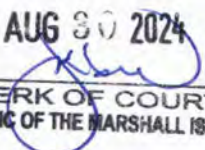


IN THE SUPREME COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

FILED
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CLERK OF COURTS
REPUBLIC OF THE MARSHALL ISLANDS

LAJANG KABUA, for Phillip K. Kabua,

Plaintiff-Appellant,

vs.

NEIMAT C. REIMERS,

Defendant-Appellee.

Supreme Court Case No. 2022-02130

OPINION

BEFORE: CADRA, C.J.; SEABRIGHT, A.J.;¹ and SEEBORG, A.J.²
CADRA, Chief Justice, with whom SEABRIGHT and SEEBORG, Associate Justices, concur:

I. INTRODUCTION

This case arises out of a “verified petition for declaratory judgment” (“Petition”) filed by Lajang Kabua, for Phillip K. Kabua (“Appellant”), seeking a determination that, as between Phillip K. Kabua and Neimat C. Reimers (“Appellee”), Phillip K. Kabua is the proper person to hold the Irojlaplap title to the *mojen* (domain) of Irojlaplap Laelan Kabua.

In his petition Appellant alleged that the High Court had subject matter jurisdiction over his claim to the Irojlaplap title. Appellant’s petition also sought to invoke the jurisdiction of the

¹ The Honorable J. Michael Seabright, United States District Judge, District of Hawaii, sitting by designation of the Cabinet.

² The Honorable Richard Seeborg, Chief United States District Judge, Northern District of California, sitting by designation of the Cabinet.

Traditional Rights Court (“TRC”) by having the High Court certify and refer the customary issue of which party was the proper person to hold the title of Irojlaplap to the TRC.

Appellee moved for summary judgment on the grounds that Appellant had not pursued his claim for approximately 27 years and, during that period of delay, material witnesses had died resulting in prejudice to Appellee. Appellant opposed, arguing that under custom and tradition he was precluded from pursuing his claim during the lifetime of his predecessor whom he claimed was the proper person to have exercised the Irojlaplap title and rights but who did not assert his rights to that title. The High Court entered summary judgment in favor of Appellee on the grounds that Appellant’s claims were barred by the equitable doctrine of laches as well as the statute of limitations which had run during the period of Appellant’s delay in asserting his claim to the Irojlaplap title.

In this appeal Appellant challenges the entry of summary judgment contending that the High Court lacked subject matter jurisdiction over the Petition he filed. Specifically, Appellant claims the High Court lacked subject matter jurisdiction over the issue of who is the rightful holder of the Irojlaplap title because 39 MIRC, Chapter 6, Section 2 provides that the *kajur* has the duty and obligation to determine the rightful holder of that title and rights, and thus strips the courts of jurisdiction. Appellant also contends that an Irojlaplap of the Ralik chain is entitled to sovereign immunity to the same extent of the King of England under the common law and is, therefore, not subject to the jurisdiction of RMI courts. Finally, Appellant contends that, although he never raised the issue below, the customary issue of which party is entitled to the rights and title of Irojlaplap should have been referred to the TRC before the High Court could consider the “legal” issues of laches and the statute of limitations.

For the reasons set forth below, we AFFIRM the High Court’s judgment.

II. PROCEDURAL BACKGROUND

On April 21, 2021, Appellant filed the Petition seeking a declaration that under custom Phillip K. Kabua is the proper person to hold the Iroj title and rights for the domain (*mojen*) of the parties' common ancestor Irojlaplap Laelan Kabua. The Petition sought certification and referral of that customary issue to the TRC. The Petition also recognized the jurisdiction of the High Court:

Jurisdiction of this matter is vested in this Court, by virtue of Article VI, Section 3(1) and Article III, Section 1(8) of the Constitution of the Republic of the Marshall Islands.

On October 12, 2021, Appellee moved for entry of summary judgment based on laches. Appellee argued that doctrine barred Appellant's claim because almost 27 years had elapsed since the death on October 8, 1994, of Irojlaplap Kabua Kabua, through whom both parties claim the Irojlaplap title. Appellant, and Appellant's predecessor Mamoru Kabua (through whom Appellant claims the Irojlaplap title) took no action to assert any right to the Irojlaplap title after Irojlaplap Kabua Kabua's death. It was only after Mamoru Kabua died on October 23, 2020, that Appellant filed this case approximately six months later. Appellee therefore contended that laches barred Appellant's claim due to the lapse of time and resulting prejudice due to the death of witnesses "notably among them is Plaintiff's immediate predecessor (i.e. Mamoru Kabua) who died only a few months before this action was brought, and who apparently did not want to contest Irojlaplap rights by Plaintiff's own admissions."

Appellant opposed the motion for summary judgment arguing that Marshallese custom and tradition precluded him from filing a claim because he was not the rightful successor to the Iroj title while Mamoru was alive. The Appellant also argued laches does not apply because there was no prejudice resulting from the almost 27-year delay in appellant pursuing his claim.

On August 3, 2022, the High Court issued its “Final Judgment Granting Defendant’s Motion for Summary Judgment.” The High Court concisely set forth the nature of the dispute:

This is a dispute regarding Irojlaplap rights over the lands in the domain or mojen of Irojlaplap Laelan Kabua (“Laelan”). Both plaintiff Phillip Kemilan Kabua (“Phillip”) and defendant Neimat Catherine Reimers (“Neimat”) are descendants of Laelan. Plaintiff Phillip claims that he is the proper person to hold and exercise the Irojlaplap rights, title and interests over Laelan’s domain as the eldest grandson of Laelan (i.e. the son of Kabua Kabua, Laelan’s son). Defendant Neimat claims that she is the proper person to hold and exercise the Irojlaplap rights, title, and interests over Laelan’s domain, as the successor of Irojlaplap rights, title, and interests over Laelan’s domain, as the successor of Irojlaplap Kabua Kabua (“Kabua Kabua”). Neimata Nakamura Kabua (“Neimata”) and Nelu Watak (“Nelu”).

The High Court set forth a lengthy citation of uncontested facts including references to Kabua Kabua’s *kalimur* recognizing Neimata Nakamura as “the likely successor” to his title of Irojlaplap. The High Court also set forth specific examples where Mamoru recognized Neimata as being the holder of the Irojlaplap title including (1) Kwajalein War Claim No. 8988, where Mamoru filed an objection but later withdrew it; (2) an agreement where Nelu assumed the title and implemented a distribution scheme for Kwajalein land payments, and (3) an April 24, 2014, agreement where Neimat succeeded Nelu to the title. The High Court noted:

...[A]fter Kabua Kabua’s death in October 1994, his oldest child and plaintiff Phillip’s older brother Mamoru, as the head of Kabua Kabua’s lineage, over 26 years repeatedly acceded to or recognized the eldest descendants of his father’s older sisters Ebon’s and Jukwe’s as the Irojlaplap over Laelan’s domain, not himself.

Based on the uncontested facts, the High Court concluded that Appellant’s claims were barred by the equitable doctrine of laches and the statute of limitation then in existence, 29 MIRC, Chapter 1, Section 17, which provided a limitation of 20 years to bring an action for recovery of land or any interest therein. That statute also provided that “[i]f the cause of action first accrued to an ancestor or predecessor of the person who presents the action, or to any other person under whom he claims, the twenty (20) years shall be computed from the time when the

cause of action first accrued.” Thus, the High Court found that Appellant (Phillip and his siblings) were required to commence their action to recover their claimed Irojlaplap interest within 20 years of Kabua Kabua’s death; i.e. no later than October 8, 2014. Although 29 MIRC, Chapter 1, Section 17, was amended in 1996 to provide that “rightful heirs” were not bound by the 20-year limitations period, the High Court determined that Appellant could not take advantage of this amendment because it did not apply retroactively. Further, the High Court found that the statute of limitations was not equitably tolled by Appellant’s deference to the alleged custom that he had to respect his predecessor’s decision not to pursue a claim to the Irojlaplap title.

Appellant filed a Notice of Appeal on November 4, 2022. The appeal proceeded through briefing and was argued on June 4, 2024.

III. ISSUES PRESENTED BY THIS APPEAL

Appellant raises three issues on appeal:

1. Is the judgment of the High Court void for lack of subject matter jurisdiction?

Appellant claims—for the first time in this appeal—that the High Court’s judgment is void because 39 MIRC, Chapter 6, Section 2, provides that the *kajur* (or commoners) have the duty of determining who is entitled to the Irojlaplap title and rights, not the courts; therefore, the High Court lacked subject matter jurisdiction over his petition for declaratory judgment.

2. Did the doctrine of sovereign immunity preclude the High Court from making a ruling on the untimeliness of the Petition?

Appellant claims—again, for the first time on appeal—that the High Court “failed to take into consideration the common law maxim that laches and delay in time did not apply to Plaintiff-Appellants in these proceedings as sovereigns under the common law of England and the United States of America, which common law was adopted as the law of the Republic of the

Marshall Islands at the time of founding of the Republic of the Marshall Islands. *Article XIII, Section 1(1), Constitution of the Republic of the Marshall Islands*. Under the common law of England, sovereign immunity prevented the application of time limits to delays of the King, that otherwise applied to the people in general. In the United States of America, the doctrine of sovereign immunity was adopted by the founding fathers who carried on that theory of immunity and applied it to the newly created federal government.”

3. Did the High Court fail to follow Constitutional requirements and court rules by failing to determine whether a substantial question has arisen in the case requiring certification of the question to the TRC?

Appellant claims the High Court violated the Constitution and its own procedural rules in not referring the customary issue of who, among the parties, was the proper person to succeed to the Iroijlaplap title and rights over Laelan’s *mojen* or domain to the TRC before considering the “legal” issues of laches and statute of limitations.

IV. DISCUSSION

A. The Judgment of the High Court Is Not Void for Lack of Subject Matter Jurisdiction.

Appellant contends that the High Court lacked subject matter jurisdiction over the petition he filed because 39 MIRC, Chapter 6, Section 2, provides that the *kajur*, not the courts, have the duty of determining who is entitled to the Iroijlaplap title. We disagree.

We begin with the Constitution’s grant of jurisdiction to the High Court. The Constitution, Article VI, Section 3, provides:

- (1) The High Court shall be a superior court of record having general jurisdiction over controversies of law and fact in the Republic of the Marshall Islands

The Constitution’s grant of “general jurisdiction over controversies of law and fact” to the High Court is a broad grant of subject matter jurisdiction. And the High Court’s subject matter

jurisdiction over matters involving custom and tradition is coterminous with the Constitution's grant of limited subject matter jurisdiction to the Traditional Rights Court. The Constitution, Article VI, Section 4, provides:

- (1) The jurisdiction of the Traditional Rights Court shall be limited to the determination of questions relating to titles or to land rights or to other legal interests depending wholly or partly on customary law and traditional practice in the Republic of the Marshall Islands.
- (2) The jurisdiction of the Traditional Rights Court may be invoked as of right upon application by a party to a pending judicial proceeding; but only if the court in which such proceeding is pending certifies that a substantial question has arisen within the jurisdiction of the Traditional Rights Court.

Although nothing in the Constitution excludes disputes over an Iroijlaplap title or associated land rights from the jurisdiction of either the High Court or the Traditional Rights Court, Appellant argues that 39 MIRC, Chapter 6, Section 2, deprives or is a limitation on the subject matter jurisdiction of the courts over disputes involving claimants to the Iroijlaplap title. That statute provides:

Pursuant to Article X, Section 2 of the Constitution of the Marshall Islands, it is hereby declared as a matter of customary law that in cases involving title disputes between Iroijlaplap claimants, the Alabs of the directly affected lands shall have the ability and obligation to determine the rightful holder of the Iroijlaplap title.

This provision does not mention the jurisdiction of RMI courts and contains no language that explicitly (or even inferentially) deprives the courts of subject matter jurisdiction over disputes involving the Iroijlaplap title or rights. Instead, it merely provides that as a matter of custom the Alabs of the directly affected lands have the ability and obligation to determine the rightful holder of the Iroijlaplap title. The statute does not address a situation where there may be a disagreement between claimants as to what the Alabs decided, *or* what occurs if the Alabs fail to exercise their "ability and obligation to determine the rightful holder of the Iroijlaplap title," *or* preclude a claimant from challenging a decision by the Alabs as being incorrect under custom

or the law, *or* deprive the courts of jurisdiction from addressing the myriad of other issues which might arise regarding a claimant’s right to the Irojlaplap title. In short, giving the Alabs the ability and obligation to determine the rightful holder of the Irojlaplap title does not strip the courts of jurisdiction to make the ultimate determination regarding title. If the Nitijela intended to strip the courts of jurisdiction, it would have to do so in much clearer terms and consistent with the Constitution. Further, Appellant has not directed us to any legislative history which evidences the intent of the Nitijela to limit the broad grant of subject matter jurisdiction to the courts under the Constitution.

Appellant also argues that, “as a matter of customary law established by [*Bina v. Lajoun*, 5 TTR 366 (A.D. 1971)] the absence of consent of the *kajur* recognizing their Irojlaplap, created a ‘genuine issue of material fact,’ thereby precluding the granting of summary judgment.”

Appellant had the opportunity but failed to raise this issue below on the motion for summary judgment and it is therefore waived on appeal. *See, e.g., Jeja v. Lajimkam, et al*, 1 MILR(Rev.) 200, 205 (1990) (stating that the Supreme Court cannot decide on appeal a question or claim not raised or asserted in the court below.)

We conclude that the High Court had subject matter jurisdiction under the Constitution to decide the issue of the rightful holder of the Irojlaplap title and rights.

B. Appellant Waived his Claim to Sovereign Immunity by Failing to Raise it Below

Appellant’s arguments regarding sovereign immunity of an Irojlaplap are waived on appeal because they were never raised below.³

Sovereign immunity, unlike the subject matter jurisdiction requirement, may be waived.

³ The Court’s ruling on the issue of sovereign immunity is limited to waiver—by discussing the issue, the Court is not suggesting that it agrees with Appellant’s claim of sovereign immunity.

Bragg v. W. Virginia Coal Ass’n, 248 F.3d 275, 300 (4th Cir. 2001). Any waiver of sovereign immunity must be “unequivocally expressed.” *Lancaster v. Sec’y of Navy*, 109 F.4th 283, 293 (4th Cir. 2024); *Caremark, LLC v. Choctaw Nation*, 104 F.4th 81, 88 (9th Cir. 2024). Such an expression of waiver is found by instituting proceedings in the sovereign’s *own* courts or in *another* sovereign’s courts without claiming immunity. In the case of a “sovereign within a sovereign” (as Appellant claims an Iroijlaplap is by analogy) a sovereign (such as a state within the United States) waives its sovereign immunity by voluntarily instituting or participating in litigation before the federal courts. See *Lapides v. Bd. of Regents of Univ. Sys. of Georgia*, 535 U.S. 613, 619 (2002) (“Thus, it is not surprising that more than a century ago this Court indicated that a State’s voluntary appearance in federal court amounted to a waiver of its Eleventh Amendment immunity.”) (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–76 (1999) (holding that a federal court will find a waiver if either “the State voluntarily invokes [federal] jurisdiction or else if the State makes a ‘clear declaration’ that it intends to submit itself to [federal] jurisdiction”); *Gunter v. Atlantic Coast Line R.R. Co.*, 200 U.S. 273, 284 (1906)(“[W]here a state voluntarily become a party to a cause, and submits its rights for judicial determination, it will be bound thereby, and cannot escape the result of its own voluntary act by invoking the prohibitions of the 11th Amendment.”).

Here, there is no question as to waiver—whatever sovereign immunity defenses or arguments Appellant may have had (if any) were waived when he voluntarily filed his petition in the High Court. In sum, a party cannot file a petition for declaratory judgment in the High Court, actively litigate in the High Court, lose in the High Court, and then seek to raise a claim of

sovereign immunity for the first time on appeal. If there was ever a description of waiver, this is it.

C. The High Court Did Not Err by Not Referring the Customary Issue of Which Party Is Entitled to the Irojlaplap Title to the Traditional Rights Court.

Appellant claims the High Court “improperly violated the constitutional right of Plaintiff-Appellant to have the High Court consider Marshallese custom before it arrived at its decision in these proceedings.” This argument fails.

The Constitution, Article VI, Section 4(4), states (emphasis added):

The jurisdiction of the Traditional Rights Court may be invoked as of right upon application by a party to a pending judicial proceeding; but only if the court in which such proceedings is pending certifies that a *substantial question* has arisen within the jurisdiction of the Traditional Rights Court.

The Traditional Rights Court Rules of Procedure, Rule 3, provides in relevant part (emphasis added):

If, after submission of the parties’ Applications and Pre-trial Statements, the High Court is satisfied that a *substantial question or questions* have arisen in the case before it relating to matters within the jurisdiction of the Traditional Rights Court, then the High Court shall so certify and shall refer such questions to the Traditional Rights Court for determination and resolution....

There is neither a constitutional or automatic right to have customary issues referred to the TRC. Both the Constitution and the TRC Rules of Procedure require that a case be certified to the TRC only if a *substantial question or questions* within the jurisdiction of the TRC have arisen in the pending proceeding before the High Court. Here, there was simply no substantial question to refer given the High Court’s ruling on timeliness of the appeal.

Any claim that could be referred to the TRC does not present a “substantial question” or a question of “considerable importance” if that claim is, in fact, time barred. Summary judgment furthers judicial economy by eliminating unnecessary trials. But if the High Court determines

that a claim is time barred, then a referral to the TRC to decide any customary issue would be meaningless and thus a waste of time and resources for the court and litigants. Stated differently, because Appellant would have lost the case regardless of what the TRC might have decided, there was no substantial question to refer. With no substantial question to refer, there was no error by the High Court.

V. CONCLUSION

For the reasons set forth above, we AFFIRM the judgment of the High Court that Appellee Neimat Catherine Reimers is the proper successor to the Iroiylaplap title and rights to the domain of Laelan Kabua.

Dated: August 30, 2024.

/s/ Daniel Cadra
Daniel Cadra
Chief Justice, Supreme Court

/s/ J. Michael Seabright
J. Michael Seabright
Associate Justice, Supreme Court

/s/ Richard Seeborg
Richard Seeborg
Associate Justice, Supreme Court