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SUPREME COURT
OF THE
REPUBLIC OF PALAU

**IN THE**
**SUPREME COURT OF THE REPUBLIC OF PALAU**
**APPELLATE DIVISION**

**JUSTINO NGSAL NGIKLEB, FELIX FRANCISCO**
Appellants
v.
**NGEUCH CLAN BY OMUIK LOTHAIN SADAO**
Appellee

Cite as: 2022 Palau 22
Civil Appeal No. 22-005
Appeal from Civil Action No. 18-079

Decided: November 1, 2022

Counsel for Appellant ..... Vameline Singeo
Counsel for Appellee ..... C. Quay Polloi

BEFORE: JOHN K. RECHUCHER, Associate Justice
KATHERINE A. MARAMAN, Associate Justice
DANIEL R. FOLEY, Associate Justice

Appeal from Decision on Remand and Judgment on Remand Entered on February 21, 2022. The Honorable Lourdes F. Materne. Associate Judge, Presiding

## OPINION

Rechucher, Associate Justice:

[¶ 1] This matter involves the appointment of a title bearer of Omuik, head of Ngeuch Clan in Ngermasech Hamlet in Angaur State based on a new custom of that State. The trial court decided Appellee Sadao, (Sadao), was properly appointed Omuik. Appellant Ngikleb, (Ngikleb), timely appealed.

[¶ 2] At the first appeal, we affirmed findings of fact made by the trial court regarding the status of female members of the Ngeuch Clan who made the appointment but vacated its conclusion as to the appointment of Omuik and remanded for the trial court to apply proper *Beouch, (Beouch v. Sasao,* 20 ROP 41 (2013)), analysis. *Ngikleb v. Sadao, 2021 ROP 5, [¶ 17].* After remand, the

trial court reaffirmed its original decision. Again, Ngikleb timely appealed, and the matter is before us for the second time.

[¶ 3] Because the trial court did not comply with our specific instructions on remand, we remand this matter to the trial court to comply with the mandate on remand.

## BACKGROUND

[¶ 4] In the first appeal in this matter, we vacated the trial court's conclusion as to the appointment of Sadao as Omuik and remanded for the trial court to apply proper *Beouch* analysis. Apparently, the trial court interpreted this instruction to mean remand for further explanation. *DECISION ON REMAND, page 1, Civil Appeal No. 18-079, (February 21, 2022.)*

[¶ 5] The trial court held a hearing wherein two ranking chiefs, Chief Ucherremasech Carlos Ramon and Chief Ucherramedeb Warren Fukuichi testified to a new custom of Angaur State regarding the appointment of clan's title bearer. They testified to the effect that the established two step-process for appointing a clan's title bearer required under traditional law applied in *Edward v. Suzuki*, 19 ROP 187 at 192-193 (1012), is no longer followed and practiced in Angaur State; that what has become a new custom of that State is "...once the *ourot* appoint, the appointee becomes the bearer of clan's title (chief) and only subject to discipline including expulsion by the *Klobak* for cause."; and, that there is no need for the acceptance by *Klobak* as their friend for *Klobak* only has authority to discipline or expel a member *Rubak* for cause. *Decision on Remand, page 2. See also Trans. pages 286 – 302.*

[¶ 6] The trial court found their testimonies credible and, acting thereon, it concluded Lothain Sadao was the rightful bearer of the title Omuik since he was appointed by the ourot of Ngeuch Clan to bear that clan's title. *Decision on Remand, pages 2-3.* In further support of its conclusion, the trial court incorporated its earlier decision granting Plaintiff's Motion for Reconsideration dated October 3, 2019. *Id. at page 2.*

[¶ 7] The Appellate Court, in its February 3, 2021 Opinion ordered each party to bear his own costs. However, on February 21, 2021, the trial court issued its Decision on Remand where it ordered Ngikleb to pay Sadao's court costs.

## ISSUES RAISED

[¶ 8] Ngikleb, raises two issues in his appeal: (1) whether the trial court erred in its conclusion that Sadao's appointment as Omuik is proper under the new custom of Angaur State without first establishing that that custom meets four (4) elements test require under *Beouch* analysis; and, (2) whether the trial court erred when it ordered Ngikleb to pay Sadao for his court costs.

[¶ 9] As to the propriety of the appointment of Omuik, it appears the threshold issue is whether the trial court complied with the appellate mandate on remand.

## STANDARD OF REVIEW

[¶ 10] Appellate Court reviews mixed questions of law and fact and pure questions of law *de novo*. *Ngiralmau v. ROP*, 16 ROP 167, 169 (2009) (holding mixed questions of law and fact are reviewed under *de novo* standard.); *Blesoch v. Republic of Palau*, 17 ROP 198, 200 (2010). It reviews the lower court's determination as to what customary law is under a *de novo* standard. *Beouch, supra. at 49.*

[¶ 11] Whether a given custom has met traditional law requirements is a mixed question of law and fact reviewed by the Appellate Court to determine if the established facts satisfy the applicable legal rule. *Glover v. Lund*, 2018 Palau 10, [¶ 9,10]. *See also* 75A Am. Jur. Trial § 604 (2007). The question as to whether a custom is or is not binding law is a pure determination of law reviewed under *de novo* standard. Id. at page 49, citing *Atkinson v. Board of Parole and Post-Prison Supervision*, 143 P.3d 538, 541 (Or. 2006).

## DISCUSSION
## NEW ANGAUR CUSTOM

[¶ 12] In the first appeal, we vacated the appointment of Sadao as Omuik based on the new custom of Angaur and remanded for the trial court to apply the proper *Beouch* analysis. *Ngikleb v. Sadao*, 2021 Palau 5 at [¶ 17]. *Beouch* requires that, for a custom to be considered traditional law under Article V, Section 2, of the Palau Constitution, it must meet the four-element test: (1) the custom is engaged voluntarily; (2) the custom is practiced uniformly; (3) the custom is followed as law; and (4) the custom has been practiced for a sufficient period of time to be deemed binding. *Beouch v. Sasao, supra.*

[¶ 13] On February 21, 2022, the trial court entered its Decision on Remand declaring Sadao the rightful holder of the title Omuik. *Decision on Remand, page 3.* Ngikleb, timely appealed arguing the trial court erred in its conclusion that Sadao's appointment was proper based on Angaur custom because that appointment did not comply with the two-step process required under traditional law - Sadao was never accepted by the Klobak of Ngermasech Hamlet as their friend. *Opening Brief, page 4.*

[¶ 14] Sadao countered Ngikleb's argument by arguing the trial court correctly applied the new custom of Angaur State for appointing the clan's title bearer. He further argues the two step-process for appointing the clan's title bearer required under traditional law and applied in *Edward v. Suzuki, 19 ROP 187 at 192-193 (2012)*, is no longer followed and practiced in the four hamlets in Angaur State. He also argues that Angaur's new custom is "…once the ourot appoints, the appointee becomes bearer of clan's title (chief) and only subject to discipline including expulsion by the klobak for cause." Two ranking chiefs of Ngermasech Hamlet

testified to that new custom and that was what the trial court determined and followed as the new custom of Angaur applicable to Ngermasech Hamlet, he argues. *Decision on Remand, page 2.*

[¶ 15] This brings up a question as to which source of authority should be followed, the new custom of Angaur or the traditional law of Palau. The answer is traditional law. Before a new custom becomes recognized and followed as traditional law, it must pass the threshold requirements of *Beouch.* For the appointment of Sadao as Omuik to be valid and have the legal force and effect of traditional law, it must be made and based on newly established traditional law.

## MANDATE RULE

[¶ 16] We instructed the trial court on remand to apply the proper *Beouch* analysis.

[¶ 17] While this Court does not have a rule similar to Rule 41 of the Federal Rules of Appellate Procedure for issuance of mandates, we have applied the mandate rule as recognized and applied in the United States federal courts. *Tengoll v. Tbang Clan,* 11 ROP 61, 64 (2004)*; Alik,* 6 ROP Intrm. 148 at 151 (1997); and *Kumangai v. Isechal*, 3 ROP Intrm. 43, 46 (1991).

[¶ 18] The underlying principle of mandate rule is to bring the proceedings in a case on appeal to a close and return jurisdiction to the lower court, but the lower court is vested with jurisdiction only to the extent conferred by the dictates of the appellate court. *See Kumangai v. Isechal*, 3 ROP Intrm. 43, 45 (1991). *See also United States v. Campbell,* 168 F.3d 263, 265, 266 n.3 (6th Cir. 1999); *Caldwell v. Puget Sound Elec. Appren. & Train. Tr.*, 824 F.2d 765, 767 (9th Cir. 1987). So, as in this case, a matter was remanded with specific instructions, and those instructions must have been followed to ensure that the lower court's decision is in accord with the appellate opinion. *Kumangai v. Isechal, 3 ROP Intrm.* 43, 45 (1991); and, *Litman v. Mass. Mut. Life Ins. Co.,* 825 F.2d 1506, 1511 (11th Cir. 1987) *(en banc).*

[¶ 19] In the first appeal, we remanded this matter for the trial court to apply proper *Beouch* analysis. This instruction constituted the mandate. However, the trial court misconstrued the mandate to mean remanded for further explanation. *DECISION ON REMAND, page 1, Civil Appeal No. 18-079, (February 21, 2022.* The trial court held a hearing wherein two ranking chiefs of Ngermasech Hamlet, Ucherremasech Carlos Ramon and Ucherramedeb Warren Fukuichi, testified as to the new custom of Angaur that is applicable to Ngermasech Hamlet. *Decision on Remand, page 2-3. See also Trans., pages 286 – 301.* The trial court found their testimonies credible and, base thereon, concluded Sadao was the rightful bearer of the title Omuik.

[¶ 20] The trial court's conclusion came before us for review in the first appeal and was vacated and the matter was remanded with specific instruction for the trial court to apply proper *Beouch* analysis.

[¶ 21] The trial court failed to comply with the appellate mandate on remand, to apply proper *Beouch* analysis.

## TRADITIONAL LAW

[¶ 22] On January 1, 1981, Palau Constitution became the supreme law of the land. Its Article V, Section 2, provides: "Statutes and traditional law shall be equally authoritative. In case of conflict between a statute and a traditional law, the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law." By this provision, the traditional law of Palau became equally authoritative with statutes in the absence of conflict. This renders new custom not parallel or equal to the traditional law of Palau. The terms traditional law and customary law are one and the same. Section 2 references "traditional law," for consistency reasons. But traditional and customary laws are both authoritative to the extent not in conflict with the Constitution. *See Standing Committee Report No. 39, March 7, 1979, Committee Comments*.

[¶ 23] The framers, when they searched for an appropriate definition of custom that fits Palau's new birth as an Island Nation, were thinking profoundly, and came to settle on four requirements for a custom to be considered traditional law under Article V, Section 2: (1) the custom is engaged voluntarily; (2) the custom is practiced uniformly; (3) the custom is followed as law; and (4) the custom has been practiced for a sufficient period of time to be deemed binding. See Palau Constitutional Convention, Standing Committee Report No. 39 (March 7, 1979).

[¶ 24] Guided by the foregoing definition, *Beouch* requires that, for a custom to be considered traditional law under Article V, Section 2, it must meet the four-elements test: (1) the custom is engaged voluntarily; (2) the custom is practiced uniformly; (3) the custom is followed as law; and (4) the custom has been practiced for a sufficient period of time to be deemed binding. Id. at page 48. The traditional law is the correct law to apply in this matter, not the new custom of Angaur State.

[¶ 25] In applying the analysis, the following sequence is offered as guidance: First, state the terms of the new custom; second, establish that the new custom is recognized as traditional law by it meeting the four) elements test of *Beouch*; and third, establish compliance with newly established and recognized traditional law. In this case, the first and third requirements were established but the second requirement was not. We remand the for the trial court to address the second requirement within the suggested sequence in applying the proper *Beouch* analysis.

[¶ 26] Finally Ngikleb argues trial court committed an error by ordering Ngirkleb on remand to pay Sadao for his court costs when this Court ordered each party to bear his own costs. On

remand, the trial court was vested with jurisdiction only to the extent conferred by the dictates of the appellate court mandate. The issue regarding court costs was not part of the remand. *See Kumangai v. Isechal,* 3 ROP Intrm. 43, 45 (1991).

[¶ 27] Accordingly, we **VACATE** the judgment of the trial court and **REMAND** to the trial court to address the second requirement within the suggested sequence in applying proper Beouch analysis.

**SO ORDERED,** this 1st day of November, 2022.

JOHN K. RECHUCHER
Associate Justice

KATHERINE A. MARAMAN
Associate Justice

DANIEL R. FOLEY
Associate Justice