

HASUMI OSAWA and KINTOKI JOSEPH, Appellants

v.

ERNIST LUDWIG, Appellee

Civil Appeal No. 22

Appellate Division of the High Court

October 24, 1966

See, also, 3 T.T.R. 465

Appeal from judgment entered in the Trial *Division* of the High Court, Truk District. Appellants contend that trial court erred *in* approving fact-finding of Master and that they had newly-discovered evidence to present. The Appellate Division of the High Court, Associate Justice Joseph W. Goss, held that limited review of appellate court does not permit *it* to set aside fact-findings unless clearly erroneous and that newly-discovered evidence must be presented by motion in trial court.

Affirmed.

1. Trust Territory-Land Law-Ownership Disqualification

Disqualification from holding title to land because of nationality is matter of which only government can take advantage.

2. Appeal and Error-Scope of Review-Facts

Findings of fact by Trial Division of the *High* Court in cases tried by it will not be set aside by appellate court unless clearly erroneous. (T.T.C., Sec. 200)

3. Appeal and Error-Scope of Review-Facts

Where the Trial Division of the *High* Court adopts findings of Master's Report, appellate court *is limited in* review and may not set aside fact *findings* unless clearly erroneous. (T.T.C., Sec. 200)

4. Appeal and Error-Scope of Review-Facts

Appellate courts are *constituted* for dealing with questions of law, and findings of fact will not be disturbed when supported by competent evidence.

5. Appeal and Error-Scope of Review-Recol'd

Evidentiary matters which are not part of record on appeal cannot be considered by appellate court.

6. Civil Procedure-Newly Discovered Evidence

Under Rules of Civil Procedure, newly discovered evidence may be considered only in connection with motion for new trial or motion for relief from judgment. (Rules of Civil Proc., Rules 18d, 18e(2))

Counsel for Appellants: KINTOKI JOSEPH
Counsel for Appellee: 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. 127, Trial Division of the High Court, Truk District. The Appellants and the Appellee filed written arguments, and oral arguments were heard at Moen Island, Truk Atoll, on September 27, 1966.

The grounds upon which the Appellants rely are essentially that:

1. The Trial Court erred in approving the Master's Finding of Fact that Kamakichi had purchased rather than rented the land Pow.
2. The Appellants have other evidence to present to Court.

[1] In this argument Counsel for the Appellants raised a question of law and alleged that Kamakichi as an Okinawan and as a non-Trukese was prohibited by Japanese law from purchasing the land. In the recent case of *Elias Cai-pot v. Robert Narruhn, et al.*, 3 T.T.R. 18, it was held that a disqualification from holding title to land because of nationality is a matter of which only the government can take advantage.

" . . . , as against all others than the government, a person subject to this disqualification can continue to exercise all the rights of ownership unless and until the government acts on the matter. *Maria Nfjurun Acfalle v. Carlus V. Aguon*, 2 T.T.R. 133, ' . ' .3 Am. Jur. 2d, Aliens and Citizens, §§ 13, 16, 26."

In the case on appeal Findings of Fact were made by the Honorable Upuili, as Master, and his report was approved by the Trial Court in the Judgment Order.

[2, 3] The first question before this Court is to determine the scope of the review which is to be made by the Appellate Division. Section 200 of the Trust Territory Code provides that on appeal the findings of fact of the Trial Division of the High Court in cases tried by it shall not be set aside by the Appellate Division of that Court unless they are clearly erroneous. Was the case "tried" by the Trial Division? In 53 Am. Jur., § 2, p. 28, "trial" is defined and discussed : —

"The word 'trial' has been defined as the judicial investigation and determination of the issues between the parties to an action. The word is commonly used to designate that step in an action by which issues or questions of fact are decided, but often signifies an examination of matters of law as well. The term is sometimes defined by statute as meaning a judicial examination of the issues, whether of law or of fact."

We conclude that despite references to "trial" by a Master in General Order No.5, *Appointment of Masters to Hear Cases on Outlying Islands*, issued by the Chief Justice on September 9, 1957, the word "tried" is used in T.T.C. 200 to distinguish those cases initially decided by the Trial Division from the cases which the Trial Division considers on appeal. The Trial Division by its Judgment Order adopted the Findings of the Master, and the Appellate Division is therefore limited in its review.

[4] It is believed the function of the Appellate Division in considering appeals from the Trial Division should be re-emphasized, and the following language is quoted from *Kenyul et al v. Tamangin*, 2 T.T.R. 648:-

"Superior appellate courts are, primarily, constituted for the purpose of dealing with questions of law; the consideration of any question of fact by such a court involves a decision on the record without any opportunity being afforded for judging as to the credibility of witnesses except insofar as discrepancies may appear in the testimony in the record If a judicial mind could, on due

consideration of the evidence as a whole, reasonably have reached the conclusion of the court below, the findings must be allowed to stand. Such findings will not be disturbed when supported or sustained by competent evidence, especially where the evidence is conflicting or where different inferences can reasonably be drawn therefrom."

After an examination of the Record, including the testimony as to consideration for the purchase and the use of the property since 1944, it is concluded that there is substantial testimony in the record to support the Finding made by the Master and adopted by the Trial Court that Kamakichi bought full title to the land Pow. We cannot conclude that in any sense the findings of the Trial Division were "clearly erroneous".

[5, 6] With regard to the new evidence which Appellants mention in their Notice of Appeal and their Brief, evidentiary matters which are not a part of the record on appeal 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 new 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.