

JONATHAN NGIRMEKUR, Plaintiff

v.

**MUNICIPALITY OF AIRAI by its MAGISTRATE, et al.,
Defendants**

Civil Action No. 42-76

Trial Division of the High Court

Palau District

October 8, 1976

Action by person who alleged he was wrongfully evicted. The Trial Division of the High Court, Hefner, Associate Justice, held that where municipality obtained court judgment that clan to which plaintiff belonged did not own the land upon which plaintiff lived, then formed a vigilante committee and proceeded to evict plaintiff without legal process and not in accordance with custom, and the court had not determined that municipality owned the land, only that plaintiff's clan did not, municipality and those who acted in its name were liable for plaintiff's damages.

1. Custom—Burden of Proof

When there is a dispute as to the existence or effect of a local custom, the party relying upon it must prove it by evidence satisfactory to the court.

2. Custom—Generally

Custom is a law established by long usage and is by common consent and uniform practice, so that it becomes the law of the place or the subject matter to which it relates.

3. Custom—Judicial Notice

It is only when a local custom is firmly established and widely known that the High Court will take judicial notice of it, and a new way of doing things does not become established and legally binding or accepted custom until it has existed long enough to have become generally

known and peacefully and fairly uniformly acquiesced in by those whose rights would naturally be affected by it.

4. Custom—Judicial Notice

Where alleged community custom for eviction from land was infrequently used, there being testimony that it had been used once in Japanese times and twice in German times, there was no evidence that any other community used the custom, and community used a modern, somewhat different version of the custom to evict plaintiff, it could not be concluded that the custom was firmly established so that the court could take judicial notice of it.

5. Custom—Conflict With Law

Public policy forbids the enforcement of those customs which are inherently disruptive of law and order, and if the carrying out of a custom breaches the peace and fails to maintain law and order, the government shall provide a solution.

6. Custom—Crimes

A criminal cannot use custom as a shield from prosecution.

7. Real Property—Eviction—Wrongful Eviction

Where municipality obtained court judgment that clan to which plaintiff belonged did not own the land upon which plaintiff lived, then formed a vigilante committee and proceeded to evict plaintiff without legal process and not in accordance with custom, and the court had not determined that municipality owned the land, only that plaintiff's clan did not, municipality and those who acted in its name were liable for plaintiff's damages.

8. Municipalities—Sovereign Immunity—Wrongful Eviction

Sovereign immunity doctrine did not apply to bar suit against municipality by possessor of land in the community, for wrongful forcible eviction not in accordance with law or custom.

9. Municipalities—Sovereign Immunity—Generally

Sovereign immunity doctrine may become inapplicable once the government engages in proprietary functions, active wrongdoing or misfeasance, property damage, or the taking of property without just compensation.

10. Municipalities—Sovereign Immunity—Trespass

A city is not exempt under the sovereign immunity doctrine from liability for a trespass caused by its corporate act.

11. Municipalities—Sovereign Immunity—Conversion

Conversion of property will subject a governmental entity to suit despite the sovereign immunity doctrine.

12. Real Property—Eviction—Wrongful Eviction

Damages claim by winner of wrongful eviction suit, for full value of items still on the premises, must be denied.

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13. Real Property—Eviction—Wrongful Eviction

That evidence of damages to person found to have been wrongfully evicted was not exact or definitive did not mean that list of damages would be disregarded as being purely speculative, where plaintiff and his effects had been forcibly evicted, and plaintiff had returned for three days and was afraid to stay on the property any longer, for it was defendants' actions which caused the problem requiring plaintiff to prove damages within the standards set by the law.

14. Torts—Damages—Compensatory Damages

Compensatory damages are those which satisfy or recompense one for loss or injury sustained, and thus are a form of putting one in the same financial position he was in prior to a tort.

15. Real Property—Eviction—Wrongful Eviction

Punitive damages, an enhancement of compensatory damages because of wanton, reckless, malicious and oppressive character of the acts complained of, would be awarded plaintiff where, while he was off the land, municipality evicted him, threw his personal effects outside, and nailed up the buildings, without having the right to do so and without following either law or custom in doing so.

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| <i>Assessor:</i> | FRANCISCO MOREI |
| <i>Interpreter:</i> | AMADOR NGIRKELAU |
| <i>Reporter:</i> | MISSY F. TMAN |
| <i>Counsel for Plaintiff:</i> | JOHN O. NGIRAKED |
| <i>Counsel for Defendants:</i> | ROMAN TMETUHL and JOHNSON TORIBIONG |

HEFNER, Associate Justice

This matter is related to Palau Civil Action 6-74, *Esuroi Clan v. Trust Territory, et al.*, now on appeal to the Appellate Division, Civil Appeal No. 146.

The action was commenced by the Esuroi Clan against the Trust Territory Government and the Municipality of Airai in February, 1974. On August 5, 1974, the plaintiff herein moved to intervene on behalf of the Kesol Clan and his motion was granted. During the trial, the Kesol Clan along with the Esuroi Clan claimed the property involved in this case.

The Trust Territory Government and Airai Municipality took the position that the clans had no interest in the property but requested the court to not make a determination as to the rights between the Trust Territory Government and the Municipality.

On June 25, 1975, judgment was entered whereby the claims of the Esuroi Clan and Kesol Clan to the land in question here were denied but no determination of the rights of the Trust Territory Government or Municipality was made.

On July 22, 1975, the Kesol Clan filed a timely notice of appeal and subsequently filed a bond pursuant to court order to obtain a stay of execution which was granted on October 16, 1975.

Now, for the facts in this case.

In October of 1970, the plaintiff moved from the Municipality of Ngardmau and requested the permission of the magistrate of Airai to move onto the property in Airai to build his house. Permission was granted and the plaintiff was told he could stay there as long as he complied with the "rules and regulations of Airai". No written lease was prepared and no written rules and regulations were given the plaintiff.

The plaintiff built his home on the property and commenced to live there along with 15 other dependents and family members. Sometime thereafter, the plaintiff started using a portion of a concrete building which was built by the Japanese and left over from World War II. The concrete building is about 200 yards from plaintiff's house. The plaintiff used the building for a shop to build boats and do carpentry work. The last boat the plaintiff built was completed in 1974 and was of sufficient size to demand a price of \$15,000. The municipality used a portion of the second floor of the same concrete building for an office.

The plaintiff also commenced using an adjacent smaller concrete building to house a generator. Extensive overhead wires were strung from the generator house to plaintiff's house and five other houses in the vicinity. The plaintiff did not charge his neighbors for the power he supplied them.

After the judgment was entered in Civil Action 6-74, the council of chiefs and the municipal council of Airai met several times and a decision was made to evict the plaintiff. A delegation first called upon the plaintiff sometime around the latter part of July informing him that he had not met his "responsibilities and obligations" to the Airai Municipality and he was given 45 days to vacate the premises.

At least one or two other notices were conveyed to the plaintiff that he had to move. At one time, he was advised that if he apologized to the Chief of Airai, he may not have to move. However, the plaintiff did not apologize nor did plaintiff move from his house or the concrete buildings.

Shortly before September 16, 1975, Chief Ngiraked and the Municipality met and arranged to have a group of Airai men, known as Ngarabras, evict the plaintiff. The leader of Ngarabras is Edeluchel Eungel.

Sometime during the day of September 16, 1975, approximately 10 members of Ngarabras came to the house of the plaintiff. At the time, only the plaintiff's daughter was at home.

The men broke a locked door of the house and entered and threw the personal property of the plaintiff out of the house including a heavy wooden bar which had been nailed to the floor of the house. In addition, they ripped off sinks from an outdoor wall and then nailed all the doors shut. On one of the front doors, there was painted "Airai Municipality" or words of similar effect.

At the same time, the tools, equipment, and generator of the plaintiff were removed from the concrete buildings and

left outside. The lock on the generator house was broken.

During this time, the daughter of the plaintiff hid in the trees and then left Airai the next morning. The plaintiff was in Ngardmau on September 16th.

On or about September 17th, the plaintiff learned of the incident and on the 18th of September went to the property. He and his relatives stayed until September 20th, moving some of his tools and equipment back inside the concrete buildings and salvaging some of his personal belongings. Also, at this time he prepared an inventory of items he alleges became lost or damaged (Plaintiff's Exhibit 1).

The plaintiff and his family were so frightened that they left on September 20, 1975, and never returned to the property until the morning the court viewed the premises on September 30, 1976.

During the trial of this matter, the court, after motions by the defendants, dismissed the complaint as to all defendants except the Municipality of Airai, Chief Ngiraked Matlab, Edeluchel Eungel, and the Ngarabras association.

The defendants' position can be stated as follows:

1. By Palauan custom, the Municipality or Council of Chiefs can evict one who lives in the Municipality who does not meet his responsibilities or obligations to the community. Therefore the defendants were performing according to customary law in evicting the plaintiff.

2. The Municipality of Airai is immune from suit since it is a governmental entity.

3. That if damages are to be awarded against any defendant, the plaintiff's claim is so speculative that there is no basis upon which to make an award.

The Magistrate of Airai, Daniel Simeon, testified that the old Palauan custom was that if an inhabitant of a village failed to comply with his responsibilities to the community, a five step procedure was initiated by the chiefs. First, word

would be sent to the person of the plan to evict him. Secondly, a bamboo raft would be made and shown to him so he could leave on the raft. Third, the men would gather to move the person out by a certain time. Fourth, if the person had not left by this time, the chief would send the men to the house, and last, if the person did not flee, the house would be burned and everyone in the house would be killed.

According to the Magistrate, the Airai people did this twice in German times and once in Japanese times.

For several reasons, this "custom" cannot be used to give legal sanction to the acts of the defendants.

[1] Where there is a dispute as to the existence or effect of a local custom, the party relying upon it must prove it by evidence satisfactory to the court. *Basilus v. Rengiil*, 2 T.T.R. 430 (Tr. Div. 1963); *Mutong v. Mutong*, 2 T.T.R. 588 (Tr. Div. 1964); *Lajutok v. Kabua*, 3 T.T.R. 630 (App. Div. 1968).

[2] Custom is a law established by long usage and is by common consent and uniform practice so that it becomes the law of the place, or of subject matter, to which it relates. *Lalou v. Aliang*, 1 T.T.R. 94 (Tr. Div. 1954).

[3] The latter case also states that mere agreement to new ways of doing things by those to be benefitted, without consent of those to be adversely affected, will not of itself work sudden change of customary law. The new way does not become established and legally binding or accepted custom until it has existed long enough to have become generally known and have been peacefully and fairly uniformly acquiesced in by those whose rights would naturally be affected.

It is only when a local custom is firmly established and widely known that the High Court will take judicial notice of it. *Lajutok v. Kabua*, supra.

[4] In this case, the alleged custom was infrequently used. There is no evidence that any community other than Airai used the custom. In addition, the custom as related by the magistrate was not followed in this case.

The actions of the defendants were nothing more than an attempt to justify their actions with a modern version of the custom which fails to meet the requirements as set forth in the cases cited above. It cannot be concluded that the "custom" was firmly established so that this court can take judicial notice of it.

The severe remedy of evicting a person from his village was seldom used even in Airai and it must be concluded that it was for the most unusual cases where, for example, the person presented a serious threat to the community. Banishment in the olden days was akin to death.

Here, the reason as advanced by defendants for plaintiff's eviction was his failure to meet his responsibilities to the Municipality. He did not work on community projects or contribute food for certain occasions. Under Palauan custom, such breaches of conduct are rectified by fines—not eviction. These failures to comply are certainly not in the category of performing criminal acts or disrupting the life in the community.

Of course, the inevitable conclusion is reached that the real purpose of the eviction was not as claimed by defendants but was actually because of the plaintiff's participation in the prior law suit. The procedure of the Chiefs and Municipal Council, the timing of the notices to the plaintiff and the eviction itself support the conclusion that the defendants decided to teach the plaintiff a lesson in asserting his rights in a court of law.

[5] Even if the court were to conclude that the old custom is still a viable custom, the law in the Trust Territory is clear. If the carrying out of a custom breaches the peace and fails to maintain law and order, the

government shall provide a solution. *Trust Territory v. Benido*, 1 T.T.R. 46 (Tr. Div. 1953).

Public policy forbids the enforcement of those customs which are inherently disruptive of maintaining law and order. *Yangilemau v. Mahoburimalei*, 1 T.T.R. 429 (Tr. Div. 1958).

[6] Where a crime is committed, the criminal cannot use custom as a shield from prosecution. *Figir v. Trust Territory*, 4 T.T.R. 368 (Tr. Div. 1969).

[7] In short, the defendants decided to take the law in their own hands, formed a vigilante committee and proceeded to evict the plaintiff without any legal process. What makes the actions of the defendants even more distressing is that they relied upon a court of law to obtain a determination that the Kesol Clan, represented by the plaintiff, did not own the property and then proceeded out of court to supposedly enforce the judgment.

Two mistakes of the defendants become readily apparent. First, the judgment in the prior case did *not* determine that the Municipality owned the land. It only decided the Kesol Clan did not own it. Secondly, they did not proceed according to the law. Title 8 of the Trust Territory Code provides the legal remedies for one who wishes to enforce a judgment.

The defendants assert that the plaintiff held his property only under a tenancy at will because of the agreement made with the magistrate in 1970. Even if this were true, eviction cannot be performed without regard for the law.

Therefore it is concluded the defendants cannot justify their actions by customary law or common law and are liable for the damages suffered by the plaintiff.

[8] The assertion of the defendant, Municipality of Airai, that it is immune from suit because of the sovereign immunity doctrine was decided in the course of the trial. As

stated by the court at that time, the act of the Municipality does not fit into the type of case usually concerned with sovereign immunity. Defendants' counsel concedes 6 TTC 251, does not apply to municipalities. The tort involved here is a "willful tort" and not one of simple negligence or failure to perform some duty. The few cases found which deal with a similar type of governmental activity (although none are nearly as offensive as the one here) have held that the governmental entity is not immune.

[9] The annotation at 60 A.L.R.2d 1198 concedes that the overwhelming majority of cases allow municipalities immunity but goes on to point out the exceptions and limitations of the doctrine. Once the government engages in proprietary functions, active wrongdoing or misfeasance, property damage, or taking property without just compensation, the immunity doctrine may become inapplicable.

[10] A city is not exempt from liability for a trespass caused by its corporate act. *Los Angeles Brick v. City of Los Angeles*, 141 P.2d 46 (Cal.).

[11] Conversion of property will subject a governmental entity to suit. *Bertone v. City and County of San Francisco*, 245 P.2d 29 (Cal.). *Selected Investments Corp. v. City of Lawton*, 304 P.2d 967 (Okla.).

The Municipality of Airai was chartered in February of 1963 and according to 4 TTC 1, it is to exercise governmental functions not inconsistent with the laws of the Trust Territory.

To allow the Airai Municipality to hide behind the shield of sovereign immunity in the case at bar would be a travesty of justice and failure of this court to recognize the rights of the plaintiff. To sanction the municipality's acts would be to defer to rule by the whim of men and not by law.

The plaintiff has claimed \$100,000 in damages. At the argument of the case, plaintiff's counsel asked the court to

assess punitive damages against the defendants and the court treats this as a motion to amend pursuant to Rule 10, T.T.R. Civ. P. and allows the amendment.

[12] Plaintiff's Exhibit 1 was prepared by the plaintiff while on the property from September 18th to 20th, 1975. Plaintiff concedes that he had no prior inventory of his equipment, tools and supplies and the list is primarily made from his personal memory. Some items on the list, such as the generator, are still on the premises and the claim for full value must be denied.

[13] The defendants argue that the list is purely speculative and therefore must be disregarded. It is true that the evidence of damages is not exact or definitive, but on the other hand, it cannot be expected that the plaintiff would carry an itemized inventory current to the day of the eviction. It is the defendants' actions which have caused the problem requiring the plaintiff to prove damages within the standards set by the law.

[14] Compensatory damages are those which satisfy or recompense the plaintiff for loss or injury sustained. *United States v. State Road Dep't of Florida* (CA 5 Fla.) 189 F.2d 591, cert. den. 342 U.S. 903, 72 S.Ct. 291. In other words, this is a form of putting the plaintiff in the same financial position he was in prior to the tort. 22 Am.Jur.2d p. 28.

Four basic areas are involved in plaintiff's claim for damages—the house, the generator house, the boat-building shop, and the farm area.

The repairs to the home have been estimated by the plaintiff to be between \$7,000–10,000. The court's view reveals this to be excessive and \$2,000 is found to be a reasonable repair cost. In addition, the plaintiff lost personal household effects claimed on the next to last page

of Exhibit 1. There is evidence of recovery of some of these items. The court finds that \$1,000 is reasonable amount for the loss of beds, sheets, clothing and bedding, and other household effects.

There were 5 drums of diesel fuel lost at \$125.50. The generator is not a lost item and \$200 is found to be the reasonable compensation for the damages resulting in its being left outside by the defendants.

The list of the plaintiff for his equipment, tools, and supplies for his boatbuilding and carpentry shop is lengthy. It must be noted that much of the material and tools were old on September 16, 1975 and had not been used for a year or more. The court has viewed the equipment which is still in the concrete building and considering plaintiff's testimony, Exhibit 1 and the pictures, Plaintiff's Exhibit 2, the court finds \$3,000 to be reasonable compensation for the loss and damage to plaintiff's tools and equipment including the saw-mill.

Damages are awarded for the loss of the use of the house at the rate of \$50 per month from September 1975 or 12 months for \$600.00.

The farm loss claimed by plaintiff is \$9,000. However, there is a dispute as to what crops plaintiff had on September 16, 1975, and the loss he incurred by his eviction. The court finds that under the circumstances, plaintiff was not able to farm the area back of his house and assesses damages at \$100. No damages are awarded for loss of crops for the taro paddy by the seashore.

[15] Punitive damages are given as an enhancement of compensatory damages because of the wanton, reckless, malicious, and oppressive character of the acts complained of. 22 Am.Jur.2d p. 322.

The court finds that this case is a proper one for the assessment of punitive damages as a punishment of the

defendants and as a deterrent to others. The sum of \$5,000 is so assessed.

IT IS THEREFORE ADJUDGED that the defendants, jointly and severally owe the plaintiff the total of \$7,025.50 compensatory damages and \$5,000 punitive damages for a total of \$12,025.50. Interest shall accrue on this judgment at the legal rate of 9% per annum from this date.

IT IS FURTHER ORDERED that the defendants, their agents, employees or representatives are enjoined from prohibiting, preventing or hindering the plaintiff in obtaining any of his remaining equipment, tools, or generator from the concrete buildings and;

IT IS FURTHER ORDERED that the defendants, their agents, employees, and representatives are enjoined from disturbing the peaceful occupation of the house of the defendant until and unless a legal order is issued by this court removing plaintiff from the premises.

IT IS FURTHER ORDERED that the defendants and each of them submit a written plan to this court within 30 days as to the manner and time of payment of the judgment rendered herein.

The plaintiff shall be entitled to his court costs.