IN THE SUPREME COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

CECILIE E. KABUA,

Plaintiff-Appellant,

vs.

MWEJEN MALOLO.

Defendant-Appellee.

Supreme Court Case No. 2018-008

OPINION

BEFORE: CADRA, Chief Justice; SEABRIGHT, Associate Justice;[1] and SEEBORG, Associate Justice[2]

CADRA, Chief Justice:

I. INTRODUCTION

Plaintiff-Appellant Cecilie E. Kabua appeals a judgment of the High Court determining that, as between herself and Defendant-Appellee Mwejen Malolo, Mwejen Malolo is the proper person to hold the *alab* title/rights on Kuror, Enejore, Jakroot, Boken, Bokram, and Wonwot wetos on Kwajalein Atoll.

In reaching its judgment, the High Court accepted and gave substantial weight to the opinion of the Traditional Rights Court. The Traditional Rights Court found the applicable

[1] The Honorable J. Michael Seabright, Chief 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.

custom is that, in the absence of an agreement otherwise, the *alab* title to *morjinkot*[3] lands descends through the male bloodline (*bototak*) until the birth of a female which then establishes a *bwij*. Upon establishment of a *bwij*, *marjinkot* lands become *bwij* lands. As *bwij* lands, the succession of the *alab* title changes from that of through the *botoktok* (paternal bloodline) to that of through the *bwij* (matrilineally). Applying the custom to the facts of this case, the Traditional Rights Court found two *bwijs* were established by the births of two females in the same generation who descended from Lokomoram,[4] the parties' common ancestor and original recipient of the wetos awarded as *marjinkot*. The older *bwij* being that of Libonlok and her children and the younger *bwij* being that of Litawe and her children. "Custom changes custom" and as *bwij* land "the children of the females will become *alabs* and the children of the males will become *dri jerbals*." Because Appellee Mwejen Malolo is a "child of the female" and is in the same generation as the last recognized *alab*, Laji Taft, the Traditional Rights Court concluded that Mwejen Malolo is the proper person to presently hold the *alab* title to the wetos at issue. The Traditional Rights Court opined that Cecilie Kabua is entitled to inherit the *dri jerbal* title as she is a child of the male.

Cecilie Kabua timely appealed. She contends the Traditional Rights Court's findings are contrary to custom. She also contends these courts erred in failing to consider certain evidence and explain adequately its findings regarding custom including the impact of Lelet, a male born in the same generation as Libonlok and Litawe, being *alab*.

As discussed below, we conclude the findings of the Traditional Rights Court are not "clearly erroneous" and, therefore, we affirm the High Court's judgment.

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[3] *Morjinkot* – "land taken at the point of the spear." Tobin, Land Tenure in the Marshall Islands, p. 34. Also spelled *Morijinkwot* – 'The highest land award in recognition of valor, and a male only award." Amata Kabua, CUSTOMARY TITLES AND INHERENT RIGHTS, A General Guideline in Brief (1993).

[4] Also spelled "LoKamran," "Lokomoran," or "Lokmoram."

II. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

A. The Proceedings Below

On October 19, 2012, Cecilie Kabua filed a "Complaint for Declaratory and Injunctive Relief," High Court Civil Action No. 2012-190, against Mwejen Malolo, seeking a determination that she is the rightful *alab* on the above referenced wetos. Mwejen Malolo answered on March 6, 2013. The case was eventually referred to the Traditional Rights Court.

A hearing before the Traditional Rights Court was conducted on November 9, 10, and 11, 2016. The question presented to the Traditional Rights Court was:

> As between Cecilie Kabua and Mwejen Malolo, and all persons claiming herewith, who is the proper person, according to Marshallese custom, to inherit from Laji Taft the Alab right on the wetos on Kwajalein Atoll, Marshall Islands? The wetos are Kuror, Enejore, Jakroot, Boken, Bokram, and Wonwot.

After hearing testimony from Cecilie Kabua, Michael Jenkins, Helkena Anni and Mwejen Malolo, and having considered the exhibits offered by the parties, the Traditional Rights Court issued its "Opinion and Answer" on February 15, 2017. In its "Opinion and Answer" the Traditional Rights Court concluded that, as between Cecilie Kabua and Mwejen Malolo, Mwejen Malolo is the proper person to hold the *alab* title on the wetos at issue.

The Traditional Rights Court reasoned that, in the absence of an agreement otherwise, the *alab* title of Lokomoram (the original recipient of the lands award as *marjinkwot* and the parties' common ancestor) descended through the male bloodline (*botoktok*) until such time that the females, Libonlok and Litawe, were born.[5] Upon the birth of these females, a "*jidrak in bwij*"

[5] "According to Marshallese custom, the descending line from Lanjok to Lokabale and Lainammo is bloodline or children of a male, and since there was no agreement as to inheritance of land that Lokomoram made, it is proper under Marshallese custom for the children of Lokabale and the children of Lainammo to inherit the Alab title when their time comes. However, this is with respect to bloodline or children of males . . . Lokobale and Litawe are "jidrak in bwij," to this family, that began and continued down over generations under bloodline or children of males. Since custom changes custom, meaning if a daughter is born, the land will become bwij land . . . the panel sees that there are two bwij that emerged. The older bwij is that of Libonlok and her children and the younger bwij is of Litawe and her children." Opinion & Answer of TRC, p. 2.

occurred establishing two *bwijs*: an older *bwij* of Libonlok and a younger *bwij* of Litawe.[6] Because "custom changes custom," the wetos at issue became *bwij* land.[7] As *bwij* land "[t]he children of the females will become Alabs and the children of the males will become Dri Jerbals."[8] The *alab* title to the subject wetos would then descend through the *bwij* (matrilineally) rather than through the *botoktok* (patrilineal blood line.) The Traditional Rights Court explained "[u]nder Marshallese custom the inheritance of the Alab title is through the children of the female, beginning from the eldest."[9] Laji Taft was the last *alab* having been declared such in the previous High Court case of *Laji Taft v. Mwejen Malolo*, High Court Civil Action No. 1993-040. Based on the *memenbwij* submitted by the parties, the Traditional Rights Court agreed "[i]t was proper for Laji Taft to hold the right of Alab before Mwejen Malolo because he (Laji Taft) is listed under the eldest bwij of his grandmother, Libonlok, and his mother, Bojaar."[10] Mwejen Malolo is of the same generation as Laji Taft, although from the younger bwij.[11] Therefore, the Traditional Rights Court reasoned "[s]ince Laji Taft was the last living descendant of Bojaar and his grandmother, Libonlok, the Alab right shall go back to the younger bwij, the descendants of Litawe who are the children of Litabu."[12] The Traditional Rights Court concluded that because "Laji Taft was the last Alab and since he does not have any surviving siblings left, it is only

[6] *Id.*

[7] *Id.*

[8] "Under Marshallese custom the inheritance of the Alab title is through the children of the female beginning with the eldest. The children of a male shall inherit the Dri Jerbal title or Senior Dri Jerbal (the head of all Dri Jerbal on the land.)" Opinion & Answer of TRC, p. 3.

[9] *Id.*

[10] "It was proper for Laji Taft to hold the right of an Alab before Mwejen Malolo because he is listed under the eldest bwij of his grandmother Libonlok, and his mother Bojaar. This panel agrees with the judgment of the High Court in Civil Action 1993-040, as shown in Plaintiff Exhibit D." Opinion & Answer of TRC, p. 3.

[11] Opinion & Answer, p. 3.

[12] *Id.*

proper that Mwejen Malolo, who is of the same generation as Laji, but from a younger bwij, be the rightful Alab title holder."[13]

On May 20, 2018, the High Court conducted a Rule 9 hearing. Cecilie Kabua, relying on the Traditional Rights Court's decision in the case of *Thomas v. Samson*, CA 2000-184 (2006), argued that two *bwijs* can never hold title to the same land at the same time. Kabua thus claimed the Traditional Rights Court's decision was "clearly erroneous" because it found that an elder and younger *bwij* with rights to the same wetos at the same time had been established with the births of Libonlok and Litawe. The High Court rejected that argument distinguishing the *Thomas v. Samson, supra,* case on its facts and characterizing its holding as dicta. The High Court reviewed the Traditional Rights Court's "Opinion and Answer" in light of the evidence concluding there was a sufficient factual basis for its determination and that determination was not "clearly erroneous." The High Court therefore adopted the Traditional Rights Court's decision and declared that, as between Cecilie Kabua and Mwejen Malolo, Mwejen Malolo is the proper person to hold the *alab* title on the subject wetos in its "Final Judgment" dated June 1, 2018.

Cecilie Kabua timely appealed on July 2, 2018.

B. The Uncontested Facts

The facts of this case are largely undisputed.

It is undisputed that the *alab* title to the wetos at issue originated with Lokomoram who was awarded these lands as *marjinkot* by his Iroij for bravery in battle.

It is also undisputed that the parties' common ancestor is Lokomoram (a male).

[13] *Id.*

The *memenbwij* submitted by the parties establishes the following uncontested genealogy. Lokomoram had a son named Lanjok. Lanjok had two sons, Lokobale[14] (the elder) and Lainammo (the younger). Lokobale (the older son of Lanjok) had a daughter named Libonlok and a son named Lelet. Lelet (the son of Lokobale) had a daughter named Rose (Rose Lelet Jenkins) and sons (Melu and August). Appellant Cecilie Kabua is a daughter of Rose (and thus a granddaughter of Lelet). Libonlok (the daughter of Lokobale) had a daughter named Bojar. Bojar had a son named Laji (Laji Taft) and a daughter named Betty (as well as other sons and daughters). Lainammo (the younger son of Lanjok) had sons (Malolo, Temoj, and Laitto) as well as a daughter named Litawe. Litawe (the daughter of Lainammo) had a daughter named Litabu (and sons, Raimon, Livai and Attari). Appellee Mwejen Malolo is a son of Litabu (and thus a grandson of Litawe).[15]

It is undisputed that Laji Taft was the last *alab* on the wetos at issue. The High Court previously entered an "Order Granting Summary Judgment" in the case of *Laji Taft v. Mwejen Malolo*, CA No. 1993-040 (3/22/94), declaring Laji Taft to be the *alab* on the wetos at issue. That judgment was not appealed and the parties concede that Laji Taft was the last recognized *alab*.

It is further undisputed that Appellant Cecilie Kabua and Appellee Mwejen Malolo are of the same generation descending from their common male ancestor, Lokomoram, as Laji Taft.

What is disputed is who between Appellant Cecilie Kabua and Appellee Mwejen Malolo succeeds Laji Taft as *alab*. This dispute is one of custom.

[14] Sometimes spelled "Lokabale."
[15] *See* Plaintiff's Exhibit A; Defendant's Exhibit 2.

III. APPELLANT'S CONTENTIONS ON APPEAL

A. Appellant Contends the Traditional Rights Court Erred in Declaring the Applicable Custom

Cecilie Kabua argues that the Traditional Rights Court made a mistake in declaring the applicable custom. Her theory of the case can be briefly summarized.

Cecilie Kabua contends there are two bloodlines (*bototok*) descending from Lokomaram: the senior bloodline of Lokobale (the elder son of Lokomoram) and the junior bloodline of Lainammo (the younger son of Lokomoram). The common ancestors of the parties (Lokobale, of the senior bloodline and Lainammo, of the junior or younger bloodline) were all males and therefore the parties are related through their bloodlines (*tor bototok*), not *bwijs* (there being no common female ancestor). Cecilie Kabua, is descended from the senior bloodline (that of Lokobale) whereas Appellee Mwejen Malolo is descended from the junior bloodline (that of Lainammo). As long as members of the senior bloodline of the same generation are living, members of the senior bloodline take precedence over members of the younger bloodline in the inheritance of the *alab* title. In the case of *Laji Taft v. Mwejen Malolo,* the High Court held that Laji Taft was of "the senior *bwij* within the senior bloodline" and was therefore the proper person to hold the *alab* title on these lands.[16] The "authority within the family" (or *alab* rights) had been held by Lokobale and Lelet until a female was born in their line; that female being Rose Jenkins which established "the *bwij* of the descendants of Lelet in the senior bloodline." The *bwijs* within the senior bloodline are those of LeBojar (Bojaar) from whom Laji Taft was descended and a younger *bwij* within the senior bloodline which was established with the birth of Rose Lelet Jenkins. Upon the death of Lelet, the *alab* title should have gone to the children of his

[16] It is unclear where the alleged finding that "Laji Taft was of the senior bwij within the senior bloodline" is derived. Plaintiff/Appellant's Exhibit E is an Order Granting Summary Judgment which declared that Laji Taft was *alab* but that Order does not explain how it reached that declaration/conclusion.

sister Libonlok (within the same generation) and his own children, Melu, August, and Rose (which would be the next generation). Pursuant to custom, title passes horizontally from senior members of a generation to junior members of the same generation. As the oldest daughter of Rose, Cecilie Kabua is the oldest member of the younger *bwij* within the senior bloodline and, as such, is the next in line after Laji Taft (her cousin) to take the *alab* title. In other words, because Appellant Kabua is of the senior bloodline she is entitled to take the *alab* title over Appellee Malolo, who is of the younger bloodline.[17]

B. Other Issues Raised on Appeal

Appellant specifies as error that:

(1) the Traditional Rights Court "failed to address questions regarding the origin of the land being from the bloodline and that Plaintiff/Appellant is of the older bloodline, (and) that therefore (Plaintiff/Appellant) has a superior claim as opposed to Defendant/Appellee";

(2) the Traditional Rights Court "failed to take into account the fact that Plaintiff/Appellant and Defendant/Appellee come from two entirely separate *bwijs*, and that both these *bwijs* cannot hold title to the same property at the same time"; and

(3) the Traditional Rights Court "failed to address the impact of Lelet being the *alab* and defendant/appellee's inconsistent statements in regard to the status of Lelet."[18]

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[17] Appellant's theory does find arguable support in J.A. Tobin's "LAND TENURE IN THE MARSHAL ISLANDS," p. 35, which states "[t]he recipient (of *Marjinkot* land) could give the land to his children or lineage . . . . If the original recipient gave the land to the lineage, it must continue that way. It is up to the first recipient to decide. If it should start through the paternal side, it must continue that way and may not be changed." Amata Kabua's "CUSTOMARY TITLES AND INHERENT RIGHTS, A General Guideline in Brief" (1993) similarly states "[p]resuming a Morijinkwot is awarded, it is then imperative that the awardee choose his successor, or successors, and so inform the iroilablab of his choice for formal confirmation. There are only two choices of successor open to him, e.g., the bwij which includes his brother, sister, etc., or his children who are of a different bwij than his own. In the event there is no close matrilineal and patrilineal relatives to succeed him, upon his death, the land rights revert back to the iroilablab for reassignment." In the instant case, it is unclear whether the original recipient Lokomoram made the requisite choice as to his successors.

[18] *See* Notice of Appeal, Appellant's Opening Brief, pp. 4-6 and the arguments set forth in that brief at pp. 8-15.

IV. STANDARD OF REVIEW

Matters of law are reviewed *de novo*. *Lobo v. Jejo*, 1 MILR (Rev.) 224*,* at 225. Findings of fact are reviewed under the "clearly erroneous" standard. *Dribo v. Bondrik, et al,* 3 MILR 127, 131 (2010); *Abner v. Jibke, et al,* 1 MILR 3, 5 (1984). A finding of fact is "clearly erroneous" when review of the entire record produces a definite and firm conviction that the court below made a mistake. *Lobo v. Jejo, supra,* at 225-6 (1991). The clearly erroneous standard does not entitle a reviewing court to reverse the findings of the trier of fact simply because it is convinced that it would have decided the case differently, the reviewing court's function is not to decide the factual issues *de novo*. *Bulele v. Morelik*, 3 MILR 96, 100 (2009). We will not interfere with a finding of fact if it is supported by credible evidence, must refrain from reweighing the evidence and must make every reasonable assumption in favor of the trial court's decision. *Kramer & PII v. Are & Are*, 3 MILR 56,61 (2008). We must defer to the factual findings of the court(s) below even if we would have decided the case differently and even if the evidence would make another conclusion more plausible.

In cases involving customary issues decided by the Traditional Rights Court, the Constitution requires that the High Court (and, therefore, this Court on review of such decision) give "substantial weight" to the Traditional Rights Court's decision. Constitution art. VI, sec. 4(5). "The High Court's duty is to review the decision of the Traditional Rights Court and to adopt that decision unless it is clearly erroneous or contrary to law." *Abija v. Bwijmaron*, 2 MILR 6, 15 (1994).

Determinations of custom by the Traditional Rights Court are ordinarily factual issues entitled to deference on review unless the custom has attained the status of law through enactment by statute or a final court decision. "Every inquiry into custom involves two factual

determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense." *Lebo v. Jejo*, 1 MILR (Rev.) 224, 226 (1991); *Zaion v. Peter*, 1 MILR (Rev.) 228, 231 (1991).

Because the custom applicable to the facts of this case has not been incorporated into a statute or formed the basis of a Supreme court decision, we must review this case under the "clearly erroneous" standard.

V. DISCUSSION

A. The Traditional Rights Court's Findings Regarding the Applicable Custom Are Not "Clearly Erroneous"

Determination of the applicable custom by the Traditional Rights Court is a factual issue to which we must give deference and substantial weight as required by the Constitution and our prior decisions.

Having considered all the evidence, the Traditional Rights Court found that two *bwijs* came into existence with the births of females. A senior *bwij* through Libonbok and a junior *bwij* through Litawe. The *alab* title was then to pass through the *bwij* with the title going first to members of the elder *bwij* and then to members of the younger *bwij* (in the same generation). We note this finding regarding custom is consistent with the generally recognized rule that the *alab* title to *morijinkwot* lands will pass through the male bloodline (*tor botoktok*) of the original recipient until a female is born at which time a *bwij* is established. The *alab* title then passes through the *bwij*, which is the usual pattern of succession.

> The general rule of patrilineal inheritance applies on all the land entitlement and rewards, if, among the matrilineal successors as described above, there is no female to pass on to her children the authority on these land rights. However, in the absence of a female heir, the authority over the land rights is determined on a seniority basis of the *botoktok bwij* of a particular *jowi* and the highest ranking

> patrilineal heir takes the reigns of authority. *Such authority by the patrilineal heirs will continue until, in later generations, a female heir is born to bear children to whom the authority will automatically pass*.

CUSTOMARY TITLES AND INHERENT RIGHTS, A General Guideline in Brief, Amata Kabua (1993) (emphasis added).

The evidence before the Traditional Rights Court supports its findings regarding the applicable custom. Plaintiff's Exhibit "C," Certification of Traditional Title Holder, indicates that Cecilie Kabua was recognized as *senior dri jerbal* by Iroijlaplap and the Chairman of the Koba Maran, Anjua Loeak.[19] This recognition is consistent with the Traditional Rights Court's finding that the children of the males as in Lelet (through whom Appellant claims title as a child of Rose) become *dri jerbal*. Defendant's Exhibit "3," Certification of Traditional Successor, indicates Mwejen Malolo was recognized as *alab* by Iroijlaplap Anjua Loeak. This evidence is likewise consistent with the Traditional Rights Court's finding of the applicable custom that the *alab* title descends through the female or *bwij*. The Traditional Rights Court also relied on Defendant's Exhibit "4," Certification of Traditional Successor and Iroijlaplap Approval and Reaffirmation of Traditional Title Holder, Iroij Mike Kabua, affirming that Mwejen Malolo is the proper person to be *alab.*

Cecilie Kabua offered evidence regarding her view of the custom through the testimony of Michael Jenkins, her exhibits, and commentary on land tenure in the Marshall Islands. The Traditional Rights Court, as fact finder, was entitled to accept or reject competing evidence regarding the applicable custom. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Bulele v. Morelik*, 3 MILR 96, 100 (2009).

[19] This document does not reference the wetos at issue in this case. The significance is that Appellant is inheriting the *dri jerbal* rights through Rose (Rose Lelet Jenkins).

We have previously recognized that the Traditional Rights Court is uniquely qualified to make determinations regarding custom. *Zion v. Peter*, 1 MILR (Rev.) 228 (1991). The Traditional Rights Court's findings regarding the custom and its application to the facts of this case are supported by the evidence in the record and the Traditional Rights Court's own expertise in custom. We therefore find the Traditional Rights Court's findings regarding the applicable custom are supported by the evidence and are not "clearly erroneous." As such, we will not interfere with those findings.

B. The Traditional Rights Court Adequately Addressed Questions Regarding the Origin of the Lands Being From the Bloodline

Review of the record in its entirety reveals the Traditional Rights Court heard and gave due consideration to Appellant's arguments and evidence regarding the origin of the subject lands (*marjinkot* to Lokomoram) as being from the bloodline. The Traditional Rights Court found that the parties had a common ancestor in Lokomoram (a male). The Traditional Rights Court recognized that the title passed through the male bloodline (*botoktok*) to Lokobale and Lainammo until the birth of females, at which time a *jidrak in bwij* occurred establishing two *bwijs*. The *alab* title was then to pass through these *bwijs*. The Traditional Rights Court rejected the theory that Appellant, as a member of the older bloodline, is entitled to take the *alab* title before Appellee, who is a member of the younger bloodline. Appellant's specification of error is merely a disagreement with the Traditional Rights Court's findings of fact regarding the custom and application of that custom to the facts of this case. Again, we defer the Traditional Rights Court's factual findings regarding the applicable custom and find no error.

C. The Traditional Rights Court Adequately Addressed Appellant's Theory That the Parties Come From Two Entirely Separate *Bwijs* and That Two *Bwijs* Cannot Simultaneously Hold Title to the Same Land

Cecilie Kabua argues that the parties have no common female ancestor and are therefore not part of the same *bwij*, but, rather, they are from separate and distinct *bwijs*. Because the *bwijs* are unrelated, they cannot inherit from each other or hold title to the same land through their *bwijs*. Branches of the same *bwij* must have a common female ancestor. There being no common female ancestor to Laji Taft, Cecilie Kabua or Mwejen Malolo, inheritance must be through the bloodline, not the *bwij*.

In support of her argument that the Traditional Rights Court erred, Cecilie Kabua relied on the Traditional Rights Court's decision in *Thomas v. Samson*, High Court Civil Action No. 2000-184 (2006), for the proposition that two *bwijs* cannot hold title to the same lands simultaneously. Appellant's apparent theory is that the Traditional Rights Court erred in finding that the two distinct *bwijs* of Libonlok and Litawe can hold title to the same wetos. The High Court distinguished that case from the facts presented by the instant case. The High Court explained:

> As to the TRC's *dicta* in *Thomas*, to the effect that two *bwijs* can never hold title on the same land, the Court concludes that this finding applies to two unrelated *bwijs* claiming rights over the same land given a customary award to two unrelated people. The TRC in *Thomas* tells us that customary awards of land are never given to two people, only to one person. The facts in the present case are different. The two bwijs claim their rights through common ancestors. The older bwij, Libonlok and her descendants, and the younger bwij, Litawe and her descendants, are both descendants of earlier *alabs* Lokomoram and Lanjok. This was not the case in *Thomas* with two unrelated *bwijs* claiming through unrelated ancestors.[20]

We agree with the High Court's analysis. Further, even accepting Appellant's reading of *Thomas, supra,* as standing for the proposition that two *bwijs* cannot hold title to the same land at

[20] Final Judgment, pp. 5-6.

the same time, it is clear that the Traditional Rights Court did not hold that the *bwijs* of Libonlok and Litawe hold title to the same land at the same time. As declared by the Traditional Rights Court, the custom is that title passes from the older *bwij* of Libonlok to the younger *bwij* of Litawe only after extinction of the member of the older *bwij* in that generation. Thus, these two *bwijs* do not hold title to the same land at the same time as claimed by Appellant.[21]

D. The Traditional Rights Court Adequately Addressed the Issue of Lelet Being *Alab* and Appellee's Inconsistent Statements in That Regard

Cecilie Kabua claims the Traditional Rights Court erred in failing to address the impact of Lelet being *alab*. As we understand Kabua's argument, the Traditional Rights Court's recognition of Lelet as *alab* is inconsistent with its finding that, under custom, the *alab* title was to descend through the *bwijs* established by the births of Libonlok and Litawe. The apparent inconsistency is that if the *alab* title was to pass through Libonlok, Litawe, and their respective *bwijs*, as found by the Traditional Rights Court, then Lelet would not have been entitled to be *alab* because he was not a member of either *bwij*.[22] It is undisputed, however, that Lelet was *alab*, notwithstanding that the Traditional Rights Court did not explain why or how Lelet became *alab* on these wetos. Because Lelet was undisputedly *alab*, that title should have descended to Rose Lelet Jenkins which established "the bwij of the descendants of Lelet in the senior bloodline." As the oldest daughter of Rose, Cecilie is the eldest member of the younger bwij within the senior bloodline and, as such, is the next in line to after Laji Taft, who was the son of

[21] In her appellate briefing, Cecilie Kabua cites the case of *Peter v. Napking*, CA 2006-163 (2008) for the proposition that "pursuant to Marshallese custom two bwijs can never hold the same title to the same land at the same time." We have reviewed that case and find it inapposite, the reference to that case likely being a mis-cite.

[22] According to the *memenbwij* submitted by the parties (Plaintiff's Exhibit A and Defendant's Exhibit 2) Lelet is a son of Lokobale (male) and is the brother of Libonlok (not a child of Libonlok or member of her *bwij*).

Bojar, the senior bwij within the senior bloodline, to inherit the *alab* title before Mwejen Malolo.[23]

As pointed out by Appellee, the fact that Lelet may have been *alab* does not mean Cecilie Kabua as a grandchild of Lelet must be *alab* under custom. While Lelet's position as *alab* may be unexplained, we find the Traditional Rights Court's declaration of the custom applicable to the facts of this case is not clearly erroneous, and we therefore decline a remand on this issue.

In further support of her theory that the *alab* title descends through the bloodline descending from Lelet to Rose and then herself, Cecilie Kabua points to the case of *Laji Taft v. Mwejen Malolo*, High Court Civil Action No. 1993-040. She asserts the High Court found that Laji Taft was the rightful *alab* "as a descendant of the senior *bwij* within the senior bloodline."[24] Her apparent theory is that as between the parties and privies to that prior case, the parties to this instant case are bound by that finding. We have reviewed the record of this appeal and note the assertion that the High Court found that "Laji Taft was the rightful *alab* as a descendant of the senior *bwij* within the senior bloodline" is unsupported by the record. The record on appeal in that case indicates that *Laji Taft v. Mwejen Malolo*, *supra*, was disposed of by a two-page order granting summary judgment.[25] That order declared that Laji Taft was the holder of the *alab* rights to the subject wetos. There were no findings regarding the source of Laji Taft's *alab* title as being "a descendant of the senior *bwij* within the senior bloodline." Therefore, to the extent that order granting summary judgment may have issue preclusion effect on the parties and their privies, it is only that Laji Taft was *alab* on these wetos—a fact not at issue, as both parties agree Laji Taft was the last *alab* on the subject wetos.

[23] Appellant's Opening Brief, p. 10.
[24] Appellant's Opening Brief, p. 10.
[25] Plaintiff's Exhibit E.

The Traditional Rights Court considered and agreed with the High Court's finding in *Laji Taft v. Mwejen Malolo, supra,* that Laji Taft was the proper *alab* but not because he was "a descendant of the senior *bwij* within the senior bloodline." Rather, consistent with its finding of the custom applicable to the facts of this case, the Traditional Rights Court explained that Laji Taft was from the older *bwij* established by Libonlok, his grandmother, and his mother Bojaar. The Traditional Rights Court agreed with Defendant's Exhibits 5 and 6 in making this finding.[26] There is ample evidence in the record supporting the Traditional Rights Court's finding the source of Laji Taft's title as descending from the older *bwij* of Libonlok, not that he was from the senior *bwij* within the senior bloodline.

Appellant also points to allegedly inconsistent statements and positions taken by Appellee in the prior litigation, *Laji Taft v. Mwejen Malolo*, *supra,* and contends it was error for the courts below not to address that issue. Appellant does not disclose the theory on which she believes Appellee Malolo should be bound by such allegedly prior inconsistent statements made in the prior litigation. Judicial estoppel can be applied when a party asserts a position in a legal proceeding and prevails, only to later assert a contrary position because of changed interests. *See New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001). Its purpose is to protect the judicial process by preventing parties from "deliberately changing positions according to the exigencies of the moment." *Id.* at 750 (quoting *United States v. McCaskey*, 9 F.3d 368. 378 (5th Cir. 1993). In deciding whether to apply judicial estoppel, a court considers various factors, including whether the party's position is clearly inconsistent with its earlier position and whether the party changing position would gain an unfair advantage over the opposing party. *Id.* at 750-51.

[26] Opinion & Answer of TRC, p. 3.

In reviewing the record in its entirety, we cannot find error in the rejection (or non-consideration) of Appellant's evidence or arguments as to Appellee's alleged contradictory or inconsistent statements regarding Lelet holding the *alab* title. Cecilie Kabua's Exhibit D is an unverified Answer and Counterclaim of Mwejen Malolo in the prior case of *Laji Taft v. Mwejen Malolo*. In that Answer, Mwejen Malolo raised as an affirmative defense that "[a]ll claims of plaintiff are barred by the customary defense of BWILOK or TIM." In his counterclaim, Malolo alleged "[c]ounterclaim-defendant Laji cannot become *alap* due to the Bwilok or Tim committed by his former male persons under the *bwij* or family of Lokabale;" "[a]ll the male persons before counterclaim-defendant Laji from the *bwij* or family of Lokabale never acted as *alap* or *senior dri jerbal* on these lands involved due to the Bwilok or Tim above stated;" and "[c]ounterclaimant Mwejen and Junios Malaolo (both from the *bwij* or family of Lainammo) hold the same Kajur rights, interests and titles held by their former male predecessors-alaps (like Lainammo) to the land involved." Appellee Malolo's position in the prior litigation involving Laji Taft is not "clearly inconsistent" with his position taken in the present case. The assertion in the prior case that a Bwilok took place, thereby preventing Laji Taft from taking the *alab* title, is not inconsistent with an alternative theory that Malolo is now the proper *alab* under the customary pattern of inheritance (as found by the Traditional Rights Court in the present case). Malolo's theory in the prior litigation was that his *alab* rights descended from Lainammo, which is consistent with his theory in the instant case. Further, even if Malolo has taken an inconsistent position in the present litigation from that which he took in the prior litigation, he did not prevail in the prior litigation. Thus, there is no estoppel arising and no error by the High Court or Traditional Rights Court in failing to address those alleged inconsistent statements or positions.

Testimony was elicited that the Loeak domains have recognized Appellant as the *alab* under a similar factual pattern. Thus, Appellant argues this recognition should henceforth be applicable to the lands at issue in the Kabua domains, as there is only one *manit* (or custom).[27] The Traditional Rights Court, however, is not bound by how a similar situation may have been handled within the Loeak domain (or the Kabua domains). The Traditional Rights Court heard that testimony and was free to accept or reject it.

We have also considered the evidence and arguments regarding alleged wrongful acts of Mwejen Malolo, the Kwajalein Land Commission, and others to usurp the *alab* title from Appellant's predecessors. These acts occurred prior to the recognition of Laji Taft as *alab* by the High Court's decision in *Laji Taft v. Mwejen Malolo, supra*. The parties concede Laji Taft was properly recognized as *alab.* The title being properly returned to Laji Taft, we find evidence of these allegedly wrongful prior acts irrelevant to the instant dispute.

VI. CONCLUSION

There is sufficient evidence in the record to support the Traditional Rights Court's determination of the applicable custom and ultimate conclusion that Mwejen Malolo is the proper person to hold the *alab* title to the wetos at issue.

The High Court's Final Judgment is therefore AFFIRMED.

Dated: December 10, 2021

/s/ Daniel N. Cadra
Daniel N. Cadra
Chief Justice

Dated: December 10, 2021

/s/ J. Michael Seabright
J. Michael Seabright
Associate Justice

Dated: December 10, 2021

/s/ Richard Seeborg
Richard Seeborg
Associate Justice

[27] Appellant's Opening Brief, p. 10.