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IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

MARGIE BECHAB,	:	CIVIL APPEAL NO. 12-007
	:	Civil Action No. 09-206
Appellant,	:	
	:	
v.	:	**OPINION**
	:	
IGNACIO ANASTACIO,	:	
	:	
Appellee.	:	

Decided: January 11th, 2013

Counsel for Appellant: J. Roman Bedor
Counsel for Appellee: Yuwiko Dengokl

BEFORE: LOURDES F. MATERNE, Associate Justice;
HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem; KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

This is an appeal of a Trial Division Order directing Appellant Margie Bechab to vacate Cadastral Lot No. 020 D 29, formerly described as Lot 020 D 08 B2. For the following reasons, the decision of the Trial Division is **AFFIRMED.**

BACKGROUND

The relevant history of Tochi Daicho lot numbers 806, 807 and 808 (collectively known as *Imekang*), the land at issue here, begins with a man named Bechab. Bechab

had several children, but a LCHO decision issued in 1995 awarded ownership of the land to two of his sons – Mesubed and Marcus. In June of 2007, after a series of legal challenges and one sale, Appellee Ignacio Anastacio and the estate of Markus were issued Certificates of Title to the three lots in fee simple.

On September 1, 2009, Anastacio filed in the Trial Division of the Supreme Court a Petition to Partition three parcels of land: (1) Cadastral Lot Number 020 D 08, formerly Tochi Daicho Lot 806; (2) Cadastral Lot Number 020 D 07, formerly Tochi Daicho Lot 807; and (3) Cadastral Lot Number 020 D 06, formerly Tochi Daicho Lot 808. A Notice of the Partition was issued on October 7, 2009. Claims and Objections regarding the Petition were filed by: (1) Appellant, on behalf of herself and her siblings, as children of Markus; and (2) Erica Bechab Siang, "on behalf of herself and her natural siblings / nieces and nephews by adoption," as children of Bechab.

A hearing on the objections to the Petition was set for November 19, 2009. At the hearing, Siang's objection to the partition was dismissed on the grounds that the 1995 Land Court decision awarded Bechab's interest in the properties to Markus and Mesubed only. Also at the hearing, Appellant claimed that Markus and Mesubed had reached a binding agreement on how the lands were to be partitioned. Subsequent to the hearing, Anastacio submitted a proposed partition, set forth in an attached Exhibit A, whereby the three lots would be split into six separate parcels: (1) A (the southern half of 020 D 06); (2) B (the northern half of 020 D 06): (3) A1 (the southern half of 020 D 07); (4) B1 (the

northern half of 020 D 07); (5) A2 (the southern half of 020 D 08); and (6) B2 (the northern half of 020 D 08).

On December 15, 2009, the Trial Division granted "the petition to partition the lands . . . in accordance with . . . Exhibit A," and directed Anastacio to "have a survey conducted in accordance with said sketch to monument and delineate the boundaries so that new certificates of title can be issued thereafter."

On November 23, 2010, Anastacio filed a Request to Partition Lands in Accordance with Proposal of Petitioner, in which he sought to receive lots B, B1 and B2 of the newly partitioned properties. In his request, Anastacio represented that he sought "this particular division because the B lots are located closest to property he already owns and it makes sense to partition the lots this way." The request further sought an order directing "Margie Bechab and the other co-owners of the remainder of the lots, to remove within 45 days from the date of the entry of the Court's order . . . any of their structures, house, debris, and other matters located, or which are, on petitioner's lots once the Court orders the division of the lots."

Appellant objected to Appellee's proposal on the grounds that: (1) the proposal would "violate their perpetual right to live and use land upon which their house is situated;" and (2) Appellee was subject to the terms of a purported agreement between Markus and Mesubed, under which "Mesubed . . .agreed to have . . . Marcus . . . live on one of the land by the beach front and to use it perpetually."

Appellee replied that the purported perpetual-use claim was "foreclosed and precluded by the doctrines of res judicata, issue preclusion, and collateral estoppels in that such issue should have been raised during the initial litigation over the ownership of the lots at issue, particularly petitioner's ownership."

On February 1, 2011, the Trial Division granted Appellee's request to partition and ruled that the perpetual-use right was barred by res judicata and/or collateral estoppel. The order dividing the property further provided that "Margie Bechab and all other co-owners of the remainder of the lots shall have Ninety (90) days from the date of this order to remove any structures, debris, and other matters located on Petitioner's Lots."

On July 29, 2011, the Trial Division issued an Order Correcting Clerical Errors in Feb. 1, 2011 Partitioning Order ("Correction Order"), in which it purported to correct typographical errors[1] contained in the February 1, 2011, Partition Order ("February Partition Order"). The Correction Order also provided that "Margie Bechab and all other co-owners of the remainder of the lots shall have up to **November 1, 2011** to remove any structures, debris, and other matters located on Petitioner's lots." (emphasis in original). Finally, the Correction Order set a hearing for November 4, 2011, to address such removal.

[1] The February Partition Order incorrectly identified lot 020 B 07 B1 as "020 B 07 BI" and lot 020 B 07 A1 as "020 B 07 AI." Despite purporting to correct these errors, the Order Correcting Clerical Errors once again identified the lots as 020 B 07 BI and 020 B 07 AI.

The aforementioned hearing was reset for November 8, 2011. At the hearing, Appellee testified that the Bureau of Land Surveys (BLS) had surveyed and placed monuments on the portioned parcels and that by looking at the monuments placed, it was clear Appellant's home fell on Appellee's side of the partition of B2 (lot 020 D 29). Additionally, Appellee introduced into evidence a survey map purporting to show the locations of said monuments. Margie testified that, as far as she was aware, her home fell wholly on A2 (lot 020 D 30).

On November 16, 2011, the Trial Division issued an order which directed Appellant to "see to it that BLS conducts a survey of the lots in accordance with this order, and that such completed survey be provided to Petitioner within (7) days of completion." With regard to Lots B and B1, the order directed Margie to "clear all debris and crops therefrom by December 16, 2011."

One week later, on November 23, 2011, Mario Retamal, the National Surveyor, transmitted the final parcel split map to the Trial Division.

On January 5, 2012, Appellee filed a motion in which he sought enforcement of the previous orders directing Appellant to vacate Cadastral Lot No. 020 D 29, formerly described as Lot No. 020 D 08 B2 ("Motion to Enforce"). In support of the Motion to Enforce, Appellee attached two pages of documents, which he represented to be the results of a BLS survey showing Appellant's home encroaching upon Lot B2. Appellant did not respond to this motion, and on January 20, 2012, the Trial Division entered an

order granting the motion and directing Appellant to vacate the property ("Enforcement Order"). This appeal followed on February 14, 2012.

STANDARD OF REVIEW

At the outset of this Opinion it is important to clarify the issues on appeal. Appellant's appeal arises from the Enforcement Order of the Trial Division directing her to vacate the lands partitioned in favor of Appellee in the February partition order. However, in her appeal, Appellant also seeks to overturn the partition of the property.

Rule 4(a) of the Appellate Rules of Procedure, provides:

> Every appeal shall be directed to the Appellate Division of the Supreme Court. The notice of appeal shall be filed within thirty (30) days after the imposition of sentence in a criminal case or service of a judgment or order in a civil case, unless otherwise provided by law. The time for filing an appeal is terminated by the timely filing, in accordance with the Rules of Civil Procedure or Rules of Criminal Procedure, of a motion to alter or amend the judgment or a motion for a new trial or in a criminal action, a motion in arrest of judgment.

We are without jurisdiction to entertain an appeal where the notice of appeal is untimely filed. *Pamintuan v. ROP*, 14 ROP 189, 190 (2007).

It is undisputed that the First Partition Order was docketed on December 15, 2009, that the Second Partition Order was docketed on February 1, 2011, and that the Correction Order was docketed on July 29, 2011. Appellant's Notice of Appeal was filed on February 14, 2012. Even measuring timeliness from the latest correction date, this Court is without jurisdiction to review either partition order. Accordingly, the sole issue

on appeal is whether the Trial Division erred in directing Appellant to remove her home and other items from Appellee's land.

Motions to enforce judgments are reviewed for abuse of discretion. *See Harvey v. Johanns*, 494 F.3d 237, 240 (1st Cir. 2007) (citing *McDowell v. Phila. Hous. Auth.*, 423 F.3d 233, 238 (3d Cir. 2005)). However, issues regarding the scope of the judgment to be enforced are reviewed de novo. *Johanns*, 494 F.3d at 241; *see also Ren Int'l Co. v. Garcia*, 11 ROP 145, 150 (2004) ("A trial court's legal conclusions are reviewed de novo on appeal."). Factual determinations made in connection with a motion to enforce a judgment are reviewed on a clearly erroneous standard. *See Chase Lumber & Fuel Co. Inc. v. Chase*, 228 Wis. 2d 179, 206 (Wis. Ct. App. 1999); *see also Edaruchei Clan v. Sechedui Lineage*, 17 ROP 127, 128 (2010) ("When two permissible competing views of the evidence are present, a lower's court decision between the competing views cannot be considered clearly erroneous.").

ANALYSIS

Appellant raises three issues on appeal: (1) the trial court erred in partitioning the land as it did because Appellant "was denied . . . her right to participate in the survey of the partial split;" (2) the trial court applied the wrong standard of proof in deciding that Appellant's home was on Appellee's property; and (3) the Enforcement Order violated Article IV, section 6 of the Palau Constitution.

I. The BLS Survey

Appellant claims that the BLS Survey was not "legally binding" because she was entitled to notice of the BLS monumentation and survey and that she did not receive such notice. Accordingly, Appellant asks this Court to "set aside the partition of the foregoing lots . . . and to remand the case back to the Trial Court." Alternatively, Appellant contends that the survey could not be used to lend support to Appellee's claim for eviction.

First, to the extent Appellant seeks to set aside the partition based on the purported deficiency in the BLS Survey, for the reasons set forth above, such claim must be dismissed as untimely. Thus, the question becomes whether the Trial Division erred in relying on the survey when issuing the eviction order. To this end, we note "[d]eterminations of the admissibility of evidence are in the discretion of the trial judge and will not be reversed by an appellate court unless there is an abuse of discretion." *Temaungil v. ROP*, 9 ROP 139, 140 (2002).

ROP Rule of Evidence 402, which is modeled after the U.S. Federal Rules of Evidence, dictates that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the Republic of Palau, by these rules, or by other rules prescribed by the Supreme Court pursuant to constitutional authority." Under this broad standard, relevant evidence obtained in violation of the Constitution will be deemed admissible in civil proceedings. *See* 29 Am. Jur. Evidence § 604 ("The exclusionary rule

is not applied in civil cases where private parties seek to introduce evidence obtained through unauthorized searches made by state officials."). Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ROP Rule of Evidence 401.

In the present matter, Appellant contends that she had a right to notice of the survey and the underlying monumentation rooted in the constitutional rights to due process and cross-examination. It is beyond dispute that the motion for relief filed January 6, 2012, contained copies of the BLS survey showing the partition of the parties' lands and a map showing structures on the property. The maps were relevant to the issue of the location of Appellant's structures. Appellant chose not to contest the motion, leaving the maps available to the Trial Division for its use without objection. Thus, Appellant's argument that the survey could not be relied upon because the underlying monumentation had occurred without notice is without merit. *See id.*

II. Burden of Proof and Necessity of Survey Map

Next, Appellant contends that the Trial Division erred because it misallocated the burden of proof and because it issued the eviction order without admitting into evidence a completed survey map.

A. The Allocation of the Burden of Proof

"Courts grant motions to enforce judgments when a prevailing plaintiff demonstrates that a defendant has not complied with a judgment entered against it, even if the noncompliance was due to misinterpretation of the judgment." *Heartland Hosp. v. Thompson*, 328 F.Supp.2d 8, 11–12 (D.D.C. 2004). Under this formulation, the proponent of a motion to enforce a judgment bears the burden of proof as to non-compliance. *Id.*

Here, Appellee filed his Motion to Enforce along with two BLS documents showing that Appellant's structure was located on his property. After Appellee failed to respond to the foregoing motion, the Trial Division issued its Enforcement Order upon a finding of "good cause" for the relief sought. Although, Appellant had been directed previously to produce a survey showing that her property was *not* encroaching over the partition line, there is no indication that the Enforcement Order was issued *because* Appellant did not produce such evidence. Accordingly, Appellant's contention that the Trial Division misallocated the burden of proof is without merit. *See Obakerbau v. Nat'l Weather Serv.*, 14 ROP 132, 135 (2007) ("It is appellant's burden to demonstrate, based on the record on appeal, that an error occurred in the trial court."). However, even assuming the burden of proof was misallocated to Appellant, any such error was harmless.

"The Appellate Division will not reverse a lower court decision due to an error where that error is harmless." *Ngiraiwet v. Telungalek Ra Emadaob*, 16 ROP 163, 165 (2009). A misallocation of the burden of proof is harmless error where the record is "so clear that the allocation of the burden of proof would make no difference." *Whiteside v. Gill*, 580 F. 2d 134, 139 (5th Cir. 1978).

The record is clear that Appellant's home rests on Appellee's property. Appellee testified that a straight line drawn between the monuments dividing the properties clearly showed Appellant's home encroaching on his property. Additionally, Appellee submitted survey documents purporting to be from BLS showing Appellant's structure straddling the partition line between lots B2 and A2. The only evidence to the contrary was Appellant's conclusory and unsupported opinion that the structure was located on A2. We conclude that, under either allocation of the burden of proof, Appellee would have been entitled to the relief provided and that, therefore, any error in this regard was harmless.

B. The Necessity of a Completed Survey

Finally, Appellant submits an argument, which we quote in full:

> Further, the Trial Court could not have speculated that three lots 020 D 08, 020 D 07 and 020 D 06 had been officially split between appellant and appellee and that appellant is on the portion of lot 020 D 08 given to appellee when the Survey of Lands and Survey did not complete the survey map of the partial split of three lots and have it admitted into evidence below. It would be speculative on the part of the court below to consider that three said lots had been officially split between appellant and appellee and appellant should vacate because she is on appellee' [sic] share of lot

020 D 08. The court does not work by speculation but by evidence to support its order.

Although difficult to discern, it appears that Appellant argues the Trial Division could not have found Appellant to be on Appellee's property because there was no evidence that the properties had been "officially split" by BLS.

"Every court that has the jurisdiction to render a particular judgment has the inherent power to enforce it." 30 Am. Jur. 2d Executions and Enforcement of Judgments § 3 (2004). Such "authority inheres in the judicial power." *Zbaraz v. Madigan*, 572 F.3d 370, 385 (7th Cir. 2009).

Here, the Trial Division issued a valid partition order (which cannot be challenged on appeal) awarding specific property to each party and directing the parties to remove all items and structures from the land parcels granted to the other side. That BLS did not "officially split" the land — a term Appellant never defines — did not alter Appellant's obligations under the judgment nor did it deprive the Trial Division of its inherent power to enforce the terms of its order. *Id.* Thus, the lack of BLS action with regard to the partitioned properties could not deprive the trial court from directing Appellant to comply with its previous orders.

III. *Appellant's Property Interest in Her Home*

Finally, Appellant argues that any destruction of her property would be an unconstitutional deprivation under Article IV, Section 6 of the Palau Constitution. Appellant Brief, at 12.

The relevant section of the Constitution provides that "[t]he government shall take no action to deprive any person of life, liberty, or property without due process of law . . . ." ROP Const. art. IV, § 6. Thus, the Due Process Clause of the Palau Constitution does not prohibit all deprivations of property. Rather, the provision prohibits deprivations *without due process*. Because it cannot be disputed that Appellant has a property interest in her home and that the Enforcement Order deprives Appellant this interest, the question becomes whether Appellant was provided appropriate due process prior to the issuance of the order.

"The hallmark of procedural due process is the requirement that the government provide notice and an opportunity to be heard before depriving a person of life, liberty, or property." *April v. Palau Pub. Utils. Corp.*, 17 ROP 18, 22 (2009).

Here, Appellant was provided ample notice and opportunities to be heard with regard to the location of her structure. Before the Trial Division granted its Enforcement Order, Appellant was provided: (1) a hearing regarding the location of her home, at which she testified; (2) time to produce further evidence regarding the location of the structure; and (3) an opportunity to respond to the Motion to Vacate. We conclude that the Trial Division provided a meaningful opportunity for Appellant to be heard and that, therefore, her due process claim must be rejected. *See Renguul v. Elidechedong*, 11 ROP 11, 13 (2003) (rejecting due process claim where appellant was given opportunity to testify at hearing).

CONCLUSION

For the foregoing reasons, the order of the trial court is **AFFIRMED.**

SO ORDERED, this 11th day of January, 2013.

LOURDES F. MATERNE
Associate Justice

HONORA E. REMENGESAU RUDIMCH
Associate Justice Pro Tem

KATHERINE A. MARAMAN
Part Time Associate Justice