

NASHION, et al., Appellants-Defendants

v.

LITIRIA, et al., Respondents-Plaintiffs

Civil Appeal No. 306

Appellate Division of the High Court

Marshall Islands District

May 5, 1983

Appeal from a judgment of the trial court in a Marshallese land dispute. The Appellate Division of the High Court, Laureta, Judge, held that trial court did not err in determining that in an attempted Marshallese land sale on *Jebrik's Side*, the necessary "approval and acquiescence" of the *Droulul* was not obtained, and land transfer was invalid, and therefore judgment of trial court was generally affirmed, although modified in some respects.

1. Marshalls Land Law—"Iroij Lablab"—Powers

Under Marshallese custom, the power to establish or terminate land interests lies with the *iroij lablab* or with persons holding that authority.

2. Marshalls Land Law—"Jebrik's Side" of Majuro—"Droulul"

On *Jebrik's Side* the *Droulul* holds and exercises *iroij lablab* authority.

3. Marshalls Land Law—"Jebrik's Side" of Majuro—"Droulul"

The *Droulul* is a committee composed of individuals holding rights as *iroij erik, alab* or *dri jermal*.

4. Marshalls Land Law—"Jebrik's Side" of Majuro—"Droulul"

On *Jebrik's Side*, termination or change of land interests must have the "approval and acquiescence" of the *Droulul*.

5. Marshalls Land Law—"Jebrik's Side" of Majuro—"Droulul"

Any delegation of the *Droulul's* authority must be either "definite" or "specifically conferred" at a meeting of which the whole *Droulul* had adequate notice and in which all members had reasonable opportunity to participate.

6. Appeal and Error—Findings and Conclusions—Substantial Evidence

Test on appeal of a trial court determination of rights in land is whether substantial evidence supports the finding.

7. Appeal and Error—Findings and Conclusions—Substantial Evidence

"Substantial evidence" is that quantum of relevant evidence which a reasonable mind would accept as adequate support for a conclusion.

8. Appeal and Error—Findings and Conclusions—Substantial Evidence

Evidence may be "substantial" even though it rationally permits two inconsistent conclusions to be drawn from it.

9. Appeal and Error—Findings and Conclusions—Clearly Erroneous

A finding is clearly erroneous when, even though some evidence supports it, the entire record definitely and firmly convinces the appellate panel that the trial court made a mistake.

10. Appeal and Error—Findings and Conclusions—Clearly Erroneous

Because the "clear error" review standard rests upon deference to a trial judge's unique opportunity to evaluate witness credibility, the reviewing court should accord weight to the lower court's assessment of conflicting or ambiguous evidence.

11. Marshalls Land Law—"Jebrik's Side" of Majuro—"Droulul"

In a Marshallese land dispute, finding of trial court that *Droulul* did not give approval for sale of land was not erroneous, where only evidence that *Droulul* delegates its authority in land matters to party who approved sale was the party's own bald and unsubstantiated claims, which the trial court evidently concluded lacked credibility.

12. Marshalls Land Law—"Jebrik's Side" of Majuro—"Droulul"

Droulul's failure to expressly repudiate a sale of land on *Jebrik's Side* did not amount to approval of the sale by acquiescence, since exercise of the *Droulul's* powers must be by approval *and* acquiescence, and substantial evidence supported a finding that valid approval was not given by the *Droulul*.

13. Marshalls Land Law—"Jebrik's Side" of Majuro—"Droulul"

Dri jermal holders, acting alone, lacked legal competence to authorize a sale of Marshalls land on *Jebrik's Side*.

14. Real Property—Adjudication of Ownership—Evidence

In a Marshallese land dispute, evidence of correspondence by and to the Chief Justice of the Appellate Division submitted for the purpose of proving the validity of certain points of law contained in the correspondence was properly excluded, since statements in a letter could not legally contravene the proper principles of law applicable to the case.

15. Civil Procedure—Consolidation

Trial court's denial of motion for consolidation of two separate cases was not an abuse of discretion, where the two cases did not present a common factual or legal question within the meaning of Trust Territory Rules of Civil Procedure. (Rules of Civil Proc., Rule 34(a))

16. Pleadings—Counterclaim

Trial court correctly denied a post-judgment motion for findings on a putative counterclaim, where neither the court or the opposing party received reasonable notice before trial of the alleged counterclaim, and the counterclaim was not properly pleaded, since it did not include a demand for judgment, and the claim was not raised at a pretrial conference.

Before MUNSON, *Chief Judge*, MIYAMOTO, *Associate Judge*, and LAURETA, *Designated Judge*

LAURETA, *Judge*

This is an appeal from the judgment of the Trial Division of the High Court divesting appellants of legal interest in a parcel of land entitled *Wojaninnan Weto* located on *Jebrik's Side* on Majuro, Marshall Islands. We affirm the judgment as modified below.

This case involves Marshallese customary law. We include, for convenience, the following definitions:¹

a. *Weto*—a parcel of land.

b. *Dri Jerbal*—all who may, by right, work a land parcel, not including the *alab*. Generally, such rights are vested by birth into the family claiming title to the particular *weto*; however, *dri jermal* rights may be granted to outsiders.

c. *Alab*—a chief or senior lineage member in charge of a *weto*.

d. *Iroi Erik*—a sub-chief or intermediate chief between an *alab* and an *iroij lablab*.

e. *Iroi Lablab*—a paramount or supreme chief in a lineage or clan.

f. *Droulul*—a governing committee of *Jebrik's Side* which exercises the powers normally exercised elsewhere in the Marshalls by the *iroij lablab*.

g. *Jebrik's Side*—a portion of Majuro Atoll.

I. FACTS

This case involves an attempted land sale on *Jebrik's Side*. The operative facts are undisputed. On April 30, 1976, appellants Mattu Malla, Violet Jolet, Debit David, Henry Muller and Taidrik Ladrik executed a document transferring *alab* and *dri jermal* rights in *Wojaninnan Weto* (hereinafter "*Weto*") to appellant Nashion. Malla

¹ The definitions are taken from J. Tobin, *Land Tenure in the Marshall Islands*, reprinted in Vol. 1, *Land Tenure Patterns in the Trust Territory of the Pacific Islands* 73-75 (1958) and *Jatios v. Levi*, 1 T.T.R. 578, 580-84 (H.C. App. Div. 1954).

and Jolet purported to sign as *alab* and Muller and Ladrik each purported to sign as *iroij erik*. Appellant Nashion took possession of the *Weto* and began making improvements thereon.

Appellee has senior *dri jermal* rights on the *Weto*. She contends that the appellants did not have proper authorization from the *Jebrik's Side Droulul* (hereinafter "*Droulul*") to make the land transfer and therefore the transfer is invalid. The appellants argue that Ladrik represented the *Droulul* and had authority to act in land matters for the *Droulul*.

On September 20, 1976, appellee filed this action. She asked the court to: 1) void the attempted land sale for violation of Marshallese custom; 2) eject Nashion from the *Weto*; and 3) enjoin Nashion from continuing construction or otherwise interfering with appellee's possession.

On October 18, 1976, appellants answered and counterclaimed for a \$5,000 injunction security bond. The parties stipulated to dismissal of the \$5,000 counterclaim on December 9, 1977. Appellants moved to consolidate this action for trial with a post-judgment motion in Civil Action No. 21-75. The trial court denied the motion at a pretrial conference on February 16, 1979. On March 19, 1979, the court rendered judgment for appellee.

II. ISSUES

The issues presented on appeal are:

A. Whether the following factual findings were clearly erroneous:

1. *Finding No. 6*: The *Droulul* did not give approval of the sale.
2. *Finding No. 7*: Malla, Jolet and David did not possess *alab* or *dri jermal* rights in the land.

B. Whether the trial court abused its discretion in excluding appellants' Exhibit B;

C. Whether the trial court abused its discretion in denying appellants' motion to consolidate this case with another action involving appellee; and

D. Whether the trial court erred by not making findings and conclusions on appellants' counterclaim.

III. DISCUSSION

A. Applicable Law

As appellant accurately points out, the trial court's judgment was required to "include a specific finding as to . . . custom, its existence and application to the facts of the case." Special Rules of Civil Procedure, Marshall Islands District, Rule 1b(3) (1972), reprinted in Code of the Trust Territory of the Pacific Islands 45 (1975 Supp.). The trial court failed to make the Rule 1b(3) finding; it is unclear what customary law principles the court applied.

In this instance the trial court's inadvertence does not in itself compel a reversal or a remand. Meaningful appellate review is possible because the reported cases afford sufficient guidance on the Marshallese custom observed on *Jebrik's Side*.

[1-3] Under Marshallese custom, the power to establish or terminate land interests lies with the *iroij lablab* or with persons holding that authority. *Lanki v. Lanikieo*, 7 T.T.R. 533, 537 (H.C. App. Div. 1977). On *Jebrik's Side* the *Droulul* holds and exercises *iroij lablab* authority. *Id.* at 538. The *Droulul* is a committee composed of individuals holding rights as *iroij erik, alab* or *dri jermal*. See *Tikoj v. Liwaikam*, 5 T.T.R. 483, 490 (H.C. Tr. Div. 1971); *Lojob v. Albert*, 2 T.T.R. 338, 341-42 (H.C. Tr. Div. 1962).

[4, 5] The High Court has previously noted that there is considerable uncertainty as to the exact procedures and mechanics involved in the exercise of *Droulul* powers. See

Alek S. v. Lomjeik, 3 T.T.R. 112, 116 (H.C. Tr. Div. 1966). What is clear, however, is that on *Jebrik's Side*, termination or change of land interest must have the "approval and acquiescence" of the *Droulul*. *Makroro v. Benjamin L.*, 5 T.T.R. 519, 522 (H.C. Tr. Div. 1971). Any delegation of the *Droulul's* authority must be either "definite" or "specifically conferred" at a meeting of which the whole *Droulul* had adequate notice and in which all members had reasonable opportunity to participate. *Joab J. v. Labwoj*, 2 T.T.R. 172, 176-77 (H.C. Tr. Div. 1961); *Lojob v. Albert*, 2 T.T.R. 338, 341 (H.C. Tr. Div. 1962).

B. Finding No. 6

[6-10] Appellant argues that the trial court clearly erred in finding that the *Droulul* did not approve the attempted sale. The test is whether substantial evidence supports the finding. *E.g.*, *Laubon v. Monna X.*, 7 T.T.R. 439, 440 (H.C. App. Div. 1976) (per curiam). "Substantial evidence" is that quantum of relevant evidence which a reasonable mind would accept as adequate support for a conclusion. *Thompson v. Schweiker*, 665 F.2d 936, 939 (9th Cir. 1982). Evidence may be "substantial" even though it rationally permits two inconsistent conclusions to be drawn from it. *T.R.W., Inc. v. F.T.C.*, 647 F.2d 942, 946 n.5 (9th Cir. 1981). A finding is clearly erroneous when, even though some evidence supports it, the entire record definitely and firmly convinces the appellate panel that the trial court made a mistake. *South Seas Corp. v. Sablan*, 525 F. Supp. 1033, 1037 (D.N.M.I. App. Div. 1981), *aff'd* No. 81-4629 (9th Cir. Sept. 30, 1981) (unpublished memorandum). Because the "clear error" review standard rests upon deference to a trial judge's unique opportunity to evaluate witness credibility, the reviewing court accords weight to the lower court's assessment of conflicting or ambiguous evidence. *Inwood Laboratories v.*

Ives Laboratories, 456 U.S. 844, 102 S. Ct. 2182, 2188–89, 72 L. Ed. 2d 606 (1982) ; *South Seas*, 525 F. Supp. at 1037.

[11] Finding No. 6 is not clearly erroneous. *Droulul* approval is the pivotal legal requirement under Marshall-ese custom for the creation or transfer of rights in a *weto* on *Jebrik's Side*. As noted above, approval may be made by the action of the *Droulul* itself or by proper delegation of its powers. In this case, absence of approval of the *Droulul* is conceded. Appellants assert that the *Droulul* delegated its authority in land matters to Ladrik. Such delegation must be “definite” or “specifically conferred.” *Supra*. The only evidence which supports appellants’ contention is Ladrik’s own bald and unsubstantial claims as to the existence of such authority. Under “clear error” review standards, the court must defer to the trial court’s evident conclusion that Ladrik’s testimony lacked credibility.

[12] Appellants further contend that the *Droulul's* failure to expressly repudiate the sale amounts to approval by acquiescence. This argument misreads the *Joab-Makroro* test. The exercise of the *Droulul's* powers must be by “approval *and* acquiescence.”² *Makroro* at 522 (emphasis added). Valid approval, in absence of a proper delegation, can only be made by the entire body, each member of which has had proper notice and an opportunity to be heard. *Joab* at 176. Substantial evidence exists to support the lower court’s finding that no such action was taken.

C. Finding No. 7

[13] Appellee concedes that appellants Malla, Jolet and David had *dri jermal* rights, and that therefore Finding No. 7 is erroneous. This court accordingly modifies Find-

² Appellants misread *Makroro* as requiring only approval *or* acquiescence. This misinterpretation is fatal as acquiescence alone is insufficient to constitute the proper exercise of *Droulul* authority

ing No. 7 to reflect Malla's, Jolet's and David's *dri jermal* status. Yet, this error does not mandate reversal under "clear error" review. The dispositive issue under Marshall-ese custom is whether the sale received plenary *Droulul* approval. As *dri jermal* holders, acting alone, Malla, Jolet and David lacked legal competence to authorize the sale.

D. Exclusion of Defendants'-Appellants' Exhibit B

Exhibit B consisted of: (1) a February 2, 1977, letter from Chief Justice Burnett to Anibar Timothy regarding *Droulul* powers; and (2) an October 8, 1976, memorandum on the same topic from the *Jebrik's Side iroi* to Chief Justice Burnett. The sole basis for which appellants offered Exhibit B was to refute "the fact that the *Droulul* has any authority over land sales." Appellants specifically represented that Exhibit B "is a statement by the Chief Justice regarding just what . . . (*Droulul*) powers are."

[14] The court below properly excluded Exhibit B as irrelevant. The more specific defect was Exhibit B's legal incompetence to prove the fact for which appellants offered it. The *Droulul's* supreme and plenary authority in land transfer matters is well settled in Marshallese customary law. Any contrary statements in correspondence by or to the Chief Justice would not legally contravene the principle.

E. Denial of Motion to Consolidate

Appellants claim error in the trial court's refusal to consolidate this action with a post-judgment motion in Civil Action No. 21-75. In Civil Action No. 21-75, Lanwoj Tomijwa sued appellee for failure to recognize Tomijwa as *alab*. A default judgment was issued against appellee on November 12, 1975. On October 19, 1976, Tomijwa moved to permanently evict appellee from the *weto* for continued refusal to acknowledge him as *alab*. This motion was *still*

pending when appellants sought and were denied consolidation on February 16, 1979. In November, 1979, Chief Justice Burnett denied the eviction motion in Civil Action No. 21-75.

[15] Appellants have not credibly demonstrated error. This case and the eviction motion in Civil Action No. 21-75 did not present a common factual or legal question within the meaning of Trust Territory Civil Procedure Rule 34(a). The issue here is whether the appellants had authority on April 30, 1976, to transfer *alab* or *dri jermal* rights to appellant Nashion without *Droulul* approval. The issue in the 21-75 eviction motion was whether appellee had attempted in good faith to fulfill her obligations as *dri jermal* to *alab* Lanwoj Tomijwa. Moreover, Rule 34(a) merely provides that the trial court “may” consolidate similar cases. This permissive language connotes broad discretion to deny consolidation of actions which do meet the threshold “commonality” test. Since appellants failed to satisfy the commonality test, it follows *a fortiori* that the lower court’s denial of consolidation was not an abuse of discretion.

F. Whether the Trial Court Erred By Not Making Findings and Conclusions on Appellants’ Counterclaim

There is no merit in appellants’ contention that the trial court should have made findings and conclusions on their counterclaim. The only counterclaim which appellants *properly* pleaded was a claim for a \$5,000 injunction security bond. Appellants dismissed this counterclaim by stipulation on December 9, 1977.

Appellants suggest that they intended to also assert a \$7,000 counterclaim for land clearing costs. They point out that ¶5 of their Answer and Counterclaim alleges this expenditure.

[16] Appellants did not properly plead a \$7,000 counterclaim. Trust Territory Rule of Civil Procedure 8(a) requires that each claim include a demand for judgment. Appellants never demanded a \$7,000 recovery for land clearing. The issue was not raised at the pretrial conference on February 16, 1979. Thus, neither the court nor appellee received reasonable notice before trial of the alleged \$7,000 counterclaim. At that point appellants waived any conceivable error. The lower court therefore correctly denied appellants' post-judgment motion for findings on the putative \$7,000 counterclaim.

The judgment is **AFFIRMED AS MODIFIED** as follows:

- 1) Finding No. 7 shall reflect that Malla, Jolet and David have *dri jermal* interests in the *weto*; and
- 2) The judgment shall specifically enjoin appellants from continuing construction on the *weto* or otherwise interfering with appellee's use of it.

**NIPWECH UNGENI, individually and on behalf of his lineage,
Plaintiff-Appellee**

v.

**TRUST TERRITORY OF THE PACIFIC ISLANDS,
Defendant-Appellant**

Civil Appeal No. 284

Appellate Division of the High Court

Truk District

August 22, 1983

Appeal from trial court decision in land ownership dispute holding that title to certain tidelands were vested in individual, and not in Trust Territory Government. The Appellate Division of the High Court, Laureta, Associate Justice, held that Trust Territory Government failed to sustain its burden of showing the existence and substance of alleged Japanese Proclamation relied upon to prove lands belonged to Government, and that doctrine of "prior