SIKSEI SECHESUCH, Plaintiff

v.

KEBIK and ELIBOSANG, Defendants

Civil Action No. 493

Trial Division of the High Court

Palau District

February 22, 1974

Motion to reopen. The Trial Division of the High Court, D. Kelly Turner, Associate Justice, held that petitioners were not entitled to testify where case was decided by summary judgment and could not have case reopened on ground their counsel failed to make sure that they had a chance to testify.

1. Civil Procedure—Reopening of Case—Grounds

Where judgment for plaintiff was on plaintiff's motion for summary judgment and was proper, and there was no trial, defendants were not entitled to testify, or to have case reopened due to their counsel's alleged failure to give his clients an opportunity to be heard in a trial. (Rules Civil Procedure, Rule 18(e)(6))

2. Civil Procedure—Reopening of Case—Grounds

Where defendants failed to appeal, they lost the right of appeal and could not successfully assert denial of right of appeal as basis for motion to reopen. (Rules Civil Procedure, Rule 18(e)(6))

Counsel for Defendant-Petitioners: ITELBANG LUII
Counsel for Plaintiff-Respondent: FRANCISCO ARMALUUK

TURNER, *Associate Justice*

Defendant-petitioner filed a motion August 29, 1973, for reopening the trial and relief from Judgment entered June 12, 1973. The Judgment was erroneously captioned *Olkeriil Sechesuch v. Kebik and Elibosang* and the motion to reopen was made under the same case title.

It is noted the Judgment recited that: "Plaintiff moved to substitute Siksei as successor to Olkeriil, who died after the complaint was filed. Sechesuch is the title held by Olkeriil and his successor Siksei. The motion was granted and the caption was amended accordingly." Because the Judgment appeared under the original title and not under the corrected caption as ordered the Court has corrected the title for this decision even though the motion was brought under the original title.

The motion for relief was brought pursuant to Rule 18(e)(6), Trust Territory Rules of Civil Procedure. The rule provides for relief from judgment for "any other reason justifying relief."

Rule 18(e) is the same as Federal Rule 60(b), Rules of Civil Procedure. Subdivision or clause 6 of both rules was considered by the Federal court in *Davis v. Wadsworth Construction Co.*, 27 F.R.D. 1, in which the Court quoted from 7 Moore's Federal Practice 295:—

> "It is important to note, however, that clause (6) contains two very important internal qualifications to its application; first, the motion must be based upon some reason other than those stated in clauses (1) and (5); and second, the other reason urged for relief must be such as to justify relief."

The petition for relief clearly meets the first qualification for application in that it is based on "other reasons" than those stated in clauses (1) through (5). The ground upon which relief is sought is based upon alleged dereliction of former counsel. The motion stated counsel from

"the commencement of this action up until the time for appeal had run out, never consulted his clients, nor had allowed his clients the opportunity to be heard in a formal trial and proceeded with the case without even notifying his clients."

As to the second ground for relief that the "reason urged for relief must be such as to justify relief" the petitioner's only stated reason was the purported failure of counsel to consult with petitioners. Whether such consultation would have made any difference in the result reached by the Court was a matter of primary consideration during the hearing on the motion. It will be considered after a review of the first "qualification" for application of the rule.

There have been decisions both ways granting and denying relief because of the alleged failure of counsel. *In Re Cremila's Estate*, 14 F.R.D. 15, granted relief because of failure of counsel to adequately represent his client. The court described the failure:—

> "The petition alleges in part that the attorney for petitioner at the time of the hearing on this matter was in such a state of drunkenness throughout the hearing as to be incapable of presenting the case on its merits and that while witnesses were present and available to testify in the matter, were not called . . . . The Petitioner further alleges there was no other attorney available in Nome (Alaska) to properly advise him on the matter and that he was without funds to secure the services of an attorney from some other place."

The court granted relief in the "interests of justice." The circumstances of the case from Alaska are entirely different than those presented in the present case, even though both of them involved alleged failure of counsel to adequately represent the petitioners. In the present case the petitioners say their counsel did not give his clients an opportunity to be heard in a formal trial.

[1] What petitioners overlook entirely is that there was no formal trial and that they would not have been allowed to testify if they had been present or had consulted with their counsel. The Judgment in the present case was not as result of a trial but was on plaintiff's motion for summary judgment.

Summary judgment is appropriate when there are no disputed facts and the judgment should be allowed as a matter of law. At the hearing on the motion for judgment the former counsel offered no dispute "of the principal issue of fact." Nor did present counsel on the motion for reopening make any showing that if the case was reopened petitioners could present any evidence that would change the result of the summary judgment. The conclusion is inescapable that there were no facts subject to dispute available to the former or present counsel for petitioners. The conclusion the court reached in its judgment remains valid after the hearing on the petition to reopen. The Judgment said:—

> "Without such issue of fact, the plaintiff, as representative of his clan, was entitled to judgment as a matter of law, based upon the decision in Civil Action No. 165, *Sechesuch v. Trust Territory,* 2 T.T.R. 458."

Both in the judgment and in the present opinion, the Court has attempted to emphasize this case was one for summary judgment and was not decided upon the basis of res judicata due to the earlier decision in 2 T.T.R. 458. The doctrine was not applicable because in the former case the Trust Territory was the party in opposition to the title bearer Sechesuch and in the present case the parties in opposition to Sechesuch were Kebik and Elibosang. There was no indication of privity between the Trust Territory and the present defendants hence res judicata was not applicable.

From the circumstances of the present case the Court concludes the petitioner's counsel was not derelict in failing to call petitioners to testify "on the merits." Petitioners were not entitled to testify as a matter of law. The alleged failure of their former counsel is rejected as a ground for reopening the case.

What petitioners actually are complaining about is that they were denied an opportunity to appeal the adverse decision. If, in fact, the petitioners could present a substantial question of law as grounds for appeal the Court would be obliged to give them an opportunity to present it by a rehearing on the motion for summary judgment.

This question goes to the second part of the application of the rule for relief. Is there a reason, as a matter of law, justifying relief?

It was Moore who referred to the rule for relief from judgments as "a grand reservoir of equitable power to do justice in a particular case." The statement has been quoted by the Trust Territory courts. *Delemel v. Tulop*, 3 T.T.R. 469.

Even the court may exercise its equitable discretion when it gives relief from a judgment, nevertheless, it is bound by the principles of law governing any discretionary action. It was said in *Loucke v. United States*, 21 F.R.D. 305:—

> "But this rule was not designed to supersede the normal and ordinary channels of relief. Nor was it intended to invest the court with an omnipotence whose boundary is defined only by the court's conscience."

The Federal court concluded that the rule for relief "for any other reason" was applicable "only where the total record portrays extraordinary circumstances."

[2] In the present case the defendant-petitioners failed to appeal and thereby lost the right of appeal from the adverse judgment. Petitioners alleged their counsel failed to

consult with them and that he "proceeded with the case without even notifying his clients."

When judgments have been reopened on petition of defendants it appears from the cases that the petitioners were deprived of an opportunity to present a valid and substantial defense. That is not the situation in the present case. What defense, if any, petitioners have has never been made to appear in these proceedings. As a matter of fact at the hearing to reopen counsel agreed that the decision reported in 2 T.T.R. 458 holding the clan and not the Trust Territory owned the land was proper.

If the former decision is acceptable, what then is the defense the petitioners were deprived of either in a trial or on appeal that would require reopening of this case? We agree with counsel that the former decision did not bar the petitioners from resisting the clan's claim to ownership. But they have indicated no valid defense either in the past or now. This is the third time the question of ownership of the land has arisen.

July 24, 1957, the Palau District Land Title Officer issued his Determination of Ownership and Release No. 81 holding the land in question belonged to the government. The clan, through its title bearer, appealed and the 1963 judgment reversed the title officer's determination, holding the land was clan land. At neither of these decisions in 1957 and 1963 did the defendants appear and make any claim. We first heard of them when Kebik told Elibosang she owned the land and that Elibosang could build his house on it. Suit was brought against them in 1970 and the summary judgment was issued in 1973 and finally a motion to vacate the judgment came before the court in 1974. At none of these proceedings does the record show the defendants appeared and presented any information in support of their claims. They haven't done so yet. In fact at

the hearing they were in agreement with the former judgment the land is owned by the Ebai Clan for whom the bearer of the principal title, Sechesuch, is the administrator and representative of the clan.

The present motion to reopen the Judgment is in lieu of an appeal and this rule was never intended to be a substitute for an appeal. The United States Supreme Court ruled in a similar situation in the landmark case of *Ackermann v. United States*, 340 U.S. 193, 71 S.Ct. 209. The Ackermann's decided not to appeal their case on information from their counsel as to the cost of an appeal. The information given them by their lawyer was wrong. It also turned out that Keilbar, who was tried with them, did appeal and the judgment was reversed for him. *Keilbar v. United States*, 144 F.2d 866.

Thus, with substantial grounds for reopening the former judgment, the Supreme Court denied a new hearing, saying at 71 S.Ct. 211:—

> "Petitioner made a considered choice not to appeal . . . . Petitioner cannot be relieved of such a choice because hindsight seems to indicate to him that his decision not to appeal was probably wrong . . . ."

After three decisions on ownership of the land in question petitioners ask for a fourth decision without showing anything to indicate the last two judgments can be changed.

Ordered, that defendants' petition to vacate the Judgment and reopen the case for trial is denied.