

FILED ✓

IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

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In re: Determination of Ownership of land in :
Ngersngai Hamlet of Ngiwal State identified :
as BLS Worksheet Lot 018 D 02 :
CHILDREN OF LLECHOLECH INGAIS, :
Appellants, :
v. :
ETUMAI LINEAGE, :
Appellee. :
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CIVIL APPEAL NO. 12-028
LC/D 11-0022

OPINION

Decided: May 02, 2013

Counsel for Appellant: Siegfried B. Nakamura
Counsel for Appellee: Oldiais Ngiraikelau

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

Appeal from the Land Court, the Honorable C. QUAY POLLOI, Land Court Senior Judge, presiding.

PER CURIAM:

This case concerns the Land Court's decision, which considered the Tochi Daicho's presumption of accuracy and which took judicial notice of some facts to aid in its decision. For the following reasons, we **REMAND** this case back to the Land Court.

BACKGROUND

Both parties made a claim in front of the Land Court for worksheet Lot 018 D 02, as it is identified on exhibit one, which was entered as evidence in the Land Court. Essentially, Etumai Lineage argued that the lot is part of Tochi Daicho Lot 55, which belongs to them. Children of Ingais did not dispute that Tochi Daicho Lot 55 belonged to Etumai Lineage, but claimed Lot 018 D 02 was part of their land, called *Olsarch*, which runs adjacent to the disputed property.

Both parties presented extensive testimony before the Land Court, seeking to prove their longstanding use and their understanding of the property's ownership. Testimony from both sides indicated that members of both parties used the property for farming and animal grazing, and also gave permission for others to use the land.

Ultimately the court determined that because neither party disputed the ownership of a Tochi Daicho lot, neither party had the benefit or the burden of the presumption of accuracy typically afforded to the Tochi Daicho's listing of the identity of the owner. Accordingly, each had a burden of proving ownership of worksheet Lot 018 D 02 through a preponderance of the evidence.

The court concluded that Etumai Lineage met its burden primarily because awarding the property to Children of Ingais would dramatically increase the size of their property from what is listed in the Tochi Daicho as their share. Despite its prior declaration that the parties needed not overcome a presumption of accuracy, the court

noted twice that the Tochi Daicho receives a presumption of accuracy and that Children of Ingais's claims far exceeded their lot size listed in the Tochi Daicho.

The court also took judicial notice of facts it deduced from reviewing prior land claims and a sketch found in the files relating to the property in question. Through this, the court found that the past actions of Children of Ingais were inconsistent with their current arguments because prior tracings of the property did not reflect their current position and because Llecholech Ingais's daughter, Anastacia, in 1985 asserted that the northern boundary of their land was in a place that was inconsistent with their claim at the hearing. In two different footnotes, the court explained that the parties were free to review the information the court used in taking judicial notice of these facts and could file a motion for reconsideration if it found any discrepancy. The same day it issued its Decision, the Land Court also issued a Determination of Ownership. Children of Ingais appealed.

STANDARD OF REVIEW

Children of Ingais appeal the Land Court's decision on two grounds. First, they argue that the Land Court improperly applied a presumption of accuracy to the size of the Tochi Daicho lots. Second, Children of Ingais contend that the Land Court improperly took judicial notice of facts without providing an opportunity for the parties to be heard, as is required by the Land Court Rules of Procedure. These are both questions of law,

which we review de novo. *Omechelang v. Ngchesar State Pub. Lands Auth.*, 18 ROP 131, 133 (2011).

DISCUSSION

I. It is not clear whether the Land Court improperly gave a presumption of accuracy to the Tochi Daicho.

Children of Ingais argue that the presumption of accuracy afforded to the Tochi Daicho extends *only* to the listed identity of the owner of any given lot. Further, they assert that the Land Court's mention of a presumption in favor of the Tochi Daicho amounted to an improper use of that presumption insofar as it was used in reference to the size of the lot rather than in reference to the identity of the lot owner. We agree that the presumption of accuracy does not extend to the listed size of the property in the Tochi Daicho. Additionally, it is not clear whether the Land Court improperly applied this presumption.

We note that the Land Court identified the arguments before it as *not* amounting to a challenge to the identity of the owners listed in the Tochi Daicho. Specifically, the Land Court explained that rather than require any party to overcome the presumption of accuracy associated with the Tochi Daicho, instead, the parties needed to show their claim to the lot through a preponderance of the evidence. However, the Land Court also stated that “[t]he Tochi Daicho is presumed accurate and, as the foregoing findings of facts show, there is a strong correlation between the listed tsubo size and the final square meter sizes for the various lots in the area.” The court found that Children of Ingais's claim to

make the contested lot part of their property was wholly inconsistent with the Tochi Daicho's description of the parties' lot sizes, explaining, "[s]ince the Tochi Daicho is presumed accurate and the size correlations of the other nearby lots validate that presumption, such a marked increase of Llecholech's property size runs counter to the presumed accuracy." Accordingly, the Land Court concluded that Children of Ingais could not meet their burden of proof.

The presumption in favor of the Tochi Daicho's accuracy has been identified and discussed by this Court on many occasions. In 1996, this Court explained the reason for the presumption. *See Silmai v. Sadang*, 5 ROP Intrm. 222, 223–24 (1996). We noted that this presumption came about because of both "historical and policy considerations." *Id.* at 223. We also explained that the Japanese program of creating the Tochi Daicho was carried out with great organized effort and that with time, "the presumption gains importance for policy reasons" as first-hand witnesses become more difficult to locate. *Id.* at 223–24.

In an even earlier case, we noted that for decades the Trial Division had been relying on a presumption of accuracy because the program of recording land information in the Tochi Daicho had been carried out "with considerable care and publicity." *Ngiradilubech v. Timulch*, 1 ROP Intrm. 625, 628 (1989) (citation and internal quotation marks omitted). We explained the process the Japanese went through to record the information, which included recording individual land ownership only after "careful

provision for proof that the clan or lineage involved had consented to the transfer of particular lands to individual ownership.” *Id.* 627–28 (citation and internal quotation marks omitted).

Our prior decisions addressing the presumption of accuracy afforded to the Tochi Daicho have concerned only challenges to the identity of Tochi Daicho lot owners, and our decisions make clear that such a presumption has only been extended to that single aspect of the Tochi Daicho. We will not extend that presumption to the listed size of the lots and we hold that if the Land Court provided the Tochi Daicho’s size listing with a presumption of accuracy, it was error to do so. Nonetheless, we maintain that considering the size listing as evidence in making its determination is not inappropriate. We are satisfied that a presumption of accuracy for the listed identity of the owner necessarily carries implications for some of the other information listed in the Tochi Daicho in order to be meaningful.

Corollary to providing a presumption of accuracy for the identity of Tochi Daicho lot owners is an assumption that that Tochi Daicho listing represents *some* amount of real land. Stated differently, a presumption of accuracy concerning the identity of the owner of a certain Tochi Daicho lot is nearly meaningless unless there is reason to believe that the listing represents an actual piece of property. Accordingly, while the listed size of the lots in the Tochi Daicho does not carry the same presumption of accuracy as the listed identity of the lot owner, it is not inappropriate for a court to consider the description of

land in a Tochi Daicho listing, insomuch that it uses that description as a baseline and in conjunction with updated maps for determining the proper land boundaries in a land dispute. Thus, when there is a dispute over whether certain property belongs to one Tochi Daicho lot or another, the Land Court may consider whether or not each claim would be inconsistent with the information contained in the Tochi Daicho. *See Olngembang Lineage v. ROP*, 8 ROP Intrm. 197, 199 (2000) (defending the lower court's practice of considering the Tochi Daicho's size listing in determining land boundaries).

We are also satisfied that the original rationale for providing the Tochi Daicho with a presumption of accuracy—namely, that the Japanese program was carried out with great care—provides a sufficient basis for taking seriously the listed description of the land along with the identity of the owner. *See Ngiradilubech*, 1 ROP Intrm. at 628. Nevertheless, land descriptions in the Tochi Daicho are not as finite as the listed identity of the landowner, and it is perhaps for this reason that the presumption of accuracy has never been afforded to other aspects of the Tochi Daicho listings. As worksheet maps are drawn and new surveys of land are taken, naturally there will be discrepancies in the sizes of the lots compared to their corresponding Tochi Daicho listings. However, the careful process of recording the land justifies the Land Court's consideration of any information listed in the Tochi Daicho.

While the Land Court was free to consider the size of the property as it is listed in the Tochi Daicho, it should not have given it a presumption of accuracy. The Land

Court's decision provides conflicting statements concerning the standard it used to reach its conclusion and it is not clear whether it merely considered this evidence in the course of its regular fact-weighting duties or improperly applied a presumption of accuracy. For this reason, we **REMAND** to the Land Court to clarify.

II. The Land Court erred in taking judicial notice of facts and issuing a determination of ownership without allowing Children in Ingais an opportunity to request a hearing.

The Land Court took judicial notice of facts it obtained or deduced by reviewing size comparisons of recently surveyed lots in the area and a sketch of the land in question. Children of Ingais do not dispute the Land Court's authority to take judicial notice of facts but do assert that the Land Court erred in failing to provide an opportunity for them to request a hearing to be heard about the facts of which the Land Court took judicial notice.

Rule 5 of the Land Court Rules of Procedure states that the Land Court may take judicial notice of certain facts but it also requires that the court afford an opportunity for the parties to be heard. The rule notes that if the Land Court takes judicial notice of facts in its findings of fact and conclusions of law then it must allow the party ten days to request a hearing. In *Wasisang v. Remeskang*, 12 ROP 35, 37 (2004), we held that the Land Court erred in taking judicial notice of certain facts and then issuing its determination of ownership only three days later. We noted that in order to comply with the Land Court Rules of Procedure, the Land Court needed to wait ten days after taking judicial notice before issuing its determination of ownership. *Id.*

Here, although the Land Court explained in a footnote that the parties had the opportunity to file a proper motion if they intended to dispute a fact of which the court took judicial notice, it issued its determination of ownership on the very day that it took judicial notice of the facts and forced the parties into filing a procedurally disfavored motion to challenge that finding. Accordingly, it did not comply with our ruling in *Wasisang* or with Rule 5 of the Land Court Rules of Procedure. Thus, we temporarily **SET ASIDE** the Land Court's decision and give the parties ten days to file a proper motion, if they so choose.

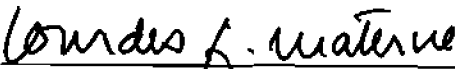
CONCLUSION

For the forgoing reasons, we **REMAND** this case to the Land Court. The parties are on notice that they have ten days to file any motion for a hearing concerning the issue of judicial notice. The Land Court is then instructed to issue a decision consistent with this opinion.

SO ORDERED, this 2nd day of ~~April~~^{May} 2013.


ARTHUR NGIRAKLSONG
Chief Justice


KATHLEEN M. SALII
Associate Justice


LOURDES F. MATERNE
Associate Justice