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ASST. CLERK OF COURTS
REPUBLIC OF MARSHALL ISLANDS

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

MASAKI JACOB on behalf of his older) CA NO. 2008-221
brother BOB MELERAN JACOB,)

plaintiff,)

v.)

FINAL JUDGMENT

IROIJLAPLAP REMIOS HERIMOS and)
WILFRED KENDALL,)

defendants.)

TO: TIANTAAKE BEERO, MICRONESIAN LEGAL SERVICES CORP., counsel for
plaintiff
CHIEF PUBLIC DEFENDER RUSSELL KUN, counsel for defendants
LAND REGISTRATION AUTHORITY

I. INTRODUCTION

On December 10, 2014, this matter came before the High Court for a Rule 9 Hearing on the Traditional Rights Court’s September 18, 2014 “Opinion and Answer on Added Questions” that supplements its July 5, 2012 “Summary of Case.” At issue is who, as between plaintiff Bob Meleran Jacob and defendant Wilfred Kendall, holds the alap title to 25 wetos in Wotje Atoll listed in paragraph 1 of the plaintiff’s February 23, 2009 First Amended Complaint¹ and to Er kub

¹The 25 wetos in Wotje Atoll including the following: Monkomej, Batijokajok, Nakurlep, Minkin, Out, Lojoen, Kiren Kan, Boken Aik, Boklemjen, Ru Island, Ijokan Island, Areto Jerok, Jabonwar, Looj Island, Kojouj Island, Enekomkon Island, En-Kotkok Island, Kidenkan Island, Weturok Island, Boklewoj Island, Mejen Island, Awao Weto, Toroko Weto, Monlomor Weto, and Tur Weto.

Atoll. In both its Summary of Case, at page 1, and its Opinion and Answer on Added Questions, at page 1, the TRC finds that defendant Kendall holds the alap titles in question.

For these reasons, set forth, the High Court adopts the TRC's determination.

II. PROCEEDINGS BELOW

In the 2012, Summary of Case, the TRC found that defendant Kendall was the proper person to be alap for three reasons. First, pursuant to both the plaintiff's and the defendants' genealogies (plaintiff's Exhibit B and the defendants' Exhibit B), defendant Kendall was of a generation older than plaintiff Jacob. Second, in his testimony Irojlaplap Hermios stated that he recognized defendant Kendall as the alap. Third in his December 6, 2005 declaration (Defendants' Exhibit A), Irojlaplap Hermios recognized Kendall "our last 'uncle.'"

Plaintiff Jacob had testified that he was the proper person to be alap, as defendant Kendall was an adopted child whose rights are subordinate to biological members of the bwij. Plaintiff Jacob argued that because defendant Wilfred Kendall was not a natural child of Kendal Lojen (aka Kendall Lojen), but instead was an adopted child, and that defendant Kendall cannot become alap until Jacob's lineage dies out (citing *Labina v. Lainej*, 4 TTR 234 (TTHC Tr. Div. 1969); *Amon v. Makroro*, 5 TTR 436 (TTHC Tr. Div. 1971), and Tobin, *Land Tenure in the Marshall Islands*).

The TRC noted, however, that in answer to the question "Kendall Lojen looked after Wilfred Kendall as his own child or as an adopted child," plaintiff Jacob answered that Kendall Lojen looked after him as his own child. Further the TRC noted Wilfred Kendall testified that he did not know he was an adopted child of Kendall Lojen. Wilfred Kendall only knew that he was the biological child of Kendal Lojen. For these reasons, the TRC rejected plaintiff Jacob's

assertion that defendant Kendall was an adopted child, not a natural child, of Kendal Lojen, saying on page 2 of the Summary of the Case that the “TRC Panel in this case finds that there is not sufficient evidence to prove that Wilfred Kendal was an adopted child of Kendal Lojen.”

However, in the 2012, Summary of Case, the TRC did not discuss plaintiff Jacob’s Exhibit D entitled “Pepa in Kalimur” which purports to be a 1988 will signed by Kendall Lojen, stating that Wilfred Kendall is his adoptive son. See page 2 of the “Plaintiff Jacob (sic) briefs for purpose of a Rule 9 hearing” dated October 22, 2012, and page 3 of the “Defendant’s Opening Brief TRC Rule 9” dated November 19, 2012. Because the TRC did not refer to Plaintiff’s Exhibit D in its 2012 Summary of Case, the High Court referred this matter back to the TRC to confirm what exhibits it considered and to state who, as between plaintiff Jacob and defendant Kendall, is the alap of the lands in question, and why.

In its 2014 Opinion and Answer on Added Questions, TRC reported that it did not consider Plaintiff’s Exhibit D, because of the lack of information on it during the trial. Further the TRC maintained that if had it considered Exhibit D, Exhibit D confirms that defendant Kendal is the alap, because as stated in Exhibit D, Kendal Lojen considered Wilfred Kendal to be “kanin lojeo,” (“from my womb”) as a biological child. According to the TRC, under Marshallese custom “kanin lojeo” adoption is different from “kokajiriri” adoption referred to in *Amon v. Makroro*, *supra*, *Loeak v. Loeak* (citation omitted in TRC opinion), and Tobin’s work. As “kanin lojeo,” defendant Kendall’s rights would not be subordinate to biological members of the bwij as he is considered a biological member of the bwij.

II. STANDARD OF REVIEW

The standard by which the High Court reviews the TRC's resolution of questions certified to it is set forth in Article VI, Section 4(5) of the Constitution. That is, the TRC's "resolution of the question shall be given substantial weight in the [High Court's] disposition of the legal controversy before it; but shall not be deemed binding unless the [High Court] concludes that justice so requires." Const. Art. VI, Sec. 4(5).

The Supreme Court has interpreted this language to impose limits upon the ability of the High Court to reject the TRC's disposition. "The High Court's duty is to review the decision of the TRC, and to adopt that decision unless it is [i] clearly erroneous or [ii] contrary to law." *Abija v. Bwijmaron*, 2 MILR 6, 15 (RMI Sup. Ct. 1994). If the question is one of fact, the standard of review is clearly erroneous.² If the question is one of law, the standard of review is *de novo*.³

In context of questions of custom, the Supreme Court has held that "[e]very inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense." *Lobo v. Jejo*, 1 MILR (Rev.) 224, 226 (1991); *Zaion, et al., v. Peter and Nenam*, 1 MILR (Rev.) 228, 231 (1991).

²*Lobo v. Jejo*, 1 MILR (Rev.) 224, 225 (1991); *Zaion v. Peter*, 1 MILR (Rev.) 228, 233 (1991).

³*Stanley v. Stanley*, 2 MILR 194, 199 (2002); *Jack v. Hisaiah*, 2 MILR 206, 209 (2002).

In the present case, the questions before the High Court are questions of fact, including customary law and traditional practice regarding the land rights of adopted children. The rights of adopted children to land have not, as yet, been codified in a statute or resolved in a final court decision of the Supreme Court. Hence, the High Court is to review the TRC's decision as under the "clearly erroneous" standard.

In *Bulele v Morelik, et al.*, Sup. Ct. Civil Case No. 2006-008 (2009), sl. op. at 5-6, the Supreme Court set forth five factors to consider when deciding whether a finding is or is not clearly erroneous.

- "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985).

- The clearly erroneous standard does not entitle a reviewing court to reverse the findings of the trier of fact simply because it is convinced that it would have decided the case differently; the reviewing court's function is not to decide the factual issues *de novo*. *Id.* at 573-574.

- Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Amadeo v. Zant*, 486 U.S. 214, 226, 108 S. Ct. 1771, 100 L. Ed. 2d 249 (1988) (*citing Anderson*, 470 U.S. at 574).

- The fact finder's factual findings need not be perfect or detailed as long as the reviewing court can adequately review them. *See, e.g., Davis v. City & County of San Francisco*, 890 F.2d 1438, 1451 (9th Cir. 1989).

Factual findings are sufficient if they provide the reviewing court with an understanding of the basis of the fact finder's decision and the grounds upon which it reached that decision. *See, e.g., Keane v. Commissioner of Internal Revenue*, 865 F.2d 1088, 1091-92 (9th Cir. 1989).

III. CONCLUSION

After reviewing the TRC's findings, the High Court concludes that there is a sufficient factual basis for the TRC's determination. The High Court is not left with a definite and firm conviction that the TRC made a mistake in its 2012 Summary of Case and 2014 Opinion and Answer on Added Questions. The High Court is not entitled to reverse the TRC, although the High Court may have found otherwise. The High Court finds that the TRC's view of the evidence is permissible, although it differs from that of plaintiff Jacob. The TRC's findings are sufficient. The findings provide the High Court with the basis of the TRC's decision and the grounds upon which it reached its decision. Further, the High Court does not find that the referred questions were not sufficiently answered or that additional questions need to be addressed.

V. ORDER

ACCORDINGLY, IT IS ORDERED, ADJUDGED, AND DECREED as follows:

As between plaintiff Meleran Jacob and defendants Remios Hermios and Wilfred Kendall, and those claiming through the parties, defendant Wilfred Kendall holds the alap title to

25 wetos in Wotje Atoll listed in paragraph 1 of the plaintiff's February 23, 2009 First Amended Complaint⁴ and to Erkub Atoll.

This order shall not affect any rights of way there may be over the land in question. No costs are assessed against the parties.

Date: December 30, 2014.

A handwritten signature in black ink, appearing to read 'C. Ingram', written over a horizontal line.

Carl B. Ingram
Chief Justice

⁴The 25 wetos in Wotje Atoll including the following: Monkomej, Batijokajok, Nakurlep, Minkin, Out, Lojoen, Kiren Kan, Boken Aik, Boklemjen, Ru Island, Ijokan Island, Areto Jerok, Jabonwar, Looj Island, Kojouj Island, Enekomkon Island, En-Kotkok Island, Kidenkan Island, Weturok Island, Boklewoj Island, Mejen Island, Awao Weto, Torko Weto, Monlomor Weto, and Tur Weto.