of the Appellate Division.

8. Palau Land Law-Generally

Palau custom is not the sole criterion to be considered concerning title to and transfer of land.

9. Palau Land Law-Individual Ownership

Purpose of introducing the concept of individual land ownership was to get away from the complications and limitations of the matrilineal clan and the lineage system as to such individually owned land.

10. Palau Custom-Clans--"Ochel"

An *ochel* adopted from his or her clan to another clan remains an *ochel* member of the original clan, but his or her authority is not as great in the original clan as an *ochel* member remaining in the clan.

11. Palau Custom-Clans-"Ochel"

Members of clan who were not strong members nearly 30 years ago, now may be regarded as strong members having equal authority with any other adult *ochel* member and superior authority to any *ulechel* members concerning clan affairs and clan land control.

Assessor:

Interpreters:

Reporters:

Counsel for Plaintiff:

Counsel for Defendant:

JUDGE PABLO RINGANG

KAZUMOTO H. RENGULBAI and

SINGICHI IKESAKES

NANCY K. HATTORI and

SANAE N. SHMULL

WILLIAM O. WALLY

ITELBANG LUII

TURNER, *Associate Justice*

FINDINGS OF FACT

1. Plaintiff is an *ochel*, a descendant in the female line, of Ngeesusem Clan of Melekeok Municipality, Palau District.

2. Although *ochel* in the clan, she was not as strong a member as other *ochel* members because the plaintiff was adopted into Baulbei Lineage of Udes Clan in Melekeok where she bears the highest female title. The adoption reduced her authority in Ngeesusem Clan.

3. Defendant is an *ulechel*, a descendant in the male line of Ngeesusem Clan, and is listed as individual owner in the Japanese land record, the *Tochi Daicho*, of the six parcels of land in dispute. These are Lot Nos. 75, 78, and 79 in Ngerang Village, and Lot Nos. 245, 268, and 292 in Ngerubesang Village.

4. At the time the defendant registered the land as his individual property in the *Tochi Daicho*, the strong members of the clan knew of it and did not object and one of them, Sebrongel, transferred five of the six lots to him.

5. The sixth lot, Lot No. 268, was transferred to the defendant by inheritance from his father's younger brother.

6. The five lots transferred from Sebrongel to the defendant were acquired as *chelebiil* by Telaulked, the great grandmother of Sebrongel, and were transferred from Telaulked to her daughter, Ordiil, by her to her daughter, Ngerchedaob, and by her to her two daughters, Sebrongel and Kekereldil. Kekereldil died leaving daughters Sofia and Limei who were adopted by Tarmau.

7. Telaulked acquired these and other parcels of land in late German or early Japanese administrations.

8. Sebrongel transferred the five lots to the defendant with the consent of her sister, Kekereldil, but she holds

other lands to replace them for the benefit of and transfer to her sister's two daughters at the time of her death.

CONCLUSIONS OF LAW

This land dispute, involving parcels in Ngerang and Ngerubesang Villages in Melekeok Municipality, grows out of an apparent conflict between land ownership in accordance with Palauan custom and the presumption arising from the ownership registration in the *Tochi Daicho*. The plaintiff, and those who claim under her in behalf of the Ngeesusem Clan, argued:-

1. That the defendant was not authorized to list the land in his own name as owner but only to list it as administrator for the Ngeesusem Clan.

2. That the defendant, as an *ulechel* member of the clan, could not hold the land as individual owner, as against the clan members who are *ochel*.

[1] The evidence is in conflict as to the first proposition, but the plaintiff's position is not sufficiently sustained to overcome the presumption the *Tochi Daicho* listing was correct. The defendant agrees with the general proposition as to clan custom as to control of land, but insisted and was able to prove by convincing evidence that the custom urged by the plaintiff is subject to certain exceptions. This is not unusual in application of Palauan custom to a specific set of facts. *Ebil Adelbai v. Adelbai Ngirchoteot*, 3 T.T.R. 619 at 627.

[2] The proof required to overcome the presumption of the correctness of the *Tochi Daicho* listing has been considered and agreed upon in more than a dozen cases in this court. For a partial listing of the cases and discussion of the principle that "there must be a clear showing that the determination is wrong," see *Keltnguul Ngirudelsang v. Pius !tol*, 3 T.T.R. 351 at 355, 356.

In this case neither the plaintiff nor those claiming under her as against the defendant bothered to check the *Tochi Daicho*, but believed that the defendant was only the administrator. When it was learned only a few years ago that the defendant was listed as individual owner, this suit was brought.

There was little doubt from the evidence that the defendant was told by at least Sebrongel to list it as his own property, and there was no evidence to contradict that others, having authority over the land, also permitted or directed him to list it as his own. There is no doubt the defendant listed the land as his own, believing it to be his.

[3] The ultimate question then is, did the defendant have a right to own the land under Palauan custom even though it had been transferred to him. This issue arises over the recognized custom that land may not be held by a clan *ulechel* member as against *ochel* members or at least without the consent of all *ochel* members of the clan, if it is the clan land, or of the lineage, if it is the lineage land.

The land in question, the plaintiff's witnesses insisted, belonged to the clan and that they, as *ochel* members of the clan, did not approve of nor consent to the defendant's ownership.

The defendant's answer was that whether it was clan, lineage, or individual land made no difference because those having control or ownership of it gave it to him, and those now objecting to the transfer had no right to object at the time of the *Tochi Daicho* listing. Demei, the son of the plaintiff, is an *ochel* in Ngeesusem Clan but was not a strong member because he went with his mother when she was adopted into Udes Clan. Ritong, the plaintiff's sister, was adopted from Ngeesusem to a Ngiwal Clan and like the plaintiff was, therefore, not a strong member, even though an *ochel* in the clan. Sofia and Limei, daugh-

ters of Sebrongel's sister, also *ochel*, were too young to be strong members at the time of the transfer.

[4] All who remained as strong members were Sebrongel and her sister, Kekefeldil, now deceased. Sebrongel testified she and her sister gave the five lots to the defendant. The only evidence to the contrary was testimony that Sebrongel and Tarmau, now deceased, and the adoptive mother of Sofia and Limei, told the plaintiff's witnesses that the defendant was only the administrator, not the owner. Findings of Fact No. 8 resolves the conflicting statements. Granted that Sofia, Limei, and Demei had no authority to object to the transfer in 1940 to the defendant; now, however, if Sebrongel attempts to transfer the remaining lands listed in her name or subject to her control without the consent of all the *ochel* members, it would be an invalid transfer which could not be sustained under the custom. *Rudimch v. Chin*, 3 T.T.R. 323.

The custom applies if the land is lineage or clan land. It is not clear that this is true as to the lands in question, except they were treated as subject to clan's control. Actually, the land was transferred to Telaulked as *chelebiil* property on the death of each of her successive two husbands and descended from her to Sebrongel and Kekefeldil, whose interests were acquired by Sofia and Limei.

[5] It is noted that specific performance of transfer of interests in land is not a part of Palauan custom since "equivalent" land may be substituted. This is in sharp contrast to United States and common law practice generally that land is unique—there is no parcel the same or equal or equivalent of another. A person having acquired an interest in a specific parcel is entitled to enforce that interest and other land may not be substituted for it.

In this case, we have an unhappy mingling of clan or lineage authority with individual property rights. If the land in question was the jointly owned lands of Sebrongel

and Kekereldil, Sebrongel could not cut off the interests in it of Kekereldil without her consent, or of the two daughters, Sofia and Limei, if their mother did not consent. But we have Sebrongel's testimony that Kekereldil did consent, and there is nothing to contradict it except the unconfirmed belief of the plaintiff and her witnesses that the land was not in fact transferred but merely continued, by the *Tochi Daicho* registration, in the administration of the defendant.

[6] However the parties themselves regarded Palauan custom as governing control over the land, we are bound by the effect of the *Tochi Daicho* listing that it was transferred to the defendant as his individual land. This action cuts off the interests of the clan and lineage members.

[7, 8] A prior decision of this court, *Ngiruhelbad v. Trust Territory*, 2 T.T.R. 631 at 636, explains the effect of the listing. Since the case is from the Appellate Division, we are bound by it here. The court said:-

"We have set out the chain of authority here to show that old Palauan custom is not, and has not been for more than sixty years, the sole criterion to be considered concerning title to and transfer of land. . . . In this instance the Japanese Administration, in its land survey of about 1938 to 1940, confirmed individual title to land, free from lineage control. In this survey the Administration made careful provision for proof that the clan or lineage involved had consented to transfer of particular lands to individual ownership in the manner required by custom for transfer to another group."

[9] After stating that "individually owned" land was a foreign concept that had no place originally in Palauan customary land law, but that the "individual ownership" concept began to affect ownership under the custom during German time and then became firmly established under the Japanese administration, the court concluded:-

"It seems clear, as stated by the trial court, that the very purpose of introducing the concept of individual land ownership,

and the registration provisions implementing the concept, were to get away from the complications and limitations of the matrilineal clan and the lineage system as to such individually owned land." *Ngiruhelbad v. Merii, Imesei, and Tarkong*, 1 T.T.R. 367 at 369, 370.

All that has been said primarily relates to the five lots transferred by Sebrongel to the defendant. The sixth lot in question, being No. 268, was not acquired from Sebrongel but by inheritance from Mochoang, the younger brother of the defendant's father. This parcel came from Ngeruleong Clan of which defendant was a member by adoption.

[10,11] To clear up a final point: **It** is to be remembered that an *ochel* adopted from his or her clan to another clan remains an *ochel* member of the original clan, but his or her authority is not as great in the original clan as an *ochel* member remaining in the clan. Also it is to be remembered that in this case members of Ngeesusem Clan who were not strong members nearly 30 years ago, when the transfers of the land in dispute were made, now may be regarded as strong members having equal authority with any other adult *ochel* member and superior authority to any *ulechel* members concerning clan affairs and clan land control.

Upon the foregoing conclusions of law and fact, we accordingly center judgment as follows:-

JUDGMENT

Ordered, adjudged, and decreed, **that:-**

1. The plaintiff be and hereby is denied relief against the defendant.
2. The individual ownership of the six parcels of land, being *Tochi Daicho* numbered lots 75, 78, and 79 in Ngerang Village and lots 245, 268, and 292 in Ngerubesang Village, Melekeok Municipality, Palau District, be and hereby is confirmed in the defendant.

3. Sebrongel holds in trust in accordance with Palauan land law custom equivalent land to the above numbered lots for the benefit of her sister's children, Sofia and Limei, and that any disposition Sebrongel cares to make of any of her lands shall be in accordance with Palauan custom and that consent of all strong members of the Ngeesusem Clan is first obtained.

4. The defendant is awarded his costs in accordance with law upon a claim filed.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Libelant

v.

KYOSHIN MARU NO. 23, Libelee

Civil Action No. 443

Trial Division of the High Court

Palau District

December 12, 1969

Libel action for condemnation and forfeiture to Trust Territory Government. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that in order for owner to obtain release of seized vessel he must demonstrate by convincing evidence that he did not know the destination of the seized vessel and if he did know, or should have known, he could not recover the vessel.

1. Criminal Law-Forfeiture and Penalty-Recovery of Property

Forfeiture is the rule and release therefrom the exception, so that the burden of proof is upon the claimant of the property seized to establish his right to it under statutory conditions. (T.T.C., Sec. 883)

2. Criminal Law-Forfeiture and Penalty-Recovery of Property

Claimant did not demonstrate by convincing proof that he did not know the destination of seized vessel and, if in fact he did not know, the evidence was such he should have known and that he was at fault in failing to learn its destination after it had been decided.

3. Agency-Generally

The captain or master of a vessel is the agent of the owner and the knowledge of the master is the knowledge of the owner.