

sented in this action by the plaintiff Titer, and neither the defendant Teifis nor the defendant Kapelei has any individual or personal rights in such land and, therefore, cannot sell or take any other action with respect to it without the consent of the lineage.

2. No costs are assessed any party.

OUCHERECHAR CLAN, Represented by Brobesong, Plaintiff

v.

E. TERMETEET and NGIWAL MUNICIPALITY,
Represented by Ignacio Sadang, Magistrate, Defendants

Civil Action No. 341

UCHESBAI CLAN, Represented! by Kodep long, Plaintiff

v.

E. TERMETEET and .NGIWAL MUNICIPALITY,
Represented by Ignacio Sadang, Magistrate, Defendants

Civil Action No. 346

Trial Division of the High Court

Palau District

February 17, 1969

Actions to determine ownership to land in Ngiwal Municipality, Palau District. The Trial Division of the High -Court, D. Kelly Turner, Associate Justice, held that by not acting regarding the transactions involved for a period of twenty years any claim the various clans may have had to the land in question had been waived.

1. Palau Land Law—Clan Ownership-Use Rights

The assignment of clan or family land to an individual to use is commonly made under Palau custom for the remainder of that individual's life, and the mere fact that such an individual lives a long time and consequently enjoys the use of the land for a long period raises no presumption of ownership of anything more than the use rights assigned.

2. Palau Land Law-Japanese Survey-Rebuttal

Boundaries marked after a Japanese hearing on the subject would control over listing in *Tochi Daicho*.

3. Palau Land Law-Clan Ownership-Transfer

Where clans made no complaint or objection either to use of land for school purposes or for the payment to title bearer of damages for cutting trees thereon any claim they may have had was waived by their prolonged failure to assert their interests.

4. Real Property-Quiet Title-Presumption of Ownership

Occupancy and use, long continued undisturbed, raises a presumption of ownership.

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<i>Interpreter:</i>	SINGICHI IKESAKES
<i>Reporter:</i>	NANCY K. HATTORI
<i>Counsel for Plaintiff</i> <i>Oucherechar Clan:</i>	BAULES SECHELONG
<i>Counsel for Plaintiff</i> <i>Uchesbai Clan:</i>	ITELBANG Lun
<i>Counsel for Defendants:</i>	WILLIAM O. WALLY

TURNER, *Associate Justice*

JUDGMENT

The two cases were combined for trial because the two plaintiffs, Oucherechar Clan in No. 341, and Uchesbai Clan in No. 346, each claimed portions of the land sold by defendant Termeteet, principal title bearer and representative of Ngemelas Clan, to Ngiwal Municipality for public school purposes. Although the two complaints were brought for recovery of land allegedly owned by each plaintiff clan and the trial was devoted to the question of land ownership, the respective counsel for the plaintiffs waived right of recovery of the land itself and asserted in behalf of their clients their willingness to accept their proportionate share of the purchase money paid by the Municipality for the land in question.

The question to be decided is whether or not the Japanese survey map made in 1936-1937 and the *Tochi Daicho* ownership summary compiled in 1940-1941 are determinative of the controversy or whether the area actually re-

surveyed in 1963 and sold to the Municipality accurately reflects the defendant Ngemelas Clan ownership.

The essential facts bearing on the ultimate question to be decided are not in serious dispute and with one or two exceptions there is very little conflict in the evidence presented. Oucherechar Clan claims ownership of land listed in the *Tochi Daicho* as Lot No. 630, which includes within its boundaries, Lots (without surveyed boundaries) Nos. 63 and 64 and separately bounded house site No. 65. Uchesbai Clan claims portions of Lots Nos. 70, 71, and 72. All of these parcels, together with the additional lots admittedly owned by Ngemelas Clan, are within the area conveyed to the Municipality for its school site.

The plaintiffs rely, for the most part, on the 1936--1937 Japanese map and the 1940-1941 *Tochi Daicho* summary showing the following:

- Lot 61, house lot, Weloi, owner, member of Oucherechar Clan.
- Lot 62, plantation, Ngemelas Clan, owner, administered by *Kubarii*.
- Lot 63, plantation, Ngemelas Clan, owner, administered by *Kubarii*.
- Lot 64, plantation, Oucherechar Clan, owner, administered by Eo!
- Lot 65, house lot, Olkebai, owner, member of Oucherechar Clan.
- Lot 70, Ngemeketkud Clan, owner, administered by *!long*.
- Lot 71, house lot, Uchesbai Clan, owner, administered by Ngiraibai.
- Lot 72, Ngiraibai, owner, the *Ibluuk* (title) of Uchesbai Clan.

In addition to reliance upon the *Tochi Daicho* listing for Lot 63, registered as clan land, and Lot 64, listed as owned individually by a clan member, the plaintiff Oucherechar

Clan attempted to demonstrate ownership of Lot 64 in that more than forty years ago, the clan title bearer cut a btaches tree in the area from which he made a canoe. A tree stump, presumably of the same btaches tree, still may be seen on the surface of the school playground. Such evidence is entirely insufficient to establish a claim to a parcel of land, particularly when it occurred so long ago. Whatever rights Oucherechar Clan is able to assert, they must be based on the *Tochi Daicho* listing or more recent evidence of ownership.

The same principle is applicable to the claim of the Uchesbai Clan. The evidence as to its claims, in addition to the *Tochi Daicho* listing and 1937 Japanese map, consisted of residence by clan members in the area and use of the land during the pre-war Japanese administration by clan members.

Use and occupancy of land in the present-day Municipality of Ngiwal has a significant and unusual background. Uong, the principal title bearer of the Municipality during Japanese times (and today), visited Japan in the 1920's and was so impressed with the neat and orderly layout of Japanese villages that he returned home and laid out a similar village on the seashore of Babelthaup Island and instructed the residents of Ngiwal, then located in the hill country inland, to move to the new seashore village. Chief Uong testified at the trial that his concern was that houses should be erected in straight lines along the village street and that ownership of the house sites on either side of the street was not as important as the orderly rows of dwellings.

[1] It appears from the evidence that three of the house sites along the road were occupied by members of plaintiff clans upon permission granted from the defendant clan title bearer and that when the ownership listing was made in the *Tochi Daicho*, the persons living on the land were

listed as owners. This, of course, was clearly erroneous because the right of occupancy gave no vested interest. The situation here, particularly as to Lots 61 and 65, is similar to the factual situation confronting this court in *Ngirchongerung v. Ngirturong*, 1 T.T.R. 71, in which it was said:-

"Consequently, the mere fact that an individual to whom the land has been assigned for use lives a long time and consequently enjoys the use of the land for a long period, raises no presumption of ownership of anything more than the use rights assigned.

"The assignment of clan or family land to an individual to use, is commonly made under Palau custom for the remainder of that individual's life.

"This court also held in Palau District Civil Action No. 11, 1 T.T.R. 66, that recognition by the Japanese Government surveyors of a purported transfer of land is at the most only some evidence that an effective transfer has been made.

"The same is true as to the listing of ownership in the report of the Japanese survey completed in 1941. (The *Tochi Daicho*) Parenthetical matter added.

"Such listing does not prevent the court from inquiring into the true situation." Also see: *Ucherbelau v. Ngirakerkeriil*, 2 T.T.R. 282.

Lots 61 and 65 were occupied by Weloi and Olkebai when the village moved to its present site. Both of these occupants were members of Oucherechar Clan and it is evident both obtained permission to build their houses on the land from *Kubarii*, title bearer of Ngemelas Clan.

Lot 64 has a somewhat different history in that after the Japanese survey and the listing of ownership of this lot in the Oucherechar Clan, administered by Eol, the listing was challenged by Ngemelas Clan and after a hearing before Japanese officials, Eol by his own admission from the witness stand, lost his claim. He now contends, however, that the dispute tried before the Japanese court involved the location of the Lot 64 boundary line and did not relate to ownership of the parcel.

In sharp conflict with this is the fact that after the hearing, the boundary line was surveyed and marked. This line marked the division between Ngemelas and Uchesbai land with no intervening Oucherechar lot. This is one of the lines of the area the defendant Termeteet conveyed to the Municipality. It not only eliminated Oucherechar ownership of Lot 64 but also encroached upon Lots 70, 71, and 72, which are respectively listed as owned by Ngemeketkud Clan, Uchesbai Clan and Ngiraibai, title holder of Uchesbai Clan. Although plaintiff in Case No. 346 claimed portions of all three lots used for the school site, the *Tochi Daicho* actually only supports the claim as to one of the three.

Regardless of the listing, the Japanese map boundaries which are in conflict with the boundary marked after the hearing, cannot prevail under the circumstances here.

The map was admittedly surveyed and drawn in 1936-1937. The hearing which resulted in marking of a boundary in accordance with that decision was held in 1940. Even though the *Tochi Daicho*, which is a summary listing of area and ownership rather than boundaries, does not indicate a correction to correspond with the boundary established as a result of the hearing, the evidence is such-coming from both sides-that the court must conclude the *Tochi Daicho* is in error in this instance because it failed to conform to the hearing result and merely restates ownership and area as originally compiled for the 1936-1937 survey and map some three years prior to the Japanese hearing and decision.

There have been a number of occasions when this court has been required by the evidence developed in trial to reject the *Tochi Daicho* listing. *Arbedul v. Ngirturong*, 1 T.T.R. 66. *Lusi Orukem v. Trust Territory*, 1 T.T.R. 356. *Fritz Rubash v. Trust Territory*, 2 T.T.R. 80. *Louch v.*

Mengelil, 2 T.T.R. 121. *Ngesengaol v. Torual*, 2 T.T.R. 275. *Ngiruhelbad v. Merii*, 2 T.T.R. 631.

[2] So in this case, we accept the boundaries as marked on the ground after the Japanese hearing as determinative of Ngemelas boundaries.

[3] In addition to the foregoing, defendants established, without contradiction, that the area in question has been used by the Municipality since 1945, first as a playground and commencing in 1946 as a school site. The area was so used with the consent of the Ngemelas Clan. The title bearer of the clan, the *Riumd*, consented to its use and received payment of Y1500 as compensation for coconut trees cut on the land when the playground was cleared. From the time of the clearing of the playground in 1945 until the defendant Termeteet's negotiation with the Ngiwal council for outright sale of the land in 1963, the plaintiff clans, either through their title bearers or their present representatives in this suit, made no complaint or objection either to use of the land for school purposes or for the payment to defendant Termeteet's predecessor title bearer of damages for cutting the coconut trees. The court considers that any claim they may have had was waived by their prolonged failure to assert their interests.

[4] Occupancy and use, long continued undisturbed, raises a presumption of ownership.

This principle of law, applicable to our facts here, was set forth by the United States Supreme Court in *Fletcher v. Fuller*, 120 U.S. 534, 7 S.Ct. 667, when the court said:-

"The owners of property, especially if it be valuable and available, do not often allow it to remain in the quiet and unquestioned enjoyment of others. Such a course is not in accordance with the ordinary conduct of men. When, therefore, possession and use are long continued, they create a presumption of lawful origin; that is, that they are founded upon such instruments and proceedings as

in law would pass the right to the possession and use of the property."

Counsel for plaintiff Uchesbai Clan calls attention to a recognized Palauan custom:-

"... that we Palauans permit our land to be used by the community without compensation with the understanding that when the community or the public cease using the land for the interest of public the land would return to the true owner."

The principle was the basis for the decision in *Rubash v. Trust Territory*, 2 T.T.R. 80. The custom cited, however, does not fit the facts in this case. Immediately after World War II, Ngemelas Clan exercised dominion and control over all of the land in question by consenting to its use, first as a playground and next as a school site. It is still being used as a school site and the fact that the purported owner is now willing to transfer title and possession permanently to the Municipality in exchange for cash does not give rise to a claim to the land by one who has "slept on his rights for many years". To say either that the land should revert to him (or his clan) or that he should share in the purchase price today when he made no protest twenty years ago when the present use adverse to his interests began is not in accord with settled principles of law. The principle cited by plaintiff is not applicable to the facts of this case in that it was not the plaintiff clans who transferred the land to the public use and such use has not been discontinued.

There are other aspects of this case, including activities of the District Land Title Office, which precipitated the filing of these suits. In view of the result reached upon the foregoing facts, we need not be concerned with any more than correction of the record relating to the transfer of the school site to the Municipality. The original contract, Defendants' Exhibit A, gave an erroneous description and the conveyance should be re-executed to conform to the

intent of the parties by describing the area transferred as shown by the survey depicted by SK-210-1/25/66, Plaintiffs' Exhibit 1 in evidence.

Ordered, adjudged, and decreed:-

1. That the Oucherechar Clan, and all those claiming under it, has no interest in and to Lots 61, 64, and 65 (*Tochi Daicho* reference) in Ngiwal Municipality, Palau District.

2. That the Uchesbai Clan, and all those claiming under it, has no interest to those portions of Lots 70, 71, and 72 (*Tochi Daicho* reference) included in the conveyance by the defendant Termeteet to Ngiwal Municipality for a school site.

3. That Ngemelas Clan, represented by defendant Termeteet, as its principal title bearer, had the right to and intended to convey to Ngiwal Municipality the area depicted by a heavy broken line between Corners 1, 2, 3, and 4 on District Land Management Office Sketch 210, dated January 25, 1966, and entitled "Resurvey of Ngiwal Elementary School & Teacher Housing Sites", containing 2,434.2 *tsubo*.

4. That as between the defendants, the defendant Municipality shall pay forthwith any balance remaining due to defendant Termeteet and that a new deed of conveyance accurately describing the area conveyed to the Municipality shall be prepared and executed by defendant Termeteet in behalf of the Ngemelas Clan upon the receipt of the balance of the payment due.

5. No costs are awarded.