NGIRATEMARIKEL DELEMEL, Plaintiff-Appellant

v.

GILBERT TULOP, Defendant-Appellee

Civil Action No. 299

Trial Division of the High Court

Palau District

April 2, 1968

Hearing on motion for relief from judgment and for a new trial. The Trial Division of the High Court, E. P. Furber, Temporary Justice, held that from the record the meetings of clan in question as supervised by a master gave a fair expression of the clan's wishes and that that decision should stand subject to further determination of the clan or some substantial change of circumstances.

Motion for relief of judgment and for new trial denied.

,1. Civil Procedure--Motion for New Trial-Newly Discovered Evidence

Affidavits filed in support of motions were clearly insufficient to show newly discovered evidence which by due diligence could not have been discovered in time to be presented either at one of previous meetings held or for use in support of a motion for new trial within the time allowed for that purpose after entry of judgment under Rule of Civil Procedure 1Sd.

2. Civil Procedure--Witnesses

Where a witness is allowed to testify without being sworn, and without objection at the time, at a hearing or trial participated in by the parties concerned, personally or through counsel, requirement of the oath is properly to be considered as waived.

3. Civil Procedure--Motion for New Trial-Equitable Grounds

Subsection 6 of Rule 18e of the Rules of Civil Procedure authorizes the court to set aside a judgment where justice so requires and it is based on a similar provision in Rule 60b of the Federal Rules of Civil Procedure which has been said to constitute a grand reservoir of equitable power to do justice in a particular case.

4. Palau Custom-Clans

A Palauan clan is no longer a completely independent body and is not allowed to settle its difficulties by physical violence or the threat of it.

5. COUl"ts-Jurisdiction

A clan is entitled to exercise a wide discretion in handling its own affairs, so long as it acts fairly with proper regard for the interests of all its members and within the limits of the law, but when it fails to operate within those limits, the courts have an obligation to intervene in the interests of justice and maintaining the peace when the matter is presented to them by one or more of the interested parties.

6. Courts-Jurisdiction

Before acting in a clan matter the courts will give a clan reasonable opportunity to settle its own problems if that can be done fairly and peacefully.

7. Courts-Jurisdiction

Where court was faced with the necessity of working out some arrangement that would solve a clan agreement the referring of the matter to a Master for a determination of the honest wishes of the clan was a reasonable and proper solution.

8. Palau Custom-Clans-"OchelI"

In many cases the word *ochell* is applied to strong active members who have come into a Palauan clan without blood relationship in the female line, and in such a case the term *ochell* is used in a figurative or simu-' lated sense.

9. Palau Custom-Clans-"OchelI"

A person can be a "strong member" and stand in the p03ition of an *ochell* of the Ngerbuuch Clan and also be a member or even a true *ochell* of some other Anguar Clan or Clans.

Assessor: JUDGE RUBASCR FRITZ
InterpreteT: SINGICRI IKESAKES
Counsel for Plaintiff: ITELBANG LUIl
Counsel for Defendant: F. ARMALUUK

FURBER, *Temporary Judge*

Counsel for the defendant-appellee, in support of the latter's motion for relief from judgment and for new trial, raised two grounds in oral argument in addition to those stated in the motion, and indicated by three affidavits submitted in support of it, namely:-

1. Some of the witnesses testified before the Master without being sworn; and

2. Members have already brought Civil Action No. 1214 in the District Court protesting against the distribution of Angaur Mining Trust Fund income made by the plaintiff-appellant to persons the defendant-appellee considers to be non-members.

In answer to questions from the court, he admitted that underPalauan custom, a person could be an *"ochell"* of one clan and a *"ulechell"* of another clan at the same time; that there are no true *"ochell"* of the Ngerbuuch Clan; and that Orodel Ngirasar, who made one of the affidavits in support of the motion for relief from judgment, is the same person as Orodel Dirramalk.

He then asked that the charts of the Tmiu, Ngerchulbelu, and Ngerchelbucheb Clans, and of the Ucheliou Clan ofPeleliu allegedly prepared by Mr. Harry K. Uyehara about 1949-52 be considered by the court and submitted folders containing these charts and a listing of names in connection with each. Counsel for the plaintiff-appellant objected as to the chart of the Ucheliou Clan of Peleliu, but agreed that the charts of the other three clans were all right. The defendant-appellee himself then admitted that the chart of the Ucheliou Clan ofPeleliu was not made by Mr. Uyehara. That chart was withdrawn from consideration but the other three were accepted for consideration of the court without objection.

Counsel for the plaintiff-appellant raised the follOWIng objections to the motion : –

1. This case had been tried twice in the District Court and all the essential facts are in the file;

2. The evidence and findings in the District Court show clearly that the plaintiff-appellant isa member of the clan!

3. Orodel Ngirasar (otherwise known as Orodel Dirramalk) who was the maker of one of the affidavits in

support of the motion was a witness in the District Court; Kristina Ukebid, the maker of another of the affidavits in support of the motion, was also a witness in the District Court; there was no showing that Kristina Pedro, the maker of the third affidavit, a resident of Koror, had not been available previously; the matter covered by these affidavits had to do with things that happened long ago, the main substance of which had already been covered in the trials of this action in the District Court; there was no showing at all as to why any of this alleged newly discovered evidence could not have been presented before or what effort had been made to discover it earlier; and these affidavits, therefore, are insufficient under the Rule of Civil Procedure 18b [believed intended to refer to Rule 18e(2)] to indicate newly discovered evidence which could not have been discovered in time to present it earlier.

4. There are many ways persons may become members of a clan; persons can be treated and considered as *"ochell"* even though they are adopted members, or just accepted as members because they were brought up in the clan, and it is well accepted under Palauan custom that a person can be a member of two or three different clans at the same time.

In rebuttal counsel for the defendant-appellee argued that the District Court had refused to consider the charts which had been offered; that he could produce that for the Ngerbuuch Clan if the court wished; and that the motion was brought under the whole of Rule 18e, not under 18b, or merely under 18e(2).

OPINION

[1] The court considers it abundantly clear that the affidavits filed by the defendant-appellee in support of his motion are clearly insufficient to show newly discovered evidence which by due diligence could not have been dis-

covered *in* time to be presented either at one of the previous hearings held in this matter or for use in support ofa motion for new trial within the ten days allowed for that purpose after entry of judgment under Rule of Civil Procedure l8d.

[2] It also considers that the objection raised by counsel for the defendant-appellee that some of the witnesses testified without being sworn is raised altogether too late. Disregarding for the moment the fact that there is no supporting affidavit on this matter and that the circumstances under which this testimony was taken have not been made clear, though they appear to relate to statements made at the meeting or gathering of the clan members organized by the Master, it is believed that any such objection must now be considered to have been waived. No such objection was raised at the hearing on the Master's Report, at which time the matter could in all probability have been straightened out either by further evidence under oath or by an arrangement to disregard particular testimony if it had been properly objected to on this basis. Where a witness is allowed to testify without being sworn, and without objection at the time, at a hearing or trial participated in by the parties concerned, personally or through counsel, as it appears the defendant-appellee did in all of the hearings involved in this case, requirement of the oath is properly to be considered as waived. 39 Am. Jur., New Trial, § 32. 58 Am. Jur., Witnesses, § 550. *Wilcoxon v. United States,* 231 F.2d 384 (1956).

[3] If the motion now before the court can be supported at all, it is believed this must be under subsection 6 of Rule 18e of the Rules of Civil Procedure. That is, on the ground of "any other reason justifying relief from the operation of the judgment". In effect, this subsection authorizes the court to set aside a judgment where justice

so requires. It is based on a similar provision in Rule 60b of the Federal Rules of Civil Procedure which has been said to constitute a "grand reservoir of equitable power to do justice in a particular case". See: Sections 19 and 20 of the Notes to Decisions following said Rule 60b in Federal Court Rules Annotated, 3rd Edition, Part 1, pages 531 and 532.

To determine this requires a review of the whole case and particularly the matters brought up in the Master's Report and the hearing upon it, as well as the matters presented in connection with the present motion.

This action was brought originally in the Palau District Court, tried there, and, after the first judgment had been rendered, a new trial was granted in that court which resulted in the re-establishment of the first judgment to the effect that the attempted removal of the defendant title-bearer was not equitable and that the claim for his removal was not recognized. The second judgment in the District Court was appealed to this court, which set aside the judgment and made the following provisions:-

"The court considers that the ends of justice would not be served by granting a new trial (which would be the third) in the District Court. The basic issue involved here is-who is properly the leader *(Ucherebuuch)* of the Ngerbuuch Clan on Angaur-and this issue should properly be determined in accordance with established Palauan custom on Angaur. Therefore, it is

"ORDERED that this action be and it is hereby referred to Judge Pablo Ringang, Presiding Judge of the Palau District Court, as Master. The Master shall arrange such conferences and meetings, hold such hearings, and take such other steps as he deems necessary to determine in accordance with Palauan custom on Angaur:-

1. Who are the *Dalal a Blai* (members of women council) of the Ngerbuuch Clan?
2. Who are the *Ruktemaol* (members of the male council) of the Ngerbuuch Clan?
3. Who has been appointed by the *Ruktemaol* and the *Dalal a Blai* to become *Ucherebuuch?*

4. Do the *Ngarangebiis* (male council) of the Ngerbelau Hamlet of Angaur Municipality concede the decision and appointment of a title bearer made by the Ngerbuuch Clan?

"The Master shall then file his report herein setting forth his findings as to the above, and may include such other findings as he deems helpful in determining who is *Ucherebuuch,* and such further findings, if any, as he deems appropriate and proper."

Pursuant to the above order, the Master endeavored to have the parties themselves hold a meeting with all the male and female members of the clan to determine who should hold the male title. Many of them did get together, but failed to reach any agreement as to who should become the title-bearer. The Master then ordered the parties to bring in all the clan members, both male and female, and each was given a chance to express his or her opinion as to who should be the title-bearer, all as more fully set out and with the results indicated in the Master's Report on file in this action. After hearing on the Master's Report, which was actively participated in by the defendant-appellee, who is the present moving party, the court found that the title *Ucherbuuch* was lawfully removed from the defendant Gilbert Tulop at the meetings of the Ngerbuuch Clan, supervised by the Master in August and September of 1965, that the plaintiff Ngiratemarikel Delemel was duly chosen at those meetings to bear the title and that the *Ngarangebiis* (village council) of Ngerbelau Village had agreed to accept him as holder of that title but that the title of *Ucherbuuch* had not been removed from said Gilbert Tulop prior to said meetings in 1965. The court accordingly entered judgment to the effect that Ngiratemarikel Delemel was the lawful holder of the title *Ucherbuuch,* and permanently enjoined and prohibited the defendant Gilbert Tulop from exercising any of the rights, privileges, and powers or functions pertaining to that title. It is for relief from that judgment that the motion now before the court has been brought.

At the hearing on the Master's Report it was stipulated as follows:-

1. The court may consider the evidence at both the trials in the District Court without its being re-introduced.

2. The court may consider the District Court's copy of Mr. Harry K. Uyehara's report of the organization of the Clans of Angaur.

Following agreement on these stipulations the defendant. appellee stated that he was ready to let the matter rest without further evidence. The judgment then rendered was based upon the Master's Report, a consideration of all the matters covered by the foregoing stipulations, and the arguments advanced by the parties as to the relative strengths of different members or alleged members of the Ngerbuuch Clan. From an analysis of the Master's Report, it appears clear that the great majority of the agreed members of the clan over 35 years of age, which appear to constitute the present nucleus of the clan, attempted at the meetings supervised by the Master, to appoint the plaintiff-appellant Ngiratemarikel Delemel as titIe-holder.

The court fully agrees with the defendant-appellee Gilbert Tulop's claim that the order referring this matter to a Master and having a clan meeting supervised by a Master are not in accord with Palauan custom. On the other hand, it also appears that the dispute within this clan had reached a point where there was no accepted method of solution under Palauan custom except by the use of force or the threat of force.

[4, 5] This court has already adjudicated a number of things about the present day status of Palauan Clans under the American administration of the Trust Territory. See both the conclusions of law in connection with the original jndgment and the additional ones in connection

with the supplemental judgment in *Lalou v. Aliang,* 1 T.T.R. 94, 290. As there indicated, a Palauan Clan is no longer a completely independent body and is not allowed to settle its difficulties by physical violence or the threat of it, as apparently was the final resort under the custom in olden days. A clan is entitled to exercise a wide discretion in handling its own affairs, so long as it acts fairly with proper regard for the interests of all its members and within the limits of the law, but when it fails to operate within those limits, the courts have an obligation to intervene in the interests of justice and maintaining the peace when the matter is presented to them by one or more of the interested parties. As indicated in the *Lalou* case, the nearest American analogy to this situation is probably the position of the courts in disputes arising within associations or clubs. For those interested in exploring this analogy, the sections of American Jurisprudence cited in that connection in the *Lalou* case have now been superseded by 6 Am. Jur. 2d, Associations and Clubs, §§ 27 through 30.

[6,7] Naturally before acting in the matter the courts will want to give a clan reasonable opportunity to settle its own problems if that can be done fairly and peacefully. It is also to be hoped that many questions as to clan rights and procedures may eventually be clarified by legislation. In the present case, the record shows serious dissention over the leadership of this clan at least since May of 1962 and one-sided attempts to change it, already having resulted in resort to violence.

As stated in 1 Am. Jur. 2d, Actions, § 49:-

"The common law does not go on the theory that a case of first impression presents a problem of legislative as opposed to judicial power, nor does it withhold a remedy until the legislature gives sanction for such an action ...."

"It is not only the right, but the duty of the courts to re-examine questions when justice demands it, and to depart from or modify

old rules when necessary to bring the law in accord with present-day standards of wisdom and justice; to adapt their practice and course of proceeding as far as possible to the existing state of society, so as to apply jurisdiction to all those new cases which must continually arise and not, from too strict adherence to form and rules established under very different circumstances, to decline to administer justice and enforce rights for which there is no other remedy."

The court was, therefore, faced with the necessity of working out some arrangement that would solve this matter, giving Palau custom as large a part as possible short of resorting to force. The solution adopted by the court in referring this matter to a Master, as set forth above, for a determination as to the honest wishes of the clan is, therefore, believed to have been a reasonable and proper solution of this difficult matter.

At the hearing on the Master's Report, the defendant-appellee was given an opportunity to present any grounds he had for believing that the action of the Master had been in any way unfair. The only specific objection (beyond that as to the participation and standing of particular members or alleged members) was that he was not allowed to question the members or alleged members before they indicated their choice, which is apparently what he refers to in the second ground of his motion as having waived his right to cross-examine all those claiming that they were *"ochell"* or *"ulechell"* of the Ngerbuuch Clan, but it also appears that he was allowed to question them later and that the same practice was applied to both sides. The court therefore can find nothing essentially unfair about this requirement.

[8] In the affidavits filed in support of the present motion, it appears to be argued that a person cannot be an *"ochell"* of two clans at once. The court readily recognizes that in its literal sense of a member by blood in the female line, this would be so, but the court also recog-

nizes that in many cases the word *"ochell"* is applied to strong active members who have come into the clan without blood relationship in the female line. In the present instance, the defendant-appellee admits that the Ngerbuuch Clan has died out in the female line and that there are no *"ochell"* whatever of it in the true literal sense. Consequently, if only such members were to be considered., the clan would be non-existent. In such a situation it is well recognized that the term *"ochell"* must be used in a figurative or simulated sense. Anthropological studies have also confirmed that persons may properly arrive at the status of "strong members" and be considered as *"ochell"* without being members by blood in the female line. See Patterns of Land Tenure, Trust Territory of the Pacific Islands, Vol. 1, p. 314,315, where it is stated: -

"The kinship system emphasizes matrilineal descent but recognition is also given to patrilineal descent. Within the lineage and the clan, it is the members in matrilineal descent, collectively called *theochel,* or the *tedlach* (literally 'one womb'), who *ideally* carry greater weight in the formulation of intra-group decisions and in the control of their collective wealth than those in patrilineal descent, the *ulechel,* or those members without previous affiliation, as castaways, called the *ultechakl.* (Adopted members, *rrodel,* may fall into any of these groups depending on their adoptive parents and their biological origins.) The functioning of the system, however, presents a confused picture, even to Palauans, and which Barnett neatly sums up as follows:-

> 'The truth is that a person's clan affiliation, for all practical purposes, is determined by *individual circumstances,* (italics mine) and the kinship system, as it works out, is bilateral with only an emphasis upon matrilineal connections. The protestations of filial attachments militate against the full expression of a matrilineal clan organization and produce, in practice, a system that recognizes bilateral controls, allegiances, kinship reckoning, and inheritance.' "

See also a quotation on page 315 of the above-mentioned volume from Barnett's "Palauan Society" where it is stated:-

"Thus, at the present time, it happens that an important chief of Alap manages the property and holds the titles of both his mother's and his father's clans. In addition, he controls another important piece of property upon which he now lives that came to him from an entirely different source. . . ."

[9] This confused situation is well illustrated by the fact that Orodel Ngirasar states, in her affidavit in support of the present motion, that her father was the last *"ochell"* of the Ngerbuuch Clan, while in her testimony at the first trial in the District Court she stated that she herself and her children are *"ochell"* of this clan. Mr. Uyehara's report of the organization of the Clans of Angaur, which it was stipulated at the request of the defendant-appellee the court might consider, lists Ngiradelmel (the plaintiff-appellant), Rebluud, and Isechal as persons of influence in this clan, yet the defendant-appellee in this action claims two of these do not have much power and that the third is not a member at all. Mr. Uyehara's report also shows clearly that a person can hold an important title in one Angaur Clan and still be a person of influence in another. Since it is admitted that the Ngerbuuch Clan has died out in the female line, it is apparent that any present members who are of full Palauan blood, must have been born into some other clan and would normally be an *"ochell"* of that other clan, at least as far as blood relationship alone is concerned. The court, therefore, rejects the claim that a person cannot be a "strong member" and stand in the position of an *"ochell"* of the Ngerbuuch Clan because he is also a member or even a true *"ochell"* of some other Angaur Clan or Clans.

It is impossible to reconcile with the record some of the statements in Orodel's and Kristina Pedro's affidavits as to their positions on the question of who should be the title-bearer. It would seem that either they have changed their minds or failed to make their positions at all clear at the

time of the meetings with the Master. In any event their present views as to their positions at that time so publicly evidenced cannot fairly be considered newly discovered evidence. If they have changed their minds, that is something the clan may want to consider at a future meeting, but it is not considered any proper ground for upsetting the judgment based on the meetings with the Master.

This court has already ruled in the *Lalou* case, cited above, on the effect of the attempted exclusion of non-resident members and held that members cannot be excluded against their will on that ground. That same action indicates clearly that the question of proper distribution of clan funds can be adjudicated in an action against the head of a clan without affecting his or her title. Thus the mere fact that a civil action has been brought protesting the distribution made by the plaintiff-appellant, without any showing of lack of good faith, is not a sound reason for relief from the judgment in the present case. With such dissension in the clan as has been shown here, it could hardly be expected a distribution could be made that would satisfy everyone.

The relative wealth of the contestants for the title is also not considered a sound reason for upsetting the judgment. It is an important matter for the clan to consider in determining upon how distribution shall be made, but that is essentially a separate matter.

On the whole record, the court considers the meetings supervised by the Master, gave as fair an expression of the clan's wishes as was practical under the circumstances, that there was reasonable ground for the clan's transfer of the title *Ucherbuuch* to the plaintiff-appellant, and that this should stand pending some further determination by the clan or other substantial change of circumstances. The court therefore holds that the defendant-ap-

pellee has failed to show that justice requires that the judgment in question should be set aside.

It is, of course, the plaintiff-appellant's obligation as title-holder to honestly endeavor to serve the best interests of the entire clan. He has shown recognition of this in waiving all claim for accounting for the defendant-appellee's past distributions and it is earnestly hoped that as many members of the clan as humanly possible will cooperate to make possible the peaceful and orderly conduct of clan affairs. Nothing in either this opinion or the judgment already rendered should be construed to prevent the clan from exercising normal control over its affairs in the future, as long as it can assemble and decide on matters peacefully with proper regard for the interests of all its members and the limitations placed on it by all applicable laws now in effect.

RULING

The defendant-appellee's motion for relief from judgment and for new trial is denied.