KIOMASA KAMINANGA, Plaintiff
v.
TEKERENG SYLVESTER, YOSIWO RENGUUL and ERETA RENGUUL, Defendants and YOSIWO RENGUUL AND ERETA RENGUUL, Cross-complainants
v.
TEKERENG SYLVESTER, Cross-defendant

Civil Action No. 478

Trial Division of the High Court

Truk District

June 1, 1971

See, also, 5 T.T.R. 312

Motion for new trial on the ground of newly discovered evidence. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, denied the motion holding that the testimony was available before the trial and that even if it were received in evidence it would not change the judgment.

1. **Civil Procedure- Motion for New Trial Newly Discovered Evidence**
   To warrant the granting of a new trial on the ground of newly discovered evidence, it must appear that the evidence is such as will probably change the result if a new trial is granted, that it has been discovered since the trial, that it could not have been discovered before the trial by the exercise of due diligence, that it is material to the issue, and that it is not merely cumulative or impeaching.

2. **Reformation of Instruments- Mutual Mistake**
   A written instrument may be corrected when both parties are mistaken as to its effect, but not when there is a mistake by only one party.

TURNER, *Associate Justice*

Plaintiff filed motion for new trial on the ground he would produce newly discovered evidence to the effect the

defendant Tekereng Sylvester would testify that he did not intend to sell all of his land to either plaintiff or defendants Renguul but that his intent was to sell a portion to each of them.

Strictly speaking, this is not new evidence as it comes from one of the parties to the litigation and Tekereng could have been brought from Saipan to testify at the trial or his deposition could have been taken and introduced at trial.

[1] The rule of law applicable to a motion for new trial on the ground of newly discovered evidence is stated in 39 Am. Jur., New Trial, § 158:—

> "To warrant the granting of a new trial on the ground of newly discovered evidence, it must appear that the evidence is such as will probably change the result if a new trial is granted, that it has been discovered since the trial, that it could not have been discovered before the trial by the exercise of due diligence, that it is material to the issue, and that it is not merely cumulative or impeaching."

The present motion fails to meet at least two of the essentials of this test. The defendant's testimony certainly was available before the trial and the defendant's testimony would necessarily have to be believed by the court and be accepted in lieu of the documentary evidence in the trial record before it would affect the judgment. Acceptance and belief of the defendant's testimony in the face of the documentary evidence is so unlikely it requires the conclusion that there is nothing Tekereng could say which would change the judgment.

According to plaintiff's motion, Tekereng would testify that he did not include in the sale to the defendants Renguul the parcel of land known as Manonong #4 and that he subsequently sold this parcel to the plaintiff. This is in direct contradiction to Tekereng's Deed to the defendants Renguul which specifically named and described Manonong #4 and Manonong #4a by metes and bounds as

depicted in the drawings of the survey by the Land Title Office.

[2] Plaintiff's statement of Tekereng's intent is insufficient to justify changing or as is said in legal jargon, "reformation", of the Deed. A written instrument may be corrected when both parties are mistaken as to its effect. Here there was no mutual mistake. If there was any mistake, it only was on the part of the grantor.

Furthermore, if the defendant Tekereng should testify he did not intend to sell defendants Renguul all of his land, but only a portion of it, then he would be contradicting his own affidavit made for the plaintiff and introduced in evidence as Plaintiff's Exhibit 2 in which he denied selling any land to the Renguuls.

The trial record shows Tekereng made two conflicting affidavits and issued two deeds to at least a portion of the land in question. Whatever his testimony might be if he were called to the stand in a new trial, it must of necessity contradict the documents executed long before the trial and introduced in evidence. This court has no intention of giving Tekereng an opportunity to commit perjury on the witness stand.

The argument at the hearing on the motion for new trial was that Tekereng, because of his unfamiliarity with English did not understand the deeds and affidavits he signed in front of the Mariana District Clerk of Courts. The trial evidence is contrary to this argument. The instruments were read and translated before he signed them. One affidavit shows on its face that it was translated for Tekereng in Japanese. Tekereng, like most older Palauans, spoke Japanese as a second language. At other times, there were both Trukese and Palauans present when the instruments were read to him. Plaintiff's argument that Tekereng didn't understand what he was signing is as implausible as that he intended to divide his land and convey two parcels.

Defense counsel raised the objection at the hearing that the motion for new trial was filed on the eleventh day after the entry of judgment whereas Rule 18(d) requires the motion be filed within ten days. In view of the grounds for the motion and the evidence in the trial record, the court considers it important to deny the motion on its merits rather than on a technicality even though it might be considered jurisdictional.

There are so many open doors to avoidance of jurisdictional issue because of lapse of time found in our Code, our procedural rules and in our decisions, the question is almost academic. For example, see the invitation to avoid late filing of an appeal in *Milne v. Tomasi*, 4 T.T.R. 448; the Code provision limiting new trials only to situations when refusal to grant a new trial would be "inconsistent with substantial justice" (6 T.T.C., Section 351); and the authority of the Appellate Division to change appeal procedure "to accomplish justice" (Rule 32(e)). It may not be good law or procedure but it is all too apparent the Court almost may write its own rules in the "interest of justice" regardless of statutes and published rules.

In this case, it is unnecessary as the plaintiff's motion is without sufficient merit to justify further trial. It is,

Ordered, plaintiff's motion for new trial is denied.