

ment as owner, appellants have no separate property interest in these fishing rights. Appellants then are not entitled to damages to their fishing rights since the government, as owner of these marine areas, has the absolute right to conduct dredging operations in marine areas below the ordinary high watermark.

AFFIRMED.

TOSHIWO SHIMA, et al., Plaintiffs-Appellees
v.
NAMO HERMIOS, et al., Defendants-Appellants

Civil Appeal No. 424

Appellate Division of the High Court

Marshall Islands District

July 8, 1988

Dispute over *alab* and *dri jermal* rights to Jikibdru lar *weto* on Wotje Island in the Republic of the Marshall Islands. The Appellate Division of the High Court, Munson, Chief Justice, held that trial division erroneously awarded *alab* rights to appellee since a previous court order had declared appellant the *alab*, and the trial division was therefore without authority under the doctrine of *res judicata* to redetermine *alab* rights, and held that trial division properly awarded *dri jermal* rights to appellee, based on finding that 1952 *kallimur* superceded a 1929 *kallimur*.

1. Appeal and Error—Notice and Filing of Appeal—Late Filing

Failure to timely file an appeal will bar a litigant from contesting the determination.

2. Judgments—“Res Judicata”

Trial division was without authority under the doctrine of *res judicata* to redetermine *alab* rights to a *weto* that had been the subject of a final judgment.

3. Marshalls Land Law—“Leroij”—Powers

As a general matter, a *leroi* (or the male counterpart, *iroij*) does have the power to determine the rights of subordinate landowners.

4. Marshalls Land Law—“Leroij”—Weight of Decisions

A decision of a *leroi* to change the rights of subordinate landowners is entitled to great weight and will be upheld unless unreasonable and arbitrary.

5. Appeal and Error—Findings and Conclusions—Tests

Trial court's findings of fact will not be overturned on appeal unless unreasonable and arbitrary.

6. Appeal and Error—Evidence

Evidentiary errors are not grounds to reverse a judgment of the trial court unless substantial justice will otherwise be undermined.

7. Appeal and Error—Evidence—Weight

It is not the function of an appellate court to second-guess the trial judge's ability to assess a witness' credibility or veracity, or to determine what weight should be assigned to evidence received by the trial court.

8. Evidence—Hearsay—Particular Cases

It was not erroneous for the trial judge in rendering judgment in land dispute to give little or no weight to hearsay evidence and to refuse to admit an unauthenticated tape recording offered without proper foundation.

9. Appeal and Error—Evidence—Sufficiency

Evidence was sufficient to support trial division's finding that 1952 *kallimur* superceded a 1929 *kallimur*, and to support award of *dri jermal* rights.

Counsel for Appellant: DAVID M. STRAUSS, ESQ.

Before MUNSON, *Chief Justice*, KOZINSKI, *Associate Justice**, and TEVRIZIAN, *Associate Justice***

MUNSON, *Chief Justice*

This appeal involves a dispute over who holds the *alab*¹ and *dri jermal*² rights to Jikibdru lar *weto*³ on Wotje Island in the Republic of the Marshall Islands.

* Judge of the United States Court of Appeals, Ninth Circuit, designated as Temporary Associate Justice by the Secretary of Interior.

** Judge of the United States District Court, Central District of California, designated as Temporary Associate Justice by the Secretary of Interior.

¹ An *alab* is a person in immediate charge of a piece of land.

² A *dri jermal* is a worker on a piece of land.

³ A *weto* (sometimes spelled *wato*) is typically a strip of land stretching across the island from the lagoon side to the ocean side and varying in size from about one to five acres. The *weto* is the typical Marshallese land unit.

[1] Appellant Capitol Labwirrik in his notice of appeal cites three errors from the May 13, 1986 decision of the trial division. The first two errors cited involve the same issue, that is, that the trial division erroneously awarded the *alab* rights to the appellee. The first ground cited as an error is that the trial division was without jurisdiction to rule on the question as to the *alab* right for the subject *weto*. A review of the trial division's file in Civil Action 7-77, *Shima v. Hermios*, reveals that Judge Gianotti's order of December 6, 1983 declared appellant Capitol was the *alab* of Jikibdru lar. The file further reveals that pursuant to the unchallenged court order, Capitol was paid the *alab*'s share of the war claims money that was the subject of that action, on February 8, 1984. Judge Gianotti's order reserved the question of the *dri jermal* rights of the *weto*. Appellee had an opportunity to appeal the December 6, 1983 order and failed to do so. The failure to timely file an appeal will bar a litigant from contesting the determination. *Santos v. TTPI*, 7 T.T.R. 615 (App. Div. 1978).

[2] We are mindful that this case involved more than 100 people disputing the *alab* and *dri jermal* rights to over 60 *wetos*; however, we cannot determine why in 1985 the trial division was not aware of the December 6, 1983 order declaring that Capitol was the *alab* of the *weto*. The file is replete with pleadings subsequent to December 6, 1983 that show that only the *dri jermal* rights to Jikibdru lar needed to be determined. We need not consider appellant's second request presented as an error as it is clear the trial division was without authority under the doctrine of *res judicata* to redetermine the *alab* rights that had been the subject of a final judgment. *Gibbons v. Owang Lineage*, 5 T.T.R. 103 (App. Div. 1970).

Turning to the final issue, appellant urges that the evidence was insufficient to support the trial division's finding

that the 1952 *kallimur*⁴ of Lotto superseded the 1929 *kallimur* of Labwirrik, which resulted in awarding the *dri jermal* rights to appellee Toshiwo's *bwij*.⁵

In 1929, while appellant Capitol's *bwij* was in control of Jikibdru lar *weto*, Labwirrik (Capitol's father) wrote a *kallimur* to government officials concerning the *dri jermal* rights to the land in question. In that document, Labwirrik expressed his wish that the *dri jermal* rights be transferred to his children, including Capitol, upon his death.

On December 1, 1952, Lotto Jenni, of appellee Toshiwo's *bwij*, signed his typewritten *kallimur* concerning the *dri jermal* rights on certain lands. The *kallimur* expressed Lotto's wish that his nephews and nieces would assume the *dri jermal* rights upon his death. The *kallimur* listed four *wetos* and did not mention Jikibdru lar. On October 17, 1981, *Leroij*⁶ Limojwa signed her name next to a handwritten entry adding Jikibdru lar as the fifth *weto* in the *kallimur*. The trial division determined that that decision by the *leroi* was consistent with the powers of a chief to cut off subordinate rights in land and thus superseded the 1929 *kallimur* of Labwirrik.

Appellant argues that the trial division should have given greater weight to the testimony of Litokwa Tomeing, described by the appellant as a disinterested witness. Litokwa testified that he attended a meeting wherein *Leroij* Limojwa stated that she did not understand Lotto's *kallimur* but that Toshiwo's people had given it to her to sign. Litokwa also offered to play a tape recording of this meeting where *Leroij* Limojwa explained her misunderstanding of Lotto's *kallimur*. Finally, appellant argues that the trial division erred by not giving greater weight to a letter, marked as Exhibit

⁴ A *kallimur* is a means by which one disposes of his or her lands, analogous to a will.

⁵ *Bwij* means an extended matrilineal family or lineage.

⁶ *Leroij* is a female chief of certain lands.

4, written by *Leroij* Limojwa wherein she recognized the *kallimur* from *Alab* Labwirrik.

[3-6] As a general matter, a *leroi*j (or the male counterpart, *iroi*j) does have the power to determine the rights of subordinate landowners. A decision of a *leroi*j to change such interests is entitled to great weight and will be upheld unless unreasonable and arbitrary. *Limine v. Lainej*, 1 T.T.R. 107 (Marshalls 1954); *Lebeiu v. Motlock*, 6 T.T.R. 145 (Marshalls 1973). We will not overturn the trial court's findings of fact unless they are clearly erroneous. *Techong v. Peleliu Club*, 7 T.T.R. 364 (App. Div. 1976). Evidentiary errors are not grounds to reverse a judgment of the trial court unless substantial justice will otherwise be undermined. *Bina v. Lajoun*, 5 T.T.R. 366, 369-70 (App. Div. 1971).

[7-9] It is not the function of the appellate court to second-guess the trial judge's ability to assess a witness' credibility or veracity, nor is it the function of the appellate court to determine what weight should be assigned to evidence received by the trial court. The trial judge in this case was sitting without a jury, the trial assistants representing the parties were not lawyers, and we therefore find that it was not erroneous for the trial judge in rendering his judgment to give little or no weight to the hearsay evidence of Tomeing and to refuse to receive the unauthenticated tape recording offered without proper foundation. We also note that the letter marked as Exhibit 4 was dated June 11, 1981, four months before *Leroij* R. Limojwa signed Lotto's *kallimur* awarding the *dri jerb*al rights to appellee's *bwij*. We therefore find that evidence was sufficient to support the trial division's findings that Lotto's *kallimur* superseded the *kallimur* of Labwirrik and further find that the trial division's findings were not clearly erroneous.

Accordingly, it is ORDERED, ADJUDGED and DECREED as follows:

1. The judgment of the trial division that Lejer is the *alab* of Jikibdru lar *weto* of Wotje land is REVERSED, and the *alabship* is CONFIRMED to Capitol pursuant to the December 6, 1983 trial division's order.

2. The judgment of the trial division awarding the *dri jermal* rights of Jikibdru lar *weto* on Wotje Island to Lejer is AFFIRMED.

3. This opinion shall not affect any rights of way over, across, or upon the said parcel of land.

4. No costs are assessed in favor or against any party.

TOSHIWO SHIMA, et al., Plaintiffs-Appellees

v.

NAMO HERMIOS, et al., Defendants-Appellants

Civil Appeal No. 428

Appellate Division of the High Court

Marshall Islands District

July 8, 1988

Appeal from judgment of trial division holding that appellee was the *alab* of four *wetos*. The Appellate Division of the High Court, Munson, Chief Justice, affirmed the judgment of the trial division, since evidence abundantly supported its finding, that a *bwilok* existed, approved by the *iroij laplap*, and that all four of the *wetos* awarded were on the list of *wetos* in issue.

1. Marshalls Land Law—"Bwilok"

Trial court properly found that a *bwilok* existed and that the *iroijs* confirmed such *bwilok*, based on testimony determined to be reliable and documentary evidence.

2. Marshalls Land Law—"Alab"

On appeal from judgment of trial division holding that appellee was *alab* of four *wetos*, claim was rejected that one of the *wetos* awarded was not on the list of *wetos* in issue.