

FILED

MAY 30 2017

[Signature]
ASST. CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

IN THE HIGH COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

<p>THE NATIONAL SPIRITUAL ASSEMBLY OF THE BAHAI'S OF THE MARSHALL ISLANDS,</p> <p>Plaintiff,</p> <p>v.</p> <p>HUSTON LOKEIJAK,</p> <p>Defendant.</p>	<p>CIVIL ACTION 2015-066</p> <p>ORDER GRANTING SUMMARY JUDGMENT FOR PLAINTIFF</p>
--	--

To: John Masek, counsel for plaintiff
Russell Kun, counsel for defendant

INTRODUCTION

Plaintiff ("NSA") filed a motion for judgment on the pleadings ("MJP"), in which NSA argues that defendant ("Lokeijak") has waived the right to raise issues of custom that could come within the jurisdiction of the Traditional Rights Court ("TRC"), and that Lokeijak's claims and defenses are also barred by the statute of limitations and laches. Lokeijak filed a response in opposition. NSA did not file a reply. Although given the opportunity to do so, neither party requested oral argument.

Both NSA's motion and Lokeijak's response rely on documents outside the pleadings. I am therefore required to treat the MJP as a motion for summary judgment ("MSJ"). Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law.

UNDISPUTED MATERIAL FACTS

1. In 1977, Labilliet Lokonwa ("Lokonwa") offered to sell Manenen weto ("Manenen") to NSA's predecessor. Lokonwa represented that he was the iroijedrik, alap and dri jermal on Manenen.

2. After several months of investigation and negotiation, the sale was completed in February 1979. It was approved by the droulul.

3. NSA's predecessor purchased Manenen as a temple site. The temple has not yet been built.

4. On April 9, 2015, NSA filed the subject complaint, alleging that Lokeijak had begun to interfere with NSA's ownership rights on Manenen by clearing trees and foliage, excavating, and harassing NSA's caretakers.

5. On May 14, 2015, Lokeijak's counsel ("Zackhras") filed an answer and counterclaim, in which Lokeijak alleges that he and his bwij are the proper owners of Manenen, that he and his bwij were never made aware of the sale of Manenen, that Lokonwa lacked the authority to sell Manenen, and that the sale violated Marshallese custom.¹

¹ These allegations are supported by Lokeijak's affidavit dated May 25, 2015. They are therefore *disputed* facts, but they are not *material* facts given the two legal doctrines (waiver and laches) upon which summary judgment is granted.

6. Until May 14, 2015, Lokeijak had not raised his concerns in a legal proceeding.
7. On May 26, 2015, Associate Justice Tuttle signed an order in which she stated:

Huston Lokeijak raised a counterclaim based on Marshallese custom. The counterclaim does not address Special Rule of Civil Procedure No. 1. Unless Mr. Lokeijak amends his counterclaim within 14 days, he will be deemed to have waived the right to raise issues of custom that may come within the jurisdiction of the Traditional Rights Court.

8. Zackhras timely filed an amended counterclaim.
9. NSA filed a motion to dismiss the amended counterclaim for failure to comply with Special Rule of Civil Procedure No. 1. Lokeijak did not file a response.

10. When neither Lokeijak nor his counsel appeared at a motion hearing/pre-trial conference on May 23, 2016, Associate Justice Plasman announced his intention to grant the motion to dismiss the amended counterclaim.

11. On June 7, 2016, Associate Justice Plasman dismissed the amended counterclaim, stating that Lokeijak had “waived the right to raise issues of custom that may come within the jurisdiction of the Traditional Rights Court.”

12. Lokeijak has never requested that Associate Justice Plasman’s order be set aside. The order remains in effect.

WAIVER OF ISSUES OF CUSTOM

Lokeijak was given the opportunity to amend his counterclaim to comply with Special Rule of Civil Procedure No. 1, but his counsel filed an amended counterclaim that was as defective as the original. Then Lokeijak did not oppose the motion to dismiss the amended counterclaim. Then Lokeijak and his counsel failed to appear at the hearing for the motion to

dismiss the amended counterclaim. Finally, Lokeijak has not requested that Associate Justice Plasman's order be set aside.

What is the result of Lokeijak's failures? First, he has waived the right to raise and have his land rights claims and defenses considered. Second, because his claims and defenses cannot be considered, the sale of Manenen remains unchallenged and therefore valid. Third, because the sale is valid, NSA is owner of Manenen, and Lokeijak and his bwij have no rights on Manenen. Fourth, Lokeijak's and his bwij's activities on Manenen, which occurred without NSA's permission, constitute trespass.

The RMI Supreme Court has recognized "that the land rights of the Marshallese people are of extreme importance and that the drastic procedure of preventing a full hearing in court should be avoided if at all possible." *Lokot and Kabua v. Kramer*, 2 MILR 89, 91 (1997). It may seem unfair that the elimination of Lokeijak's claims and defenses without TRC involvement arises from the actions and omissions of Zackhras. However, where a litigant voluntarily chooses his counsel, the litigant cannot avoid the consequences of his counsel's acts and omissions. *Ibid.* at 91.

The *Lokot* opinion requires me to consider less severe alternatives than dismissal. I have done that. However, I decline to adopt less severe alternatives because to do so would require me to: (1) ignore Associate Justice Tuttle's warning; (2) pretend that the amended counterclaim cured the defects in the original counterclaim; (3) disregard Zackhras's failure to respond to the motion to dismiss the amended counterclaim; (4) disregard Zackhras's and Lokeijak's failures to appear at the motion hearing; (5) ignore Associate Justice Plasman's order; and (6) pretend that Lokeijak has moved to set aside Associate Justice Plasman's order.

STATUTE OF LIMITATIONS

Contrary to NSA's claim, Lokeijak's claims and defenses are not barred by the 20-year statute of limitations. 24 MIRC §113 states in part, "A statute of limitations shall not apply to the inheritance of land by rightful heirs."²

LACHES

The common law doctrine of laches bars claims and defenses when there has been undue delay in bringing those claims and defenses before the court. Neither the RMI Constitution nor any RMI statute prohibits the application of the doctrine of laches to cases involving Marshallese lands or Marshallese land rights. *Likinbod and Alik v. Kejlat*, 2 MILR 65, 66 (1995).

In order to find that the doctrine of laches bars Lokeijak's claims, I must find: (1) a lack of diligence by Lokeijak; and (2) prejudice to NSA. *Langijota v. Alex*, 1 MILR 216, 222 (1990).

Lokeijak's lack of diligence is evident. More than 35 years passed before Lokeijak raised his claims and defenses in a court. In *Lokot*, the Supreme Court noted that a lapse of 15 years in a land rights case was likely sufficient to support a claim of laches. *Lokot* at 91. Here, the delay is more than double that in *Lokot*.

NSA's prejudice is also evident. Although undue delay itself creates a rebuttable presumption of prejudice³, NSA need not rely on the rebuttable presumption. NSA's predecessor

² Both counsel, whom I consider competent and experienced, overlooked this last sentence of 24 MIRC §113. I, a relative newcomer to Marshall Islands land rights law, would have overlooked it myself but for a happenstance discussion with the High Court's Chief Justice. The Nitijela may wish to consider moving or copying the second sentence of 24 MIRC §113 to a more obvious location, i.e., 29 MIRC Part VI.

³ *Langijota* at 222.

considered the offered sale of Manenen for several months. It acquired a survey. It acquired a valuation that led to a significant increase in the purchase price. It advertised the proposed sale. It obtained the approval of the droulul. It recorded the deed with the clerk of court. In short, NSA's predecessor went to great lengths to prevent the very challenge now raised by Lokeijak. Next, NSA's predecessor paid \$15,000 for Manenen – even using a minimal interest rate of 2% per year, that investment is now worth approximately \$30,000. Next, NSA's predecessor purchased Manenen at a time when purchases of land were legal – that is no longer the situation. Finally, some, and perhaps many, of the people with first-hand knowledge of the sale have died. These factors, individually and in combination, prejudice NSA.

ORDER

1. Summary judgment is granted in favor of NSA and against Lokeijak.
2. NSA is the lawful owner of Manenen.
3. Lokeijak and his bwij have no land rights on Manenen.
4. NSA may, within 30 days of date hereof, file a specific and itemized request for compensatory and/or punitive damages. Failure to timely file such a request shall be deemed a waiver of all such claims. If NSA files a claim, Lokeijak may respond within 21 days.
5. NSA is entitled to costs. NSA may, within 30 days of date hereof, file an itemized statement of costs. Failure to timely file such a statement shall be deemed a waiver of costs.
6. Each party shall bear their own attorneys' fees.

DATED this 30th day of May, 2017.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Colin R. Winchester".

COLIN R. WINCHESTER

Associate Justice