

OTNIEL EDMOND TULENKUN, Plaintiff
v.
VILLAGE GOVERNMENT OF UTWE, Defendant

Civil Action No. 415

Trial Division of the High Court

Kusaie, Ponape District

March 13, 1972

Action between village and upland owner to determine rights to filled shore lands. The Trial Division of the High Court, H. W. Burnett, Chief Justice, held that the government could not dispossess a landowner at will of rights conferred upon him by law and that the occasional use of filled land was permissive only and thus rights therein were in upland owner.

1. Trust Territory—Land Law—Generally

Neither the government, nor any part of it, can dispossess a landowner, at will, of a very real and substantial right conferred on him by law.

2. Real Property—Shore Lands

Provision of the Trust Territory Code relating to rights in areas below high watermark, does not give ownership of the land below the high watermark, but rather gives a right, under conditions of approval, to build improvements on the land, which improvements may be the property of the upland owner; ownership of the land remains in the government. (67 T.T.C. § 2(c))

3. Real Property—Shore Lands

Where the occasional use made of filled shoreland by village was permissive only, the village acquired no rights thereby. (67 T.T.C. § 2(c))

BURNETT, *Chief Justice*

FINDINGS OF FACT

1. The land in dispute, a portion of the land Utwe Taf, Utwe Village, Kusaie, is located below the ordinary high watermark.
2. Plaintiff owns the land which abuts the area in dispute.

OPINION

The facts necessary to decision in this action and set out in the foregoing findings, are not in serious dispute, and found support in the testimony of witnesses for both parties. The question then becomes one of law, to be answered by reference to 67 T.T.C. 2, which is controlling as to ownership of land below the high watermark.

67 T.T.C. 2, with the exception, here applicable, set forth in subdivision (c) reads:—

“Section 2. Rights in areas below high watermark.

(1) That portion of the law established during the Japanese Administration of the area which is now the Trust Territory, that all marine areas below the ordinary high watermark belong to the government, is hereby confirmed as part of the law of the Trust Territory, with the following exceptions:—

(c) The owner of land abutting the ocean or lagoon shall have the right to fill in, erect, construct and maintain piers, buildings, or other construction on or over the water or reef abutting his land and shall have the ownership and control of such construction; PROVIDED, that said owner first obtains written permission of the District Administrator before beginning such construction.”

[1] The exception, and the nature of the right which it confers on the abutting landowner, is most important in this matter. The defendant contends that, as a local government of the Trust Territory, it was entitled to use the land, which had been filled and on which, at various times in the past, had been maintained the Utwe municipal office, notwithstanding the lack of consent of the owner of the

abutting upland. To sustain that position would require a finding that the government, or any part of it, can dispossess a landowner, at will, of a very real and substantial right conferred on him by law. Of course this cannot be.

[2] There was much conflict in the testimony as to whether the land had been filled, and the first building erected, before or after plaintiff's father bought the land. The defendant contends that this was done before, and thus the municipality's rights were fixed by permission of a prior owner. This contention too must fail. Note that Section 2(c) does not give ownership of *the land* below high watermark. What it does give is a right, under conditions of approval, to build improvements on the land, which improvements may be the property of the upland owner. Ownership of the land below high water does not change; it remains in the government of the Trust Territory.

It follows, therefore, that, whether any prior owner attempted to transfer the area in dispute or not is immaterial. The right given by Section 2(c) is one which cannot be separated from ownership of the abutting upland.

[3] In the view which I take of the matter, the occasional use made of the area in dispute by the village government of Utwe has been permissive only, and defendant has acquired no rights thereby.

Mention was also made of the almost universal failure of land owners in Kusaie to obtain the approval of the District Administrator, as required by Section 2(c), before proceeding to fill and build on land below high water. However that may be, such a defect is one available only to the government, and cannot affect the outcome of a suit such as this in which the village government stands in the same position as a private landowner.

It is, therefore, ordered, adjudged, and decreed:—

1. The land here in dispute is the property of the Trust Territory government, pursuant to Section 2, Title 67,

Trust Territory Code, subject to the exception set forth in subsection (c) thereof.

2. The plaintiff, Otniel Edmond Tulenkun, is owner of the land abutting the area in dispute and possesses those rights conferred by subsection (c) of Section 2, Title 67, Trust Territory Code; Defendant Village Government of Utwe has no rights therein.

3. No costs are allowed either party.