

TASIO, Appellant
v.
YESI and NIEISECH, Appellees
Civil Appeal No. 23
Appellate Division of the High Court
October 24, 1966

Appeal from judgment in land dispute entered by the Trial Division of the High Court, Truk District. The Appellate Division of the High Court, Associate Justice Joseph W. Goss, held that plaintiff had failed to meet burden of proving allegations set forth in his complaint.

Affirmed.

1. Evidence-Burden of Proof

Burden of proving case is upon person who puts it forward and if pleadings consist of allegations of facts by plaintiff and denial by defendant, burden of proving facts is upon plaintiff.

2. Evidence-Burden of Proof

Where at conclusion of trial, evidence is evenly balanced, decision must go against party who has burden of proof.

3. Appeal and Error-Scope of Review-Newly Discovered Evidence

Newly discovered evidence cannot be considered in first instance by appellate court but can only be considered in connection with motion for new trial or motion for relief from judgment. (Rules of Civil Proc., Rules 1Sd, 1Se(2))

Counsel for Appellant: AUGUST HARTMAN and HERBERT NEDLEC
Counsel for Appellees: MITARO DANIS

Before GOSS, *Associate Justice*, SHRIVER and DUENAS,
Temporary Judges

GOSS, *Associate Justice*

This is an appeal from the judgment entered in Civil Action No. 208, Trial Division of the High Court, Truk District. The Appellant and the Appellees filed written arguments, and oral arguments were heard at Moen Island, Truk Atoll, on September 27, 1966.

The grounds upon which the Appellant relies are as follows:-

- a. That I do not understand about the evidence offered by the defendant which is marked as No.1 because it is not translated in either Trukese or English.
- b. That the trial of the land is not involved the whole of Fanapo, but it is just involved a part of it. This is clearly shown in the sketch has submitted to court."

As to the first point, at the trial the then Counsel for the Appellant agreed that the German land document (Exhibit A) be accepted as an exhibit and translated by High Court personnel. (Transcript, p. 9, lines 42-46). The document was translated and the English translation was included with the original document as a part of the case file and as a part of the Record on Appeal.

The contention that the trial did not involve the whole of the land Fanapo is rebutted by the Transcript and by the first paragraph of the Pre-Trial Order:

"1. At the pre-trial conference, plaintiff asked leave to amend his complaint to show that he claims the land Fanapo and everything now growing or built upon it."

When Appellant in his closing argument before the Trial Court indicated that his claim was primarily for four breadfruit trees (Judgment Order, p. 1, lines 1-4), he did not narrow the agreed issues in the case but only indicated to the Court the area of his primary concern.

[1, 2] It is true that the German land document (Exhibit A) refers to ownership by "Jop" (also known as Sop) of only "one part of Falabo" (now spelled Fanapo). On the other hand, there is testimony in the record that Fanapo is not divided into parts. (Transcript, p. 10, lines 35, 36 and see also p. 2, lines 8, 9). Exhibit A does show that Appellees' predecessors in interest did own at least part of Fanapo, and their ownership was so registered. Considering the evidence as a whole, the Trial Court found

that the Appellant had failed to prove his claim to the land or to any trees upon it and cited McKelvey on Evidence, Chapter 4, Burden of Proof:-

"It is fundamental that the burden of proving a case . . . is naturally upon the person who puts it forward. If the pleadings consist of the allegation of certain facts by the plaintiff and their denial by the defendant, the burden of proving the facts, be they negative or affirmative, is upon the plaintiff. In order to recover he must prove his case. If the evidence is evenly balanced, the case is in exactly the position at the conclusion as it was at the beginning and it must go against the party who has the burden of proof."

[3] Appellant's written argument refers to evidentiary matters which are not a part of the record on appeal and hence cannot be considered by this Court. Under the Rules of Civil Procedure, newly discovered evidence can only be considered in connection with a motion for a new trial (Rule 18d) or a motion for relief from judgment (Rule 18e(2)). The Rules require that a motion for new trial be made not later than ten days after entry of judgment and a motion for relief from judgment within a reasonable time and not more than one year after judgment. In this case, no such motion was made and no affidavit, deposition or oral testimony was offered to verify the evidence or to set forth the facts of its new discovery. See Rule 8b(2)).

JUDGMENT

The Judgment appealed from is amply supported by the evidence, and the Judgment is affirmed.