JEKKEINI, Successor to LELKAR, Deceased, Plaintiff

v.

BILIMON, Defendant

Civil Action No. 278

Trial Division of the High Court

Marshall Islands District

September 3, 1971

Action to determine title to Mejerto *Wato*, Wotje Atoll, Marshall Islands. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that where *iroij's* determination that defendant should lease land was arrived at without notice to defendant, it was invalid.

1. Judgments—Res Judicata

Res judicata is a bar to a subsequent suit when the prior action involved the same parties and there was a judgment on the merits on the same cause of action.

2. Judgments—Res Judicata

An agreement between the *leroij*, the *alab* and the plaintiff, who claimed to be *dri jerbal* of the land in question, which resulted in the dismissal of the prior litigation was not binding on the present defendant who was in actual occupancy of the land through his predecessor and who was not a party either to the prior suit nor the agreement which caused its termination.

3. Marshalls Land Law—"Dri Jerbal"—Revocation of Rights

A *dri jerbal's* failure to acknowledge the *alab* and to pay him his share of the copra harvest is generally regarded as good cause for removal of the *dri jerbal* from the land by the *iroij*.

4. Marshalls Land Law—"Iroij Lablab"—Limitation of Powers

An *iroij* must give reasonable consideration for the rights of those having interests in the land and it is not "reasonable consideration" for an *iroij* to make a determination without notifying the party who is cut off from the land and to give him an opportunity to present his side of the issue.

5. Real Property—Quiet Title—Laches

While period of occupation of property was short of the twenty-year statute of limitations which would have been an absolute bar to the plaintiff's action, nevertheless, the period was long enough and the circumstances were such that plaintiff could be held to be estopped because of his failure to act.

Assessor:	SOLOMON L., *Associate Judge of the District Court*
Interpreter:	J. JOHNNY SILK
Reporter:	NANCY K. HATTORI
Counsel for Plaintiff:	ANIBAR TIMOTHY
Counsel for Defendant:	JOHN HEINE

TURNER, *Associate Justice*

FINDINGS OF FACT

1. Jekkeini, the successor plaintiff to his brother Lelkar, deceased, also was the plaintiff in two suits filed in 1958 involving the same land as in the present case—Mejerto *Wato*, also spelled Mwejerto, Wormej Island, Wotje Atoll. The defendants in the 1958 cases were Lolkab, the *alab* at the time complaint was filed, and Lojabeo, the successor *alab*, in Civil Action No. 101; and Limojwa, the *leroij lablab*, and Lojabeo, the *alab*, in Civil Action No. 171.

2. At the time Actions No. 101 and 171 were brought and prior thereto from the death of Loboktok, the *dri jerbal*, in 1949, and subsequently thereto up to the present, the land has been occupied and worked by the defendant Bilimon and his family, including his brothers and sisters. None of the actual workers on the land were made parties to plaintiff's 1958 suits.

3. Plaintiff's claim of *dri jerbal* rights in the 1958 cases was on the basis that he inherited the *dri jerbal* interests from his father, Loboktok, who held *dri jerbal* rights because the land was *ninnin* from his father Jedrio. This claim was not established in the two suits because they were dismissed in 1964 after a written agreement was submitted to the court whereby the *leroij lablab*, the *alab* and the plaintiff agreed that the plaintiff should become *dri jerbal*.

4. This agreement had the effect of cutting off the *dri jerbal* interests of the defendant and his family in the present case.

5. The defendant in the present case did not learn of the agreement cutting off his *dri jerbal* interests until 1968, when he was called before the *leroij lablab* because he refused to surrender the *wato* to the plaintiff.

6. The plaintiff's brother, Lelkar, brought this suit based upon the agreement and obtained service on the defendant December 2, 1965. Although defendant received "technical" notice that his rights had been terminated by the agreement between the *leroij* and *alab*, he was not a party to the proceedings in which it arose, was given no opportunity to defend himself in court or before the *leroij* and was not aware the action was being taken.

7. The *leroij* made no independent determination of "good cause" for terminating defendant's interests but accepted the statement of her co-defendant, *Alab* Lojabeo, that Bilimon and his brother Jimanko had withheld the *alab's* share of copra sales after Lojabeo succeeded Lolkab. However, the *leroij* did not attempt to enforce the action terminating defendant's interest and installing plaintiff as holder of the rights even though she was fully aware that defendant and his brother Jimanko, whom the *leroij* now recognizes as the successor *alab* to Lojabeo, did not leave the land and had refused to let either Lelkar or Jekkeini enter upon it and work it.

8. At the close of World War II, the coconut trees on Mejerto *Wato* had been destroyed by bombing and it was not until approximately the time plaintiff began his 1958 suits that the replantings had reached productive maturity. The defendant's predecessor and defendant had replanted the land.

9. Except when he lived with his father, until he was fifteen years old in 1938 when he left Wotje, plaintiff has not occupied or worked the land in question nor have any of his family worked the land since the death of plaintiff's father in 1949.

10. In spite of her agreement that plaintiff should become *dri jerbal*, the *leroij* had answered the plaintiff's suit to the effect that at a meeting in 1921, the then *iroij lablab*, Lobareo, and others including successor *iroij*, agreed that upon the death of plaintiff's father, none of his relatives or children would succeed him on the land he held as *ninnin* from his father. The *leroij's* agreement with the plaintiff which resulted in dismissal of the plaintiff's suit against her five years after it was filed was an action completely contrary to the position she took in her answer to the suit.

OPINION

The facts of this case raise several questions of law and Marshallese custom relating to land tenure.

Plaintiff relies to some extent on his original theory—expressed in the 1958 suits—that he inherited *dri jerbal* rights from his father who held the land as *ninnin*, which is defined as the gift of land by a father who is an *alab*, or possibly an *iroij*, to his son. Under the custom, a gift of *ninnin* goes to one generation only. After the death of the son or daughter, the land generally is passed down thereafter as *bwij*—lineage—land in the children's *bwij* rather than the father's *bwij* from whence it came. *Ninnin* may be given by the *alab* or *iroij* in the new lineage, but *ninnin*, as such, is not inherited by children of the worker as plaintiff originally claimed. A short discussion of *ninnin* is found in "Land Tenure Patterns" by J. A. Tobin, beginning at page 27.

There is some supporting evidence to the very positive answer of *Leroij lablab* Limojwa to the plaintiff's 1958 suit, that when plaintiff's father received the *ninnin*, it was determined by *Iroij* Lobareo that "no one among his relatives and children would succeed him." When plaintiff's father died in 1949, the plaintiff did not enter the land, nor has he ever worked the land. This appears to be

in accordance with the condition imposed upon the gift of the land to his father.

The agreement plaintiff obtained from the *leroij* and the *alab* which resulted in settlement in 1964 of the prior suits and which directed that plaintiff should be the *dri jerbal* also has not yet been successfully enforced by plaintiff. The defendant refused to comply with it, and as recently as 1969 the *leroij* recognized Jimanko (who entered the land as *dri jerbal* upon the death of plaintiff's father in 1949) as the *dri jerbal* in spite of the agreement naming plaintiff as *dri jerbal.* Since 1969, the *leroij* has recognized Jimanko as *alab* and in accordance with the genealogical chart of the parties, the defendant Bilimon, being from the youngest *bwij,* became the senior *dri jerbal.*

Plaintiff's major reliance in support of his claim was upon the agreement of 1964. Had the defendant Bilimon, or his predecessor, Jimanko, been named a defendant in the 1958 suits, instead of the *leroij* and the *alab,* or had Jimanko been given notice of the proposed agreement or been made a party to the proceedings, there would have been no question as to plaintiff's entitlement to *dri jerbal* interests under the doctrine of res judicata or the doctrine of estoppel by judgment.

[1] Res judicata is a bar to a subsequent suit when the prior action involved the same parties and there was a judgment on the merits on the same cause of action. *Lawlor v. National Screen Service Corporation,* 349 U.S. 322, 75 S.Ct. 865, holds that a dismissal of a prior suit which does not include findings of fact does not bind the same parties as to any issue. Also the Supreme Court holds that:—

"Under the doctrine of collateral estoppel (employed when the parties and the cause of action may be different in a subsequent suit) . . . a judgment (on the merits) precludes relitigation of

issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit."

The present case meets few of the requirements of the 1958 suits. There was an agreement resulting in a dismissal without any determination on the merits, and, of course, the defendants were not the same. The reason for denying the application of the doctrines of res judicata or estoppel are found in *United States v. International Building Company*, 345 U.S. 502, 73 S.Ct. 807:—

"But unless we can say that they (prior judgments) were an adjudication of the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits."

[2] It follows, therefore, that an agreement between the *leroij*, the *alab* and the plaintiff, who claimed to be *dri jerbal* of the land in question, which resulted in the dismissal of the prior litigation is not binding upon the present defendant who was in actual occupancy of the land through his predecessor and who was not a party either to the prior suit nor the agreement which caused its termination.

In an attempt to bolster his claim founded upon the 1964 agreement, the plaintiff sought to prove that the *leroij* had good cause for cutting off the interest of the defendant and replacing him with the plaintiff. The theory was that at the time the agreement was entered into, the defendant's predecessor had not paid over the *alab's* share and that this failure constituted good cause for cutting off the rights of the defendant.

Failure to pay an *alab's* share and refusal to meet the *dri jerbal* obligations to an *alab* justified the removal of the *dri jerbal*, this court held in *Litakwien v. Lanilon*, Civil Action No. 210, not reported. In the *Litakwien* case,

however, the conduct of the *dri jerbal* toward the *alab* was substantially more than a mere failure to pay the *alab's* share. In the present case, the defendant acknowledged the authority of the *alab*, and though delayed, eventually made payment to the *alab*.

As shown in the findings of fact, copra production was limited from this land until the time the first suits were filed. Further, the evidence established that the defendant did pay to the *alab* his share, in the amount of seventy-four dollars ($74.00), for the entire period copra had been harvested and sold after Lojabeo became *alab* in 1964 until 1968.

[3] A *dri jerbal's* failure to acknowledge the *alab* and to pay him his share of the copra harvest is generally regarded as good cause for removal of the *dri jerbal* from the land by the *iroij*. In the present case, it was not. It is true that an *iroij's* land determinations are entitled to "great weight". *Limine v. Lainej*, 1 T.T.R. 107.

[4] But it is also true, the *Limine* case holds, that an *iroij* must give "reasonable consideration for the rights of those having interests in the land." It is not "reasonable consideration" for an *iroij* to make a determination without notifying the party who is cut off from the land and to give him an opportunity to present his side of the issue.

In *Abija v. Larbit*, 1 T.T.R. 382, this court declined to uphold an *iroij's* determination cutting off established interests in land when a thorough investigation and discussion between opposing claimants had not been made. The court said at 1 T.T.R. 386:—

"Perhaps such action as Leben has attempted here would have been all right under Marshallese custom in the days when disputes as to succession to the position of *iroij lablab* were often decided by war, but today an *iroij lablab's* determinations, in order to have legal effect, must also meet the requirements that have been imposed by the successive administering authorities."

One of the requirements imposed by the present administration is that there must be a lawful determination of good cause before interests can be transferred. A "lawful determination" is one in which the *iroij* makes a thorough investigation and hears both sides of a controversy. It is particularly required also as was said in *Limine v. Lainej*, supra, that:—

> ". . . the *iroij lablab* must act within the limits of the law, including Marshallese customary law so far as it had not been changed by higher authority, and where the law left matters to their judgment they must act reasonably as responsible officials and not simply to satisfy their own personal wishes."

It is only natural that the *leroij* should desire to settle a suit brought against her. But in satisfying her "personal wishes", she also must act in fairness and according to law and custom. As was said in *Abija v. Larbit*, supra, at 1 T.T.R. 386:—

> "The taking away of subordinate rights is a drastic matter which should be undertaken only after thorough investigation and a reasonable effort to settle matters by negotiation."

When the defendant finally was given his "day in court" at the trial of this case, he clearly demonstrated that the *leroij's* determination was not based on "good reasons" but was perhaps largely motivated by a desire to get rid of the lawsuit brought against her.

It must follow that upon the law and the custom governing an *iroij's* land determination, the 1964 agreement between the *leroij* and the plaintiff was not based upon good cause and it did not terminate the defendant's interests in the land in question.

[5] The foregoing holding is decisive but another reason why the plaintiff should not obtain the relief he seeks should be mentioned. Plaintiff's father died in 1949 and Bilimon and his family entered the land. The plaintiff did not attempt to occupy the land nor did he make any effort

in the courts or before the *iroij* and *alabs* to obtain the rights which he now claims. This suit was filed by plaintiff's predecessor, Lelkar, on December 1, 1965, against the defendant who had occupied the land, with his family, without interference or interruption for more than sixteen years. This was, of course, short of the twenty-year statute of limitations which would have been an absolute bar to plaintiff's action, nevertheless, the period was long enough and the circumstances were such that plaintiff could be held to be estopped because of his failure to act. For decisions upholding denial of recovery of land interests because of estoppel, stale demand or laches by the plaintiff, see: *Armaluuk v. Orrukem*, 4 T.T.R. 474, 478. *Oneitam v. Suain*, 4 T.T.R. 62, 69.

In the *Oneitam* case, this court cited most of the applicable Trust Territory decisions and said:—

". . . in the doctrine of laches or stale demand . . . an owner is deprived of his interests because he had not exercised proper diligence in protecting his rights in court."

For all of the foregoing reasons, it is,

Ordered, adjudged, and decreed:—

1. That the plaintiff failed to establish *dri jerbal* interests in Mejerto *Wato*, Wormej Island, Wotje Atoll.

2. That the defendant and all those who claim under him are *dri jerbal* on the land in question.

3. No costs are assessed against either party.

4. This judgment shall not affect any rights-of-way over the *wato*.