BINA, AKA LABINA JETNIL, Appellant

v.

LAJOUN, and INEAJ, Appellees

Civil Appeal No. 53

BINA, AKA LABINA JETNIL, Appellant

v.

JAIMON and OTHERS, Appellees

Civil Appeal No. 54

BINA, AKA LABINA JETNIL, Appellant

v.

NEBIT SOSAN, Appellee

Civil Appeal No. 55

BINA, AKA LABINA JETNIL, Appellant

v.

MWEJENWA, Appellee

Civil Appeal No. 56

June 1, 1971

Trial Court Opinion—4 T.T.R. 234

Appeal from judgment denying appellant exercise of *leroij lablab* rights over lands on eastern side of Arno Atoll. The Appellate Division of the High Court, D. Kelly Turner, Associate Justice, held that where appellant had not been recognized by the *alabs* as the *leroij lablab* over lands in question the court would not upset that determination even if it were contrary to custom.

1. Appeal and Error—Evidentiary Error

Error in receipt or rejection of evidence or other procedural irregularity is not a ground for disturbing a judgment by virtue of 6 Trust Territory Code Section 351 "unless refusal to take such action appears to the court inconsistent with substantial justice". (6 T.T.C. Sec. 351)

2. Marshalls Custom—"Iroij Lablab"—Succession

It is an established principle of customary land tenure in the Marshall Islands that a claimant to the rights in land of an *iroij lablab* must

show that the other persons having interest in the land recognize or acknowledge the rights of the *iroij lablab* claimant.

3. **Marshalls Custom—"Iroij Lablab"—Succession**
   It is not a matter for the courts to say whether a claimant should be installed as *iroij*.

4. **Marshalls Custom—"Iroij Lablab"—Succession**
   If there is opposition to the person otherwise entitled to be *iroij*, the court should exercise restraint in decreeing entitlement to the position even though it is possible for holders of lesser interests in land to thus effectively block the exercise of *iroij lablab* powers.

5. **Marshalls Custom—"Iroij Lablab"—Succession**
   Whether contrary to custom or not, if those with rights in land oppose a claimant to *iroij lablab* rights and in so doing throw off *iroij lablab* controls contrary to custom, the Appellate Division of the High Court should not upset the determination.

6. **Courts—Judicial Restraint**
   Judicial restraint is an essential in land matters as insistence upon adhering to laws of land custom.

7. **Custom—Applicability**
   When the people concerned desire, for any reason, to reject custom, the court should not prevent it.

8. **Custom—Applicability**
   Custom, like written legislation, may be changed or amended when the people involved determine to do so.

Counsel for Appellant: LEVI L.
Counsel for Appellees: BILIMON AMRAM

Before BURNETT, *Chief Justice*, TURNER and BROWN, *Associate Justices*

TURNER, *Associate Justice*

The four cases on appeal were consolidated for trial with *Labina v. Lainej*, 4 T.T.R. 234. *Lainej* was not appealed and the judgment in that case is the only one of the five reported. The separate judgments in the four cases appealed recite that the opinion in Civil Action No. 197 (*Lainej*) is applied to the facts involved "in this action." Also, the findings of fact in *Lainej*, commencing 4 T.T.R. 263, are identical to the findings in the four judgments on appeal. The "Conclusions of Law" at 4

T.T.R. 266 are the same in all five cases except for the names of the lands involved.

The five judgment orders were identical, holding the plaintiff, Bina, "is not and never has been the *leroij lablab*" of the land in question. No decision as to the rights, if any, of the defendants was made. In *Mwejenwa*, Civil Appeal No. 56, the court supplemented its opinion, saying that: "The Court in this action is not deciding any issue as to the right of Mwejenwa to act as *alab*."

Also in *Sosan*, Civil Appeal No. 55, a supplemental statement was included in the opinion relating to the defendant's rights, without any conclusion being reached as to his interests in the land that was the subject of that action.

Although the trial court issued five separate judgments, the cases were tried together and the four appeals were treated as a single appeal. We see no reason for separating the appellate decisions.

The first question to be decided is whether this court has jurisdiction to consider the appeals on their merits in view of the decision in *Milne* v. *Tomasi*, 4 T.T.R. 488. These appeals, as in the *Milne* case, were filed on the sixty-first day after entry of judgment, one day more than the time allowed by the trial court.

Although this court decided in *Milne* it did not have jurisdiction on appeal, it did open the door and invited the appellants to obtain a review of the judgment, either by a motion in aid of judgment or by an independent action for relief from the judgment. The authority for such procedure is Rule 18e, Rules of Civil Procedure.

An example of motion for relief from judgment, on the ground of avoidance of denial of justice, is found in *Delemel v. Tulop*, 3 T.T.R. 469, 473:—

"In effect, this subsection (Rule 18e(6)) 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 Pro-

cedure which has been said to constitute a 'grand reservoir of equitable power to do justice in a particular case'.

* * *

"To determine this requires a review of the whole case . . . ."

As to an independent action for relief from a judgment which was not appealed within the time allowed, see *Owang Lineage v. Ngiraikelau*, 3 T.T.R. 560.

This litigation has been before the High Court Trial and Appellate Divisions for more than five years. To reject consideration now of these appeals and to require or invite the appellant to go back to the trial division to commence a proceeding which will result in review of these judgments and the records on which they are based—which is the same thing sought in these appeals—in our opinion imposes a burden upon the parties which should be avoided if at all possible. In the interest of justice—we cannot say "speedy" justice after five years—we treat these appeals as if they are, or have the same effect as, motions for relief from judgment. Accordingly, the entire record will be examined to ascertain if there has been a denial of substantial justice on the appeal grounds that the trial court's judgments did not conform to Marshallese custom, as appellant contends, or for any other reason disclosed in the record or contained in the findings and conclusions in *Bina v. Lainej*, supra, made applicable to the judgments on appeal.

[1] We note at the outset the *Lainej* judgment contains astounding error wherein the trial court rejected certain documentary evidence and then employed the facts purportedly contained in that evidence as a basis for findings and conclusions supporting the ultimate holding. Whether this requires the judgments to be set aside depends on the effect of the procedural error on the ultimate holding. Error in receipt or rejection of evidence or other procedural irregularity is not a ground for disturbing a judgment by

virtue of 6 T.T.C. Sec. 351 "unless refusal to take such action appears to the court inconsistent with substantial justice."

When we examined the record to ascertain whether appellant should be granted relief from the judgment, the first thing we observed was a rejection of documentary evidence by the court and thereafter a finding of fact supporting the judgment which was derived from the rejected evidence. The court explained his rejection of exhibits purporting to be petitions in favor of and against the claim that appellant was the *leroij lablab* of eastern Arno Atoll lands. The court said:—

"There was no testimony offered as to who the persons were who signed the petition . . . . However, counsel for defendant stated as to the proferred exhibit that only 22 *alabs* had signed it and of these 5 had changed their minds and signed the defendant's proferred Exhibit B."

Upon these "proferred" and rejected exhibits together with defense counsel's statements, the court found as a fact that:—

"It is clearly evident from the testimony in this case and the statements of counsel that there has been no choice of Bina (appellant) as *leroij lablab* by the defendants in these actions or by a large percentage of the persons having rights in the lands on the eastern side of Arno Atoll."

[2] It is an established principle of customary land tenure in the Marshall Islands, and the court recognized the custom, that a claimant to the rights in land of an *iroij lablab* must show that the other persons having interests in the land (*iroij erik*, *alab* and *dri jerbal*) recognize or acknowledge the rights of the *iroij lablab* claimant. There are other grounds for determining *iroij lablab* rights, not the least of which is birth and inheritance, but it is true there must be an acceptance of a claimant.

The court erred in making a finding of fact applicable to the general area of "lands on the eastern side of Arno Atoll." This conclusion was based on what counsel said rejected evidence contained. It was neither good law nor judicial procedure.

All the court needed to have said was that the defendants in the five cases being tried did not acknowledge the appellant to be the *leroij lablab* over the lands in question in each case in which they held rights. Such finding is sustained by the evidence. It is sufficient to justify each of the limited judgments declaring appellant had no *leroij lablab* rights.

It was error for the trial court, upon the evidence before it, to attempt to extend this conclusion to all of the lands on the eastern side of Arno Atoll. The statements in the opinion to that effect are not to be considered binding or conclusive.

[3] The trial court opinion recognized that it is not a matter for the courts to say whether a claimant should be installed as *iroij*. In doing so it ruled contrary to an earlier decision on the point. We approve the decision reached in the appeals before us. The crux of this decision was the statement:—

> ". . . it also must be held that even in a case where a person by birth and blood is unquestionably entitled to the office of *iroij lablab*, that if there is substantial opposition by the persons owning rights in the lands in the territory where there has occurred a vacancy in the office of *iroij lablab*, the High Court should not by order or decree establish the person as *iroij lablab*."

[4] Thus, if there is opposition to the person otherwise entitled to be *iroij*, the court should exercise restraint in decreeing entitlement to the position. Accordingly, it is possible for holders of lesser interests in land to effectively block the exercise of *iroij lablab* powers. This is contrary to the holding in *Lojob v. Albert*, 2 T.T.R. 338. In that case, the court said:—

"The appellees' argument seems to be that those who do not accept the decisions of the 20-20, or want to work with it, have 'gone out of *Jebrik's* side', or *droulul*, and therefore need not be considered or notified, but that decisions of the 20-20, or at least of *Jebrik's droulul*, should still be binding upon the lands of those who have thus 'gone out.'

" . . . there seems to be a desire by the appellants, or some of their supporters, to be permitted to throw off entirely all *iroij lablab* controls over their land or pick a new *iroij lablab* of their own choosing for their lands. The court considers such 'going out' of *Jebrik's* side and carrying their land rights with them would be clearly contrary to Marshallese customary law and inconsistent with the entire system of Marshallese land ownership."

[5] Whether contrary to the custom or not, if those with rights in land oppose a claimant to *iroij lablab* rights and in so doing throw off *iroij lablab* controls contrary to custom, this court should not upset the determination. The record shows that except for a very few years there has been no *iroij lablab* over the eastern Arno lands in question from 1932 until the present. Neither the court nor the executive branch of government has insisted on the vacancy being filled. Nor will this court in this instance. *Lainlij v. Lajoun*, 1 T.T.R. 113. *Liwinrak v. Jiwirak*, 1 T.T.R. 394.

[6–8] Judicial restraint is as essential in land matters as insistence upon adhering to laws of land custom. When, as here, the people concerned desire, for any reason, to reject custom, the court should not prevent it. The conclusion in *Lojob* is not binding upon the lands in this case merely because, as said in *Lojob*, the present status of control is "clearly contrary to Marshallese customary law." Custom, like written legislation, may be changed or amended when the people involved determine to do so.

That custom may be subject to change has been recognized in the past. In *Labina v. Lainej*, supra, the court cited "Land Tenure Patterns" with reference to "deviation" from accepted custom. Nor is deviation from custom

limited to the Marshall Islands. This court said in *Adelbai v. Ngirchoteot*, 3 T.T.R. 619, 628:—

"We conclude that exceptions to the general custom developed by actual practice in the clan are recognized and frequently occur."

The practice followed with regard to the specific lands involved in these appeals does not necessarily relate to other eastern Arno lands, despite the court's erroneous conclusion to that effect. In a decision decided the year following the decisions now on appeal, it was held that appellant was indeed the *leroij lablab* for three Arno eastern-side *watos*. *Jetnil v. Buonmar*, 4 T.T.R. 420.

From the record, it must be concluded the appellant has not been recognized by the *alabs* as the *leroij lablab* over these specific lands. In accordance with the customary land law applicable to this ultimate fact, it must be held appellant may not exercise *leroij lablab* rights over the following lands on the eastern side of Arno Atoll:

Malel and Kilane Islands;

Monwadrik, Kebeltobok, Mwetera and Lobol *watos*.

The four judgments on appeal as limited by this opinion are affirmed.