IN THE SUPREME COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

NIDEL LORAK (on behalf of Gertrude Navarro), BOJEANG LORAK and AIN KABUA,

Plaintiffs/Appellees,

vs.

SIMPTON (JIMMY) PHILIPPO, HAEM MEA and TIMMY MARCH,

Defendants/Appellants.

Supreme Court Case No. 2019-004
(High Court Case No. 2014-232)

OPINION

BEFORE: CADRA, Chief Justice; SEABRIGHT, Associate Justice;[1] and SEEBORG, Associate Justice[2]
CADRA, Chief Justice, with whom SEABRIGHT and SEEBORG, Associate Justices, concur:

I. INTRODUCTION

Defendants/Appellants, Simpton (Jimmy) Philippo, Haem Mea, and Timmy March appeal a September 29, 2019, judgment of the High Court determining, among other issues, that Plaintiff/Appellee Ain Kabua holds the *alab* title, rights and interests and that Plaintiff/Appellee Bojeang Lorak holds the *senior dri jerbal* title, rights and interests on To weto, (also spelled "Too weto" and "Toweto") located in Ajeltake, Majuro Atoll.

[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.

In reaching its judgment the High Court reviewed the findings of the Traditional Rights Court (TRC) in view of the evidence and concluded those findings were permissible and therefore not "clearly erroneous." As required by the Constitution and our case law, the High Court therefore gave deference to and adopted the opinion of the TRC.

Appellants timely appealed. In their briefing, Appellants contend (1) that both the High Court and TRC erred in concluding that Bojeang Lorak is *senior dri jerbal* on To weto; (2) that both courts erred in considering and giving weight to Plaintiffs' Exhibit F, an "unofficial" 1958 land determination by the former Trust Territory, in finding that Plaintiffs' predecessors in interest Akki was *dri jerbal* and Jam was *alab* on To weto; and (3) that the "claims" of Bojeang and Nidel Lorak should be dismissed because they died during the pendency of this appeal.

As discussed below, we conclude the findings of the TRC are neither "contrary to law" nor "clearly erroneous" and therefore affirm the High Court's judgment. Further, we refrain from dismissing decedents Bojeang and Nidel Lorak as parties to this appeal because the issues raised in this appeal are not mooted by their death.

II. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

This customary title dispute arises out of Gertrude Navarro's construction of two residences on To weto in or around 1987. These residences were constructed with the permission of *iroij* Amata Kabua, Atlon Caleb acting as *alap* and Lito Mea acting as *senior dri jerbal.* After construction was completed, Simpton (Jimmy) Philippo, acting as *man-maronron*[3] for Neimon Philippo, took possession of these two residences from Navarro. In response, Navarro

[3] *Man-maronron* refers to "a Marshallese custom which applies only within a *bwij* if there are male siblings who are younger than the female siblings. With the approval and appointment by the older female, the male will do all the work for her. However, when it comes to making the final decisions, it is solely the responsibility of the elder sister." *See, e.g.,* TRC Opinion/Summary of Case in *Katip Mack v. Tony Robert, et al,* Civil Action Nos. 2005-127 & 2007-217 Consolidated, 8/4/2011.

commenced the instant civil action (High Court Case No. 2014-232) seeking ejectment of Philippo from To weto and for a permanent injunction.

The High Court ordered joinder of the individuals recognized by the opposing parties as *alap* and *senior dri jerbal* for To weto as well as for a weto known as Enejibaru, located on Rongrong, Majuro Atoll. Plaintiff Nidel Lorak represented the interests of his sister Gertrude Navarro. Gertrude Navarro claimed she is the rightful owner of the two residences constructed on To weto. Plaintiff Ain Kabua claimed the *alap* title and interest. Plaintiff Bojeang Lorak (the older sister of Nidel Lorak) claimed the title and interest of *senior dri jerbal*. Defendant Haem Mea claimed the *alap* title and interest. Defendant Timmy March claimed the title and interest of *senior dri jerbal*.

On June 30, 2017, the High Court referred nine questions reflecting the parties' theories of their respective cases to the TRC for resolution. Those questions were as follows:

(1) Was Lito Mea the adopted child of Ladrille under the custom of *kanne lujen* or *kanin lojeo*?
(2) Did Ladrille give the *alap* and *senior dri jerbal* rights on Enejibaru Island and To weto to Lito Mea as *imon ninnen*?
(3) If the answer to question # 2 is 'yes,' was the *ninnen* transfer in accordance with custom?
(4) In 1987, as between Alton Caleb and Lito Mea, who was the proper person to hold and exercise the *alab* right and title on To weto?
(5) In 1987, as between Akki Laruon and Lito Mea, who was the proper person to hold and exercise the *senior dri jerbal* title on To weto?
(6) When Alton Caleb and Akki Laruon gave their consent to Gertrude Navarro to build a house on To weto in 1987, were they acting respectively as *alab* and *senior dri jerbal*, or were they acting as *man-maronron* for Lito Mea?
(7) Was it just and proper under custom for Jimton 'Jimmy' Philippo, acting as *man-maronron* for Neiman Philippo, to take possession of the two houses built by Gertrude Navarro on To weto?
(8) Today, as between Ain Kabua and Haem Mea, who is the proper person to hold and exercise the *alap* right and title on To weto?
(9) Today, as between Bojeang Lorak and Timmy March, who is the proper person to hold and exercise the *senior dri jerbal* right and title on To weto?

A trial spanning six days was held before the TRC in April, 2018. In brief, Plaintiff Ain Kabua claimed To weto was originally *bwij* land. The *bwij* became extinct and the land consequently became *botoktok* land. According to Ain Kabua, she is the member of the *botoktok* currently entitled to exercise the *alab* title.[4] Ain Kabua's *memenbwij* traces her claim to the *alab* title back to Linwad (also spelled Lenwood, Ain Kabua's great-grandmother). Linwad was the sister of Jam (male), and Ladrille (male).[5] Jam, the younger brother of Linwad, exercised the *alab* rights on To weto. After Jam's death the *alab* title went to Atlon Caleb, the last member of the *bwij*. Atlon was then succeeded by Amlok Sawej, then in descending order by Toke Sawej and then Billy Sawej (who are *botoktok* inheriting the *alab* title because the *bwij* had become extinct). Ain Kabua contends she is the eldest member of the *botoktok* currently entitled to exercise the *alab* title on To weto.

Plaintiff Nidel Lorak's (and Boejeang Lorak's) theory of the case was that they are the proper persons to exercise the *senior dri jerbal* title under custom. Plaintiffs' *memenbwij* traces Nidel Lorak's genealogy back to Neiwan. Neiwan (female) had children including Luamouj (female) who was married to Larijon (male). Larijon and Luamouj had children including Kitmeto (female), Akki (male) and Lito (female). Kitmeto had children including Bojeang (female) and Nidel (male). Bojeang Lorak claims to be *senior dri jerbal* based on the descending lineage of Laruon, Kitmeto, and Akki. Bojeang is older than Nidel and, as such, is entitled to exercise the *senior dri jerbal* title before Nidel. Plaintiffs' *memenbwij* indicates Akki also had children as did Lito. Lito's children include Haem (male) and Timi (male).[6]

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[4] Plaintiffs' Opening Statement, TRC transcript, Vol. 1, April 10-12, 2018, pp. 4-5.
[5] Plaintiffs' Exhibit A.
[6] Plaintiffs' Exhibit H.

Defendants Simpton "Jinmy" Philippo, Haem Mea and Timmy March's theory of the case, as reflected by the questions certified to the TRC, was that Ladrille held the *alab* and *senior dri jerbal* titles to To weto and Enejibaru. Ladrille adopted Lito as *kanin lujen* and To weto (as well as Enejibaru) were given as *immon ninnin* from Ladrille to Lito. Because the land had been given by Ladrille to Lito as *immon ninnen,* the *alab* and *senior dri jerbal* titles and interest would descend through Lito's bloodline (lineage). According to Defendants, it is proper for Haem Mea and Timmy March to currently hold the *alap* and *dri jerbal* interests, respectively, to the subject wetos based on the descending lineage of Lito. Defendants' *memenbwij* traces their lineage back to Ladrille (male). Ladrille adopted Lito (female). Lito had children including Neimon (female), Aem (variant spelling of Haem, male) and Timi (Timmy, male).[7]

The parties introduced testimony and documentary evidence in support of their respective claims, which evidence is discussed below as is relevant to this appeal. Of particular relevance to this appeal is Plaintiffs' Exhibit F which is a 1958 land title determination by the former Trust Territory which designated Jam as *alab* and Akki as *senior dri jerbal* for To weto.

The TRC issued its "Opinion & Answer" on August 8, 2018. In response to the questions certified to it, the TRC found:

(1) Ladrille adopted Lito Mea;
(2) there was insufficient evidence to show that Ladrille gave To weto and Enejibaru to Lito Mea as *immon ninnin*;
(3) the purported transfer was not an *immon ninnin* because "according to the evidence, the *bwij* have no knowledge of an *immon ninnin*;"
(4) in 1987, as between Atlon Caleb and Lito Mea, Alton Caleb was the proper person to hold and exercise the *alap* right and title to To weto;
(5) in 1987, as between Akki Laruon and Lito Mea, Akki Laruon was the proper person to hold and exercise the *senior dri jerbal* title on To weto;
(6) when Alton Caleb and Akki Laruon gave their consent to Gertrude Navarro to build a house on To weto in 1987, they were acting as *alap* and *senior dri jerbal* (not as *man-maronron* for Lito Mea);

[7] Defendants' Exhibit No. 4.

(7) it was not proper under custom for Simpton (Jimmy) Philippo, acting as *man-maronron* for Neimon Philippo to take possession of the two houses built by Gertrude Navarro on To weto;

(8) today, as between Ain Kabua and Haem Mea, Ain Kabua is the proper person to hold and exercise the *alap* right and title on To weto; and

(9) as between Boejang Lorak and Timmy March, Bojeang Lorak is the proper person to hold and exercise the *senior dri jerbal* title on To weto.[1]

The TRC explained each of its findings referencing the evidence which had been admitted before it. The TRC explained that although Ladrille adopted Lito under custom and considered the adoption *kane lujen*, the descendants of the *bwij* or the *botoktok* should have agreed to Ladrille's giving of To weto and Enejibaru to Lito as *immon ninnin*. Referencing Plaintiff's Exhibit A (*memenbwij*), the TRC noted that Ladrille had elder siblings, Jam and Lenwod. Jam had no children but Lenwod did. The TRC stated "clearly, if her (i.e. Lenwod's) descendants are not aware and do not agree with the *immon ninnin* for Lito, having been given to an adopted child, then the giving of To weto and Enejibaru as *immon ninnin* is not proper."[2] Because "according to the evidence, the *bwij* had no knowledge of such an *immon ninnin*" the purported transfer of the *alab* and *dri jerbal* rights to the subject wetos from Ladrille to Lito was not proper under custom.[3]

The TRC found that in 1987 (the year Gertrude Navarro constructed the two houses) "it was proper and right for Atlon to be *alab* on To weto." In support of that finding, the TRC relied on Plaintiff's Exhibit B which "shows that the Commission of Land had asserted that Atlon held the *alab* right to Enejibaru and To weto."[4] The TRC further made reference to Plaintiff's Exhibit F (a 1958 Majuro Land Determination of Ownership by the former Trust Territory) which indicated Akki Lauron was *senior dri jerbal* on To weto.[5] The TRC explained that Defendant's

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[1] TRC "Opinion & Answer," pp. 2-3.
[2] TRC "Opinion & Answer," p. 3.
[3] *Id.*
[4] *Id.* Exhibit B is signed by *iroijlaplap* Amata Kabua and is dated November 11, 1996.
[5] TRC "Opinion & Answer," p. 4.

Exhibit 5 shows that *Iroij* Amata Kabua, Alton as *alap* and Akki as *senior dri jerbal* consented to (Navarro's) construction of the two houses on To weto.[6] The TRC found that while it was proper under custom for Simpton Jimmy Philippo to act as *man-maronron* for Neimon Philippo, that did not allow him to take Gertrude Navarro's houses "because the *Iroijlaplap,* the *alap*, and the *senior dri jerbal* of To weto had authorized the construction of the two dwellings."[7]

The High Court held a Rule 9 hearing on August 22, 2019, and issued its "Decision & Judgment" on October 1, 2019.[8] The High Court found the TRC's answers to the nine questions which had been referred to it were not "clearly erroneous or contrary to law," accepted those findings and entered judgment declaring that Ain Kabua is the holder of the *alap* title, rights and interests on To weto and that Bojeang Lorak is the holder of the *senior dri jerbal* title, rights and interests on To weto. The High Court also declared that Gertrude Navarro is the owner of the two residential structures on To weto which are in dispute.[9] The High Court ordered that defendants may be ejected from the two residential structures owned by Navarro but denied an injunction excluding Defendants from entering To weto because Defendants also have the right under custom to build their residences and live on To weto.[10]

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[6] *Id.*
[7] TRC "Opinion & Answer," pp. 3-4.
[8] The High Court's Decision & Judgment is dated 9/29/19 but was filed 10/1/19.
[9] *Id.*
[10] *Id.*, pp. 10-12.

In discussing the TRC's finding that Bojeang Lorak is *senior dri jerbal* and addressing Defendants' contention that the TRC had improperly relied on Plaintiff's Exhibit F (the 1958 Majuro land determination), the High Court observed:

> The TRC determined that Bojeng Lorak was the appropriate person, between her and Timmy March, to hold the *senior dri jerbal* title in their answer to Question 9. It reasoned, based on the *memenbwij* of Neimon (Plaintiff's Exhibit H), that Bojeang was the daughter of Kitmeto. Kitmeto was the older sister of Akki and Lito. Akki had been recognized as *senior dri jerbal* in the 59 Trust Territory land ownership listing for To weto (Plaintiff's Exhibit F). As noted by defendants, this document was not an "official" determination, and as such, would not provide the basis for conclusive determination of rights for res judicata purposes. However, that does not mean the unofficial land ownership determination has no evidentiary value. It is up to the trier of fact (in this case, the TRC) to determine how much or little weight to give to that evidence. It is not for the High Court to reweigh that determination. Similarly, Akki Lauron was the *senior dri jerbal* and was so found by the TRC's answer to Question 5. To the extent that defendants may argue for purposes of Question 7 that Jimmy Philippo was acting as *manmaronron* for Lito in her capacity as *senior dri jerbal*, this would not have been proper as the TRC had found Akki, not Lito, to be *senior dri jerbal.*

Defendants/Appellants timely filed a Notice of Appeal on October 15, 2019, identifying six questions on appeal. That Notice of Appeal was amended by a Notice of Appeal filed on October 25, 2019, identifying nine questions presented on appeal. As discussed below, Appellants' briefing presents three issues on appeal. We limit our review to the issues briefed. *See, e.g., Arpin v. Santa Clara Valley Trans. Agency*, 261 F.3d 912, 919 (9th Cir. 2001)("[I]ssues which are not specifically and distinctly argued and raised in a party's opening brief are waived.")

III. APPELLANTS' CONTENTIONS ON APPEAL

Appellants' briefing raises three questions on appeal:

1. "Whether the High Court including the TRC erred in finding that Bojeang Lorak was the *senior dri jerbal* on To weto;
2. Whether the High Court and TRC erred in finding that the plaintiffs-appellants' Exhibit No. F, (the 1958 unofficial determination of land ownership by the Trust Territory),

which is an unofficial document naming Akki as the *dri jerbal* on To weto when said document was not official and the defendants' family was never informed or participated in the land determination process regarding To weto.

3. Whether the High Court and TRC erred in finding that the plaintiffs-appellees' Exhibit No. F, (the 1958 unofficial determination of land ownership by the Trust Territory), which is an unofficial document naming Jam as the *alab* on To weto, when said document was not official and the defendants' family was never informed or participated in the land determination process regarding To weto."[1]

Appellants urge the proper standard of review on these issues is "*de novo* with regard to the High Court's failure to apply the law and customary law."[2] Appellees agree that the appropriate standard of review of whether the courts below erred in giving substantial weight to Appellees' Exhibit F is *de novo*.[3]

Finally, Appellants contend the claims by Nidel Lorak and Bojeang Lorak, both of whom died during the pendency of this appeal, are "no longer valid and should be dismissed." According to Appellants, the *senior dri jerbal* rights and title now pass to the younger *bwij* in the same generation which Bojeang and Nidel Lorak were in and that Appellant Haem Mea is now the proper person to hold the *senior dri jerbal* title on To weto.[4]

IV. STANDARD OF REVIEW

Matters of law are reviewed *de novo*. *Lobo v. Jejo*, 1 MILR(Rev.) 224, 225 (1991). 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"

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[1] Opening Brief, pp. 10-11, "Questions Presented."
[2] Opening Brief, p. 10.
[3] Answering Brief, "Standard of Review," p. 5.
[4] Opening Brief, pp. 20-21.

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 are required to 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. *Kabua v. Malolo*, Supreme Court Case No. 2018-008, Slip. Op. 12/10/21; *see also Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

In cases involving customary issues decided by the TRC, the Constitution requires that the High Court (and, therefore, this Court on review of such decision) give "substantial weight" to the TRC's decision. Constitution, art. VI, sec. 4(5). "The High Court's duty is to review the decision of the TRC 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 TRC 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 Supreme 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." *Lobo v. Jajo*, 1 MILR (Rev.)

224, 226 (1991); *Zaion v. Peter*, 1 MILR (Rev.) 228, 231 (1991); *Kabua v. Malolo*, Supreme Court Case No. 2018-008, Slip Op. 12/10/21.

V. DISCUSSION

A. Appellants' Argument That the TRC Erred In Applying The Custom Fails On *De Novo* Review.

Appellants contend the High Court and TRC erred in finding that Bojeang Lorak was *senior dri jerbal* on To weto because that finding violates custom. Appellants argue this finding is contrary to custom because (1) the *alab* and *senior dri jerbal* titles/interests to the subject lands must come from the same lineage (*bwij* or *botoktok*); (2) it is uncontested that Bojeang Lorak and Ain Kabua come from different lineages (or families); therefore, (3) Ain Kabua cannot be *alab* and Bojeang Lorak cannot be *senior dri jerbal* on these wetos because they are from different lineages (or families).[5] In support of the asserted custom (that the *alab* and *senior dri jerbal* interests must come from the same lineage, *bwij* or *botoktok*) Appellants rely on Amata Kabua's treatise, CUSTOMARY TITLE & INHERENT RIGHTS, A General Guideline In Brief, (1993), p. 4. [6] Appellants urge a *de novo* standard of review because custom is a matter of law.[7]

We note first that Amata Kabua's treatise cited by Appellants does not clearly set forth an invariable custom that the titles of *alab* and *senior dri jerbal* must come from the same lineage. That treatise, page 4, simply defines "*alab*" as "the elder and senior head of the *kajur bwij*" and "*dri jerbal*" as the "worker and senior patrilineal offspring, lower ranking members of the *bwij*." Both titles are from the *bwij* but there is no statement that both titles must necessarily originate from the same *bwij* in all circumstances.

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[5] Opening Brief, pp. 8-9; pp. 12-13.
[6] Opening Brief, pp. 8-9; Appendix 5.
[7] Opening Brief, IV. STANDARD OF REVIEW, p. 10.

Second, Amata Kabua's treatise although an excellent reference which is commonly cited and relied upon is appropriately styled a "general guideline in brief." As such, it is not intended as a definitive statement of the custom and all the many variations of custom which might apply to different fact patterns. We cannot conclude that treatise is meant to cover and define the custom applicable in all situations which might come before the courts.

Finally, and more importantly under *de novo* review, we conclude that Appellants' asserted custom (i.e. that the *alab* and *senior dri jerbal* titles must come from the same lineage) has not attained the status of law through enactment of a statute or formed the basis of a final Supreme Court decision. *See Lobo v. Jajo, supra,* and *Zaion v. Peter, supra.* Because that asserted custom has not attained the status of law, the existence of such a custom is a factual issue and the burden was on Appellants to prove its existence and application to the facts presented by this case. *Id.* Appellants failed in proving the existence of that custom as it applies to the facts of this particular case.

We find the custom alleged by Appellants (that the *alab* and *senior dri jerbal* titles/interests must come from the same lineage) is a factual issue and, therefore, the appropriate standard of review is the highly deferential "clearly erroneous" standard, not *de novo* review. Appellants failed to prove the existence of that custom and its application to the facts of this case so we conclude the TRC did not err in failing to address and apply that custom under either the *de novo* or "clearly erroneous" standards of review.

The judges of the TRC are uniquely qualified as experts in the custom and, in the absence of some statute, court decision or some obvious error, we defer to its findings regarding the custom applicable to the facts of this case. The TRC found the custom is that the alleged transfer of land rights from Ladille to Lito required *bwij* (or *botoktok*) knowledge and consent which was not

obtained. The fact that Ain Kabua and Bojeang Lorak are from different lineages is obvious from the *memenbwij* submitted and that fact was likely not lost on the TRC. If the custom is that the *alab* and *senior dri jerbal* titles must come from the same lineage the TRC could have been reasonably expected to have identified that custom and applied it to the facts presented. In any event the burden was on Appellants to present proof of such a custom at trial but they failed to do so. In the absence of proof of such a custom, a statute or final Supreme Court decision setting forth such a custom as alleged by Appellants, we cannot find that the TRC erred "as a matter of law" in determining the custom applicable to the facts of this case and in its ultimate conclusion that under custom Ain Kabua is *alab* and Bojeang Lorak is *senior dri jerbal* on To weto although they are from separate lineages.

Appellants argue, alternatively, that:

> "if plaintiff Ain Kabua were to become *alab* on To weto then the proper person to hold the *senior dri jerbal* title would be Lito according to the *memenbwij* and Traditional Marshallese custom. The reason is simply because the TRC had found Ladille adopted Lito (p. 3, TRC decision), Jam did not have any children and Ladille had adopted Lito, if not as a *kannin lujen*, but under customary adoption as decided by the TRC. In other words, following the TRC's decision in finding that Ladille adopted Lito, then Lito was the only child in the male line of succession therefore she is the proper person to hold the *senior dri jerbal* title on To weto, Ajeltake, and Enajbaro, Majuro Atoll, Republic of the Marshall Islands."[8]

Appellees respond that this argument regarding the custom was not raised before the TRC and should therefore not be brought up for the first time in the Supreme Court citing *Nashion and Sheldon v. Enos and Jacklick*, 3 MILR 83, 86 (2008).[9]

We have reviewed the transcript of proceedings below and find that Appellants' alternative theory was not raised in the proceedings below and is therefore waived on appeal. *Nashion, supra.*

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[8] Opening Brief, p. 13.
[9] Answering Brief, p. 12.

B. The Lower Courts' Finding that Bojeang Lorak is *Senior Dri Jerbal* on To Weto Is Not "Clearly Erroneous."

We have independently reviewed the TRC's findings under the "clearly erroneous" standard and conclude its findings and ultimate conclusions are supported by credible evidence.[10] The TRC's explained its findings by referring to the evidence. We find that the TRC's account of the evidence is plausible in light of the entire record and its findings cannot therefore be "clearly erroneous." Therefore, we may not reverse even if we would have weighed the evidence differently and arrived at a different conclusion. We, like the high Court, find no clear error in the TRC's findings and therefore defer to those findings as required by the Constitution and our case law.

C. The Lower Courts Did Not Err In Admitting, Considering And Giving Substantial Weight To Plaintiff's "Exhibit F."

Plaintiffs' Exhibit F is a "1958 land title determination" by the former Trust Territory listing Jam as *alap* and Akki as *senior dri jerbal* on To weto. That Exhibit indicates there was "no claim," "no hearing" and that "ownership (is) unofficial from 1958."

Appellants claim the TRC and High Court erred in relying on Plaintiffs' Exhibit F in finding that Jam was *alap* and Akki was *senior dri jerbal* on To weto. Appellants frame the issue as whether the court(s) below "misused its discretionary power in taking into consideration the unofficial land determination document as a valid evidence (sic) with probative value to support the findings of the TRC."[11] Appellants further argue this unofficial land determination was

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[10] *See* "Factual Background and Proceedings Below," *infra*, summarizing TRC's findings in reference to the evidence submitted by the parties.

[11] Opening Brief, p. 15.

improperly given "conclusive and binding" effect in violation of the Court's holding in *Ebot v. Jablotok*, 1 MILR 13 (1984).[12]

Thus, Appellants raise two issues:

(1) whether the TRC erred in admitting and considering Exhibit F as "valid evidence" with "probative value;" and

(2) whether the TRC abused its discretion in the amount of weight it afforded Exhibit F.

The first issue raised by Appellants is whether Exhibit F was properly admitted into evidence for consideration by the TRC. Generally, we review evidentiary rulings by the trial courts under the "abuse of discretion" standard. *See, e.g., Old Chief v. United States*, 519 U.S. 172, 174 n. 1 (1997). The "abuse of discretion" standard applicable to evidentiary rulings is highly deferential. *See, e.g., Sprint/United Mgmt. Co v. Mendelson*, 552 U.S. 379, 384 (2008)("In deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeal afford broad discretion to a district court's evidentiary rulings."). However, the Ninth Circuit has reviewed hearsay rulings using a two-part test: (1) whether a district court correctly construed the hearsay rule as a question of law which is reviewed *de novo,* and (2) a district court's decision to admit evidence as non-hearsay for an "abuse of discretion." *See, e.g., United States v. Alvarez*, 358 F.3d 1194, 1214 (9th Cir. 2004). In considering whether the trial court abused its discretion in admitting and considering evidence it is necessary for the appellate court to consider any objections to such evidence which were timely and specifically raised below. *See* Marshall Islands Evidence Rules, [28 MIRC, Chpt. 1, Evidence Act,] Rule 103(a). It is well settled that objections to the admission of evidence are waived if not timely raised before the trial court. *See, e.g., Kramer & PII v. Are & Are*, 3 MILR

[12] *Id.*

556, 569 (2008)(Failure to object to admission of evidence on a specific ground constitutes a waiver to assert the alleged error on appeal); *see also, Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1066 (9th Cir. 1996)("By failing to object to evidence at trial and request a ruling on such an objection, a party waives the right to raise any issue [on appeal] ...concerning admissibility.")

Review of the record indicates that Appellants initially objected to the admission of Plaintiffs' Exhibit F on grounds of "authentication." That objection, however, was withdrawn upon the parties' stipulation that Exhibit F is "not a land determination."[13] There were no other objections, such as on grounds of relevance or hearsay, which were raised by Defendants/Appellants to the admission of Exhibit F into evidence. Due to the lack of objection, we find that any objection to its admission has been waived. Having been admitted into evidence without objection, the TRC was free to consider that Exhibit. We find no error in the admission and consideration of Exhibit F by either court.

Even in the absence of an objection to evidence at trial, we have discretion to review evidentiary rulings and admission of evidence for "plain error." Marshall Islands Rules of Evidence, Rule 103(d) provides "Nothing in this Rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."

> "Plain error requires an error that is plain or obvious and that it is so prejudicial that it affects the parties' substantial rights such that review is necessary to prevent a miscarriage of justice...An error creates a miscarriage of justice if it 'seriously impaired the fairness, integrity, or public reputation of judicial proceedings.'... Plain error is not only a highly deferential standard to meet in non-evidentiary challenges, but poses an even higher burden in evidentiary appeals. As a result, '[a]ppellate decisions reversing a judgment in a civil case for plain error in applying rules of evidence are very rare.' 1 C. Mueller & L. Kirkpatrick, *Federal Evidence*, Sec. 1:22 (4th ed. 2013)." *Tan Lam v. City of Los Banos*, 976 F.3d 986, 1006 (9th Cir. 2020).

[13] TRC Transcript, Vol. 3, pp. 9-10.

Appellants argue the true owners of the wetos at issue did not have "notice" of the meetings concerning the land determination by the Land Title Officer. Not having "notice," Appellants or their predecessors did not have an "opportunity to be heard" on their claims to the subject wetos. Procedural due process generally requires "notice" and "an opportunity" to be heard before any property interest is affected by government action, such as the former Trust Territory's land ownership determinations. Because substantial due process and property rights are implicated by the alleged lack of notice of proceedings before the Trust Territory Land Title Officer and the TRC's admission and consideration of Plaintiffs' Exhibit F, we exercise our discretion and review for "plain error."

Review for "plain error" does not require that we engage in an academic exercise positing all arguments for the admission or exclusion of evidence which were not raised below. Ultimately, whether the TRC erred in admitting and giving weight to Exhibit F depends on whether that Exhibit was "relevant." TRC Rules of Procedure, Rule 15, states:

> "The Marshall Islands Rules of Evidence shall govern proceedings of the TRC, except that the TRC may admit any evidence that is reasonably relevant to the question under its consideration ...."

"Relevant evidence" is defined by Marshall Islands Evidence Rule 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The test for relevancy is very liberal, the test being whether the evidence has any tendency "however slight" to prove a fact at issue. The determination of whether evidence is relevant is reviewed for "abuse of discretion" and appellate courts are highly deferential to findings of relevancy by the trial courts. *See, e.g., Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1020 (9th Cir. 1985).

The parties conceded Exhibit F is an "unofficial" document and stipulated it is "not a land determination." Although not determinative of ownership, that document is relevant to show that Jam and Akki were asserting title interests in To weto in 1958 which is consistent with *iroijlaplap* Amata Kabua's implicit recognition of Atlon and Akki as being title holders when he consented to Navarro's construction of the two residences as evidenced by Exhibit 5. Appellants had the opportunity to put on evidence that they were not able to attend the meeting and/or had no notice of that meeting. There was no abuse of discretion in admitting Exhibit F as relevant evidence.

Regarding Appellants' claim that the TRC gave "conclusive weight" or "bound itself by such unofficial document" in violation of the holding of *Ebot v. Jablotok*, 1 MILR 13(1984), it is clear that conclusive weight or *res judicata* effect was not given to Exhibit F by the TRC. Again, the TRC considered Exhibit F along with other testimony and documents, such as Exhibit 5, in concluding Akki held the *dri jerbal* interest on To weto. Further, the TRC did not rely on Exhibit F at all in finding Jam was *alab*. The TRC, rather, found Jam was *alab* after Lenwod explaining that "previous *iroijlaplaps* as well as the current *iroijlaplap* recognize these people to hold the right of *alap* on the wetos, namely To weto, Enejibaru island and other wetos on Rongrong island as shown on Plaintiff Exhibit B (*iroijlaplap* Amata Kabua), Plaintiff Exhibit D (*leroij* Atama Zedkaia), and Plaintiff Exhibit E (*iroijlapap* Lein P.Zedkaia)."[14]

We find that the TRC did not err in the weight it afforded Exhibit F. The weight a trial court gives to evidence properly admitted before it is within its discretion and we will not reverse a finding based on such evidence absent an abuse of discretion. There being no objection to the admission of Exhibit F, the TRC was free to ascribe whatever weight it believed appropriate to

[14] TRC "Opinion & Answer," p. 4.

that Exhibit in light of the other evidence. We will not reweigh that evidence substituting our judgment for that of the TRC.

D. The Deaths of Bojeang and Nidel Lorak Do Not Justify a Dismissal of Their "Claims" or Their Status as Parties to this Appeal.

Appellants argue that the claim(s) of Bojeang and Nidel Lorak to the *senior dri jerbal* title should be dismissed because both of these claimants died during the pendency of this appeal. Appellants further assert that because Bojeang and Nidel were the last persons in the generation of Kitmeto's *bwij*, that the *senior dri jerbal* rights and title now pass to the next younger *bwij*, which is Lito's *bwij*. Thus, Haem Mea being a member of this younger *bwij* is now the proper person to hold the *senior dri jerbal* rights.[15]

Appellees do not address Appellants' argument that the claims of Bojeang and Nidel Lorak should be dismissed but submit the issue of whether Haem Mea is now the rightful person to hold the *senior dri jerbal* rights is a matter for the TRC to determine and not this Court.[16]

The deaths of Bojeang and Nidel Lorak were placed on record albeit not before this Court.[17] There has been no motion to substitute a personal representative for either Nidel or Bojeang Lorak. Appellants have not filed a motion to dismiss for failure of Appellees to effectuate a substitution of a representative for these deceased parties. As a procedural matter, we find Appellants' requested dismissal of these deceased parties inappropriate because the request should have been made by motion, not by inclusion as an issue in its brief on appeal. Nevertheless, we find that dismissal of Bojeang and Nidel Lorak as parties to this appeal would be inappropriate even if a motion to dismiss had been filed.

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[15] Opening Brief, pp. 20-21.
[16] Answering Brief, p. 15.
[17] Appellees filed a "Notice of Death"of Bojeang Lorak on 1/21/20 in the High Court. Appellants filed a Certificate of Death of Nidel Lorak dated 12/4/19 with their brief. No motions or other filings have been made with this Court.

Appellants seek dismissal of the "claim" of Nidel and Bojeang Lorak as "no longer valid" because they died during the pendency of this appeal. As a preliminary matter, it should be clarified the "claim" of deceased Appellees Nidel and Bojeang Lorak to the *senior dri jerbal* title on To weto has already been decided by the trial courts and is now a "judgment." The rules governing dismissal of "claims" in the trial courts upon death of a party differ from the rules governing the death of a party to an appeal from a "judgment."

> "Generally, an appeal cannot be taken, in the name of a person who has died after judgment; nor can an appeal be taken, against such a person; but the death of a party to a judgment does not necessarily prevent an appellate review of the judgment. An appellate court's authority to substitute a party following the death of a party is controlled by the applicable rule of civil appellate procedure; not the rule of civil procedure governing substitution of parties upon death. Accordingly, the appropriate rule on the death of a party may empower a court of appeals to direct that an appeal may continue and be decided as if the deceased party were not deceased." *See, generally*, 4 C.J.S., Appeal and Error, Sec. 347.

Unlike the High Court's counterpart rule, High Court Rules of Civil Procedure, Rule 23, the Supreme Court Rules of Procedure do not mandate dismissal of an appeal for failure to timely file a substitution motion upon the death of a party. Supreme Court Rules of Procedure, Rule 43(a) provides in relevant part:

> If a party dies after notice of appeal is filed or while the proceeding is otherwise pending in the Supreme Court, the Court may substitute the personal representative of the deceased party as a party on motion filed by the representative or by any party...If the deceased party has no representative, any party may suggest the death on the record and proceedings shall then be had as that Court shall direct ...

In exercising discretion as to how to proceed upon the death of a party to an appeal, an appropriate consideration is whether the appeal has become moot because of the death of that party.

> "Generally, a proceeding for appellate review which is pending does not abate because of the death of a party; but a pending appeal will abate if by reason of the death of a party the issue becomes moot. As a general rule, if a proceeding for appellate review has been instituted and is pending, it does not abate because of the death of a party, particularly if property rights are

> involved...An appeal will abate ...where, by reason of the death of a party, the record presents a mere abstract or moot question, the determination of which will be of no practical benefit." *See, generally*,4 C.J.S., Appeal and Error, Sec. 348.

A moot case or question is one on which there is no real controversy. The test for mootness is commonly stated as whether the court's action on the merits would affect the rights of the parties. *See, e.g., Crawford v. State*, 153 S.W.3d 497, 501 (Tex.App. 2004).

The issues presented by this appeal are not mooted by the deaths of Bojeang and Nidel Lorak because property rights of other parties to this litigation are involved and are dependent on how the appeal is ultimately decided. The High Court's judgment that Gertrude Navarro is the owner of the two residential structures on To weto is dependent on the findings that Bojeang and Nidel Lorak's predecessors were the rightful holders of the *senior dri jerbal* interests with the authority to consent to the construction of the residential structures on To weto. Further, customary title disputes have the potential for spanning generations. The courts' conclusion that Bojeang and Nidel Lorak are the holders of the *senior dri jerbal* interests has been the subject of litigation resulting in a judgment which should be entitled to *res judicata* effect in future disputes involving these parties or their privies. Finally, as a practical matter, it is difficult to understand how Appellants' case is furthered by the requested order dismissing the claim of Bojeang and Nidel Lorak as "no longer valid" or abating Appellants' appeal as moot. Such a dismissal order would not amount to a reversal of the trial court's judgment and would not serve a basis for a declaration that Appellants are now *senior dri jerbal* on To weto. To the extent that Appellants argue that Haem Mea is now the proper person to exercise the *senior dri jerbal* rights to To weto under custom, we agree with Appellees that this issue is not for the Supreme Court to decide in this appeal.

Accordingly, we deny Appellants' request to dismiss the "claim(s)" of decedents Bojeang and Nidel Lorak and refrain from addressing the factual issue of who now is *senior dri jerbal* on To weto.

VI. CONCLUSION

For the above stated reasons, we AFFIRM the judgment of the High Court.

Dated: 7/7/2021 /S/

Hon. Daniel Cadra, Chief Justice

Dated: 7/7/2021 /S/

Hon. J. Michael Seabright, Associate Justice

Dated: 7/7/2021 /S/

Hon. Richard Seeborg, Associate Justice