

**FILED**

JUL 28 2014

8:46 am

PALAU SUPREME COURT  
CLERK

IN THE  
SUPREME COURT OF THE REPUBLIC OF PALAU  
APPELLATE DIVISION

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NIRO TUCHERUR,	:	CIVIL APPEAL NO. 13-017
	:	LC/B No. 12-00052
Appellant,	:	
	:	
v.	:	<b>OPINION</b>
	:	
KUKUMAI RUDIMCH,	:	
	:	
Appellee.	:	
	:	

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Decided: July 28, 2014

Counsel for Appellant: Oldiais Ngiraikelau  
Counsel for Appellee: J. Roman Bedor

BEFORE: KATHLEEN M. SALII, Associate Justice; R. ASIIBY PATE, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice Pro Tem.

Appeal from the Land Court, the Honorable Rose Mary Skebong, Associate Judge, presiding.

PER CURIAM:

This appeal arises from the Land Court’s determination of ownership awarding Tochi Daicho Lot 804 to the late Kukumai Rudimch. For the following reasons, we affirm the decision of the Land Court.<sup>1</sup>

<sup>1</sup> Although Appellant requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

## BACKGROUND

This case involves a dispute over land identified as Tochi Daicho Lot 804, which is located in Iyebukel Hamlet, Koror State, and listed as Lot No. 182-213 on BLS Worksheet No. 2005 B 07. There were originally four claimants to the land—Niro Tucherur, Kukumai Rudimch, Rechuld Tucherur, and Haruo Ultiraki—but Haruo withdrew his claim and Rechuld's granddaughter eventually testified on behalf of Kukumai. Accordingly, Niro and Kukumai (represented by her daughter, Miriam Chin) were the primary claimants in the proceedings before the Land Court.

Although Lot 804 was monumented in 1975, no formal action to adjudicate ownership was taken for thirty years. In 2005, the Bureau of Lands and Surveys (BLS) published a notice for re-filing of claims, momentation, and survey; designated Lot 804 as Lot 182-213 on the survey worksheet; and named Niro, Kukumai, Rechuld, and Haruo as claimants for Lot 804. No further formal action was taken until 2012, after a dispute arose when Niro's grandson began to clear a portion of Lot 804 with the intention of building a house on it. Eriko Singeo, one of Kukumai's daughters, filed a lawsuit to enjoin Niro's grandson's activities on the land. That suit was dismissed without prejudice and the matter was referred to the Land Court for adjudication of the underlying ownership dispute.

On July 18, 2013, the Land Court held a hearing, which included a site visit. At the hearing, the Court heard testimony from Niro, Miriam Chin, Ochob Niro (Niro's

daughter), Elsie Rechuld Ucherbelau (Rechuld Tucherur's granddaughter), Eyos Rudimch, and Chamberlain Ngiralmu. Eriko Singeo, one of Kukumai's daughters and the plaintiff in the lawsuit discussed above, passed away before she could testify before the Land Court.

Niro claimed that Lot 804 belonged to him because he inherited it from his adoptive father, Barao Tucherur,<sup>2</sup> who was listed in the Tochi Daicho as the owner of Lot 804 (and of the adjoining Lot 803, which is not at issue here). Niro testified that Barao told Niro to build Niro's house on Barao's land, which Niro did. Barao later told Niro that the land on which Niro's house stood would pass to Niro after Barao's death. Barao died in 1969. Niro testified that, at his eldecheduch, it was discussed that all of Barao's property would go to Niro. In 1971, Niro went to the Land Management Office and obtained a "certificate of ownership," which he then took to Rechuld Tucherur and Bilung Ngerdoko, who signed it. That document stated, in essence, that title to Tochi Daicho Lots 803 and 804 vested in Niro pursuant to custom and to Barao's intention.

Niro's daughter, Ochob, testified on his behalf. She stated that they have lived in their present house since Typhoon Sally, that Niro's grandmother had a tapioca garden on the land, and that Ochob used to collect mangos from the land despite being scolded by Rechuld's wife for doing so. Ochob also testified that both she and her father were aware

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<sup>2</sup> The Land Court decision refers to Niro's adoptive father alternately as "Barao," "Parao," and "Barau." For consistency, we will refer to him as "Barao."

when Elsie began constructing her home on Lot 804 in 1986, but that her father was a very calm man and did not object.

Kukumai, who filed a Land Acquisition Record in 1975, based her claim on the ground that she bought Lot 804 from Rechuld Tucherur in 1961. A 1977 Warranty Deed purports to record the transfer of Lots 574, 578, and 894 (with a handwritten correction stating that the actual lot number is 804) from Rechuld to Kukumai.

Elsie testified on behalf of Kukumai. She stated that she and her husband built their house in 1986 on land that belonged to her grandfather, Rechuld. She said that, for as far back as she can remember, her family has always used this land. She further testified that she saw Kukumai gardening on the land before 1967 and that she never saw Sekluk, Barao's wife, use the land. She also testified that her grandfather had leased the land to the Japanese. Finally, she stated that, to the best of her knowledge, the land that Niro received at Barao's eldecheduch was the land where Niro's house was standing.

Eyos testified that he and his father, Isidoro Rudimch, monumented the parcel claimed by Kukumai. He identified the land and explained that reference to Lot 894 contained in the 1977 Warranty Deed conveying land from Rechuld to Kukumai was a typo and that the correct lot number was the one written in the margin—Lot 804.

Miriam testified that her mother, Kukumai, owned Lot 804 and had a garden on it for years, dating back to before 1966. She stated that she knew that her mother had obtained the land from Rechuld.

After the hearing, the Court ordered BLS to re-survey the land to clarify whether Niro's house and the Jehovah's Witness Church were located on Lot 804. The re-survey took place on August 15, 2013 and indicated Lot 804 did not contain either Niro's house or the Jehovah's Witness Church.

In September 2013, the Land Court issued a determination of ownership finding that Kukumai Rudimch owned Lot 804 in fee simple. The Court found that there was undisputed and credible evidence that Rechuld had used Lot 804 since at least the 1960s and possibly earlier. The Court determined that Elsie's house was located on Lot 804, while Niro's house and the Church buildings were located on Lot 803. The Court reasoned that Niro's failure to take action to prevent Elsie from building a house on Lot 804 or to in any way regulate others' use of that property was suggested that he was not the owner of that land. The Court ultimately concluded that Rechuld had authority to sell Lot 804 to Kukumai and that he did so.

Niro Tucherur timely appeals.

#### **STANDARD OF REVIEW**

We review the Land Court's conclusions of law de novo and its findings of fact for clear error. *Rengiil v. Debkar Clan*, 16 ROP 185, 188 (2009). "The factual determinations of the lower court will be set aside only if they lack evidentiary support in the record such that no reasonable trier of fact could have reached the same conclusion." *Id.* Where there are several plausible interpretations of the evidence, the Land Court's

choice between them shall be affirmed even if this Court might have arrived at a different result. *Ngaraard State Pub. Lands Auth. v. Tengadik Clan*, 16 ROP 222, 223 (2009).

### ANALYSIS

Niro raises several challenges to the Land Court's decision. First, Niro argues that the Land Court erred in construing his inaction as evidence that he did not own Lot 804 and in relying on *Mesubed v. Iramek*, 7 ROP Intrm. 137 (1999), to do so. Second, he argues that insufficient evidence supported the Land Court's determination that, in the past, Rechuld, rather than Niro, owned the land and that Rechuld therefore had the authority to sell it to Kukumai. Third, Niro argues that the Land Court overlooked a claim that he filed in 1993. Fourth, Niro argues that the Land Court erred in awarding the entirety of Lot 804 to Kukumai because Kukumai's claim was limited to a portion of the Lot. And, finally, Niro argues that 39 PNC § 402, which requires a later transferee to be first in time to record the deed in order to prevail against an earlier transferee, precludes a finding that Lot 804 belonged to Kukumai. We address these arguments in turn.

#### I. Niro's Inaction

After the death of his adoptive father in 1969, Niro's actions relating to Lot 804 were few and far between. In 1971, Niro obtained a "certificate of ownership," which, in essence, indicated that title to Tochi Daicho Lots 803 and 804 vested in Niro pursuant to custom and to Barao's intention. Niro took the document to Rechuld and Bilung Ngerdoko, who signed it. Nearly thirty years later, in 2000, Niro filed a claim of

ownership of Lot 804.<sup>3</sup> In the interim, Niro failed to participate in the monumentation of Lot 804, despite the fact that he lived on the neighboring tract, and failed to object when Elsie built a house on the land, in full view of Niro's own residence.

Niro argues that the Land Court erred in treating his failure to exercise control over Lot 804 as evidence that he did not own the land. Niro asserts that he is a non-confrontational man whose inaction was the result of his gentle nature rather than an indication of lack of ownership. He takes particular issue with the Land Court's reliance on *Mesubed*, arguing that that case is inapplicable to the facts presented here and that the Land Court misunderstood and misapplied its holding.

Under Palauan law, a claimant's failure to perform acts consistent with ownership may be circumstantial evidence that the claimant does not and never did in fact own the land in question. *Obak v. Joseph*, 11 ROP 124, 128-29 (2004). The inverse is also true—evidence that a claimant consistently used and exercised control over land without eliciting objection may be circumstantial evidence of ownership. *Id.* *Mesubed* is simply “one of a line of cases holding that a court may infer a valid transfer of land to a claimant when that claimant has occupied the land without objection for a significant period of time.” *Id.* at 128. “Implicit in these cases is the premise that although there may be no direct evidence of the disposition of a property, evidence of an individual's use and

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<sup>3</sup> On appeal, Niro claims that the Land Court overlooked a 1993 claim that he filed. That argument will be addressed below.

possession of the property may be relevant in ascertaining ownership.” *Ikluk v. Udui*, 11 ROP 93, 96 (2004).

The Land Court permissibly applied the well-established rule from these cases in construing Niro’s failure to perform acts consistent with ownership as evidence that Niro did not own the land. In the face of Rechuld and his family’s use and dominion over the property, without objection on the part of Niro, the Land Court reasonably concluded that, at some point before Barao’s death, there had been a valid transfer of Lot 804 to Rechuld.

Niro is correct that many of the cases applying this rule, including *Mesubed*, have involved more clear-cut and prolonged periods of inaction than the facts presented here. Niro did take some actions consistent with ownership, such as obtaining the 1971 document and filing a claim to the land, and Rechuld took at least one action inconsistent with ownership when he signed the 1971 document. However, the *Mesubed* line of cases merely stands for the proposition that the Land Court may construe a claimant’s failure to take acts consistent with ownership as evidence that he did not own the land. The Land Court appropriately applied that proposition here.

## **II. Sufficiency of the Evidence of Ownership as Between Niro and Rechuld**

Niro next argues that insufficient evidence supported the Land Court’s conclusion that Rechuld owned Lot 804 and therefore possessed the authority to transfer it to Kukumai. As discussed above, the Land Court correctly understood that a claimant’s



failure to act like a landowner could be evidence of lack of ownership and, inversely, that a claimant's use and dominion over land could be evidence of ownership. It was then up to the Land Court to determine the strength and weight of that evidence.

Here, the Land Court was faced with evidence that Niro had taken few actions consistent with ownership over a period of at least thirty years, including failing to object when Rechuld's granddaughter built her house on the land in full view of Niro's residence. Meanwhile, the evidence suggested that Rechuld and his family had used the land consistently without seeking Niro's permission and without eliciting any objection from him. Niro's own daughter testified that, when she would attempt to collect mangoes on the land, it was Rechuld's wife who objected. However, neither Rechuld nor Niro behaved entirely consistently; in particular, Niro executed the 1971 document claiming ownership of Lot 804, and Rechuld signed it.

Thus, the evidence in this case was not clear-cut, and it was up to the Land Court to weigh it. In doing so, the Land Court rejected Niro's contention that he had failed to object to others' use of the land out of politeness and concluded instead that he failed to object because he did not in fact own the land. The Land Court also apparently found Rechuld's consistent use and dominion over the land to be more convincing than his signature on the 1971 document. Accordingly, the Land Court concluded there had been a valid transfer to Rechuld at some point in the past and that Niro had never owned Lot 804. That was a reasonable interpretation of the evidence presented. *See Kawang Lineage*

*v. Meketii Clan*, 14 ROP 145, 146 (2007) (“[I]t is not the appellate panel’s duty to reweigh the evidence, test the credibility of witnesses, or draw inferences from the evidence.”).

### III. Niro’s 1993 Claim

Niro argues that the Land Court erred in overlooking a claim to Lot 804 that he allegedly filed in 1993. He attaches a copy of that document to his opening brief and states that he referred to the document during the Land Court hearing.

In its determination of ownership, the Land Court discussed only Niro’s 2000 claim. An examination of the record reveals that, although Niro’s attorney mentioned the 1993 claim and apparently showed that document to the Court and opposing counsel at the hearing, the document was never entered into evidence or labeled as an exhibit. It is well-established that we may not consider on appeal evidence not contained in the record below. *Pedro v. Carlos*, 9 ROP 101, 103 (2002).

Moreover, any error is harmless. See *Rengiil v. Debkar Clan*, 16 ROP 185, 191 (2009) (reviewing for harmless error the Land Court’s misstatement of testimony presented at the hearing). Even if Niro filed a claim in 1993, that fact does not “undermine the reasoning or validity” of the Land Court’s conclusion. *Id.* Assuming Niro did file a claim in 1993, he still waited seven years after Elsie built her house before taking any action whatsoever, and the sum total of his ownership actions amounts to three

documents over thirty years. Accordingly, nothing suggests that the existence of a 1993 claim would materially change the Land Court's determination of ownership.

#### **IV. Award of Entirety of Lot 804 to Kukumai**

Niro objects to the Land Court's determination that Kukumai owned the entirety of Lot 804, rather than just a portion of the Lot. He asserts that, at the hearing, Kukumai's representative expressly disavowed ownership of the entire lot and claimed only a portion of it.

Niro unfairly characterizes of the testimony at the Land Court hearing. At the hearing, there was some confusion as to whether Worksheet Lot 182-213 (Lot 804) included Niro's house and the Jehovah's Witnesses buildings. The portions of the transcript to which Niro refers were instances in which Miriam Chin and Kukumai's counsel, Mr. Bedor, were clarifying that their claim did not include the land on which those buildings stood. To resolve the confusion, the Land Court ordered a survey, which revealed that Lot 804 did not in fact include those buildings. Accordingly, there is no tension between the award of Lot 804 to Kukumai and her representatives' statements at the hearing. Moreover, in awarding Lot 804 to Kukumai, the Land Court relied on a 1977 Trust Deed that purported to transfer Lot 804 in its entirety from Rechuld to Kukumai. The Land Court therefore did not clearly err in awarding ownership of the entirety of Lot 804, rather than just a portion of it, to Kukumai.

## V. Applicability of the Recording Statute

Niro's final argument is that he recorded his interest in Lot 804 (by the 1971 document) before Kukumai recorded her interest (by the 1977 Warranty Deed), and that Niro therefore prevails under Palau's recording statute, 39 PNC § 402. That statute provides:

No transfer of or encumbrance upon title to real estate or any interest therein, other than a lease or use right for a term not exceeding one year, shall be valid against any subsequent purchaser or mortgagee of the same real estate or interest, or any part thereof, in good faith for a valuable consideration without notice of such transfer or encumbrance, or against any person claiming under them, if the transfer to the subsequent purchaser or mortgagee is first duly recorded.

39 PNC § 402. The classic case in which this statute is applicable is that of the double-dealing landowner who sells his land to one person and then, later, sells that same land to another person. To determine who prevails between the first and second transferees, the court looks to whether the second transferee was a bona fide purchaser without value and to which of those transferees recorded her deed first. *See Ongalk Ra Teblak v. Santos*, 7 ROP Intrm. 1 (1998).

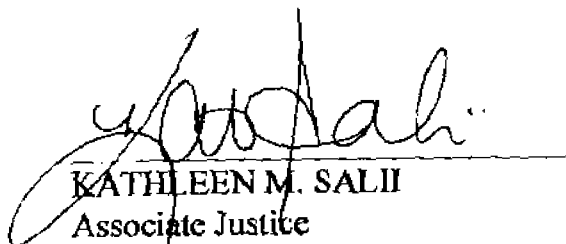
Under the Land Court's determination of the facts, the recording statute is inapplicable here because Lot 804 was simply never transferred to Niro. It did not pass to him by inheritance upon Barao's death, and no document purports to memorialize a transfer of the Lot from Rechuld to Niro. Indeed, the 1971 document purports to memorialize Barao's intentions with regard to his heirs, not a conveyance from Rechuld

to Niro. Moreover, the Land Court described Rechuld's signing of the 1971 document as an "anomalous act," which was contradicted by Rechuld's use of the land both before and after that date. Accordingly, the Land Court reasonably concluded that there simply was no transfer of Lot 804 to Niro, ever. The recording statute is therefore inapplicable.

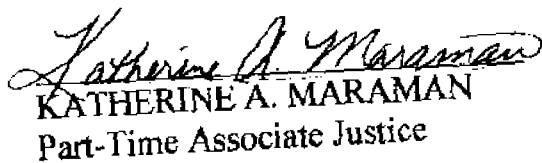
**CONCLUSION**

For the foregoing reasons, the decision of the Land Court is **AFFIRMED**.

SO ORDERED, this 28<sup>th</sup> day of July, 2014.

  
KATHLEEN M. SALII  
Associate Justice

  
R. ASIIBY PATE  
Associate Justice

  
KATHERINE A. MARAMAN  
Part-Time Associate Justice