

NOT FOR PUBLICATION

NO. 24096

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

MAKAPONO PARTNERS, LLC, a Hawai'i limited liability company, Plaintiff-Appellee, v. HEIRS AND/OR DEVISEES OF M. SOL SIMEONA, also known as M. S. Simeona, also known as Solomona Simeona, also known as Simeona Opio, Deceased, et al., Defendants-Appellees; and JULY SIMEONA, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIV. NO. 99-237K)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Foley, JJ.)

Defendant-Appellant July Simeona (July) appeals from the Final Judgment entered by Judge Ronald Ibarra on February 12, 2001, in favor of Plaintiff-Appellee Makapono Partners, LLC¹ (Makapono). We affirm.

BACKGROUND

On December 30, 1999, Makapono filed a "Complaint for Quiet Title, Partition and Damages" (Complaint), seeking to establish itself as the owner of the parcel of land (the Land) described as

¹ A "LLC" is a limited liability company organized under Hawai'i Revised Statutes Chapter 428 (Supp. 2002).

NOT FOR PUBLICATION

[a]ll of that certain parcel of land (being all of the land described in Land Commission Award No. 7354, Royal Patent Nos. 8032 and 8033 to KALUA[]), situate[d] at Puapuaa 1, District of North Kona, Island and County of Hawaii, State of Hawaii, containing an area of 2.20 acres, more or less, and commonly designated by Tax Map Key [(TMK)] 7-5-016:010.

Makapono sought to "be declared and adjudged to be the owner of the subject property by reason of deed and/or adverse possession."

In his typewritten letter to the attorney for Makapono, which was filed with the circuit court on April 6, 2000, July stated that Makapono's Complaint was "unlawful and should be dismissed." Judge Ibarra characterized July's letter as a motion to dismiss under Hawai'i Rules of Civil Procedure (HRCP) Rule 12. On April 24, 2000, Makapono filed "Plaintiff's Memorandum in Opposition to Defendant July Simeona's Motion to Dismiss." By letter dated April 25, 2000, July sought to change the venue of this case "to Honolulu."² On May 31, 2000, Judge Ibarra entered an "Order Denying Defendant July Simeona's Motion to Dismiss and Motion for Change of Venue."

In a "Pre-Trial Statement" filed on November 27, 2000, July stated, in relevant part, as follows:

STATEMENT OF FACTS

The record clearly provides that said real estate consisting of 2.20 acres . . . was the property of D. W. Kalua, [July's] great, great grandfather having TMK: 7-5-016-010

² Hawaii Revised Statutes § 603-36(2) (1993) states, in relevant part, that "[a]ctions . . . to quiet title to . . . real property shall be brought in the circuit in which the real property in question is situated[.]"

NOT FOR PUBLICATION

. . . .

CONCLUSIONS OF LAW

. . . .

3. Said Law - Hawaii's Constitution titled Quieting Title Art. XVI, Section 12.³ [July] finds unconstitutional if not a racist act, for it applies to only one ethnic race - Hawaiians. More importantly said Law violates Federal Law, the Bill of Rights Art. XIV Section 1 in pertinent part;

"No state shall make or enforce any law which shall abridge the privileges or immunities of Citizen of the United States; nor shall any state deprive any person of Life, Liberty, or Property without due process of Law;" . . .

CONCLUSION AND RELIEF

[July] herein requests this Honorable Court, for the aforementioned Conclusions of Law must determine Jurisdiction as to whether or not . . . this court has Jurisdiction and that [July's] costs, fees and other expenses be reimbursed in defending his rights.

[July] herein begs this Honorable Courts indulges that due to lack of Public Transportation and financial circumstances attending said hearing at 8:30 AM from Waimanalo, Hawaii was extremely difficult for this 80 year old defendant. Therefore, [July] herein requests that the court accepts [July's] pre-trial statement as suffice to a Jury Trial. [July] welcomes any questions by telephone.

(Footnotes added; emphasis in original.)

On December 27, 2000, Makapono filed "Plaintiff's Motion for Default and/or Summary Judgment." On January 4, 2001, July filed "Defendant[']s Objections to Plaintiff[']s Motion of

³ Article XVI, Section 12 of the Hawai'i State Constitution states, in relevant part, as follows:

No person shall be deprived of title to an estate or interest in real property by another person claiming actual, continuous, hostile, exclusive, open and notorious possession of such lands, except to real property of five acres or less. Such claim may be asserted in good faith by any person not more than once in twenty years.

NOT FOR PUBLICATION

Judgment/Summary Judgment" in which he asserted "Constitutional Rights to a Jury Trial[.]"

On February 12, 2001, following a hearing on January 22, 2001, at which July did not appear,⁴ Judge Ibarra entered the court's "Findings of Fact, Conclusions of Law and Order Granting Plaintiff's Motion for Default and/or Summary Judgment." The appealable Final Judgment was entered on February 12, 2001. July filed a notice of appeal on February 22, 2001.

STANDARD OF REVIEW

The circuit court's grant or denial summary judgment is reviewed *de novo* under the same right/wrong standard applied by the circuit court. Roxas v. Marcos, 89 Hawai'i 91, 116, 969 P.2d 1209, 1234 (1998) (citation omitted); Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22, reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992) (citation omitted). Waikiki Malia Hotel, Inc. v. Kinkai Properties Ltd. Partnership, 75 Haw. 370, 381, 862 P.2d 1048, 1056 (1993); HRCF Rule 56(c). Summary judgment is proper where

⁴ Rule 7(c) of the Rules of Circuit Court (2001) provides, in relevant part, that "[f]ailure to appear at the hearing may be deemed a waiver of objections to the granting of the motion." Appellants are afforded due process on a motion for summary judgment, if notice was given to appellant(s) and they are given a meaningful opportunity to be heard, but failed to appear at the hearing. Citicorp Mortgage, Inc. v. Bartolome, 94 Hawai'i 422, 436, 16 P.3d 827, 841 (App. 2000).

NOT FOR PUBLICATION

"there is no genuine issue as to any material fact and where the moving party has clearly demonstrated that it is entitled to judgment as a matter of law." Petran v. Allencastre, 91 Hawai'i 545, 554, 985 P.2d 1112, 1121 (App. 1999). See, e.g., Gossinger v. Ass'n of Apt. Owners of Regency of Ala Wai, 73 Haw. 412, 417, 835 P.2d 627, 630 (1992); Namaau v. City & County of Honolulu, 62 Haw. 358, 614 P.2d 943 (1980); HRCP Rule 56(c). "A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982) (citations omitted). In a motion for summary judgment, "we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." Morinoue v. Roy, 86 Hawai'i 76, 80, 947 P.2d 944, 948 (1997) (quoting Maguire v. Hilton Hotels Corp., 79 Hawai'i 110, 112, 899 P.2d 393, 395 (1995)) (brackets omitted).

DISCUSSION

Noncompliance With the Rules

July's *pro se* opening brief does not comply with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b), which specifies the format and requirements of an opening brief. July's noncompliance with HRAP Rule 28(b) includes, among other things, the failure to include (1) a subject matter index and a

NOT FOR PUBLICATION

table of authorities, HRAP Rule 28(b)(1); (2) a "concise statement of the case, setting forth . . . the course and disposition of proceedings in the court . . . appealed from, and the facts material to consideration of the questions and points presented" on appeal, HRAP Rule 28(b)(3); (3) a "concise statement of the points of error set forth in separately numbered paragraphs," HRAP Rule 28(b)(4); (4) a "brief, separate section, entitled 'Standard of Review,'" HRAP Rule 28(b)(5); and (5) an "argument, containing the contentions of the appellant on the points presented and the reasons therefor," HRAP Rule 28(b)(7). Notwithstanding such violations, the Hawai'i Supreme Court favors a policy of affording *pro se* litigants "'the opportunity to have their cases heard on the merits, where possible[.]'" Housing Fin. and Dev. Corp. v. Ferguson, 91 Hawai'i 81, 85-86, 979 P.2d 1107, 1111-12 (1999) (citation omitted). Accordingly, pursuant to Ferguson, we address the merits of the issues raised by July as we discern them to be.

Record Title

Record title to the Land started in the 1800s by "Land Commission Award 7354, Royal Patent Nos. 8032 and 8033 to Kalua."

The record indicates that William Kalua (Kalua) had a son named T. N. Simeona, whose wife was named Kamakani Simeona (Kamakani). It further appears that T. N. Simeona and Kamakani

NOT FOR PUBLICATION

had two sons, M. Sol. Simeona and Ikeole, and that Ikeole is July's father.

The record contains (1) an 1892 conveyance from Kalua to his grandson, M. Sol Simeona, also known as S. M. Simeona, M. S. Simeona, Jr., Solomon Simeona, and Simeona Opio, and (2) a 1909 conveyance from "Kamakani Simeona, wife of T. N. Simeona, deceased and, mother and heir of S. M. Simeona, deceased[,] " to Emmaline H. Liftee. Thereafter, the chain of title leads to Makapono's acquisition of the Land by deed dated October 8, 1999, from Patrick J. Duarte.

July introduced no evidence to counter Makapono's asserted claims, except for a single quitclaim deed of various parcels of land, including the Land, from Ikeole Simeona to his wife, Anna Scott Simeona, on January 20, 1956, recorded in the Bureau of Conveyances, Territory of Hawai'i, in Liber 3162, page 487. This deed states, in relevant part, as follows:

Being the same premises that were sold and conveyed by William Kalua (widow), 1/3 undivided interest to Mele Keawe (w), by certain Deed recorded in the Bureau of Deeds in Liber 167, on Page 51, together with that certain Deed executed by Kamakani (w) my beloved mother who sold and conveyed an unknown undivided interest to the said Emmaline Liftee (w) within the said land granted to Kalua (k) of recorded in Liber 328, on Page 7 and 8.

Other than this deed, there was no evidence that July's father, Ikeole, had any interest in the Land.

Makapono need not prove that it has superior title against any and all other parties, but merely that it has "substantial interest in the property and that [its] title is

superior" to any of the other parties to this action.⁵ Maui Land & Pineapple v. Infiesto, 76 Hawai'i 402, 408, 879 P.2d 507, 513 (1994). The record validates the circuit court's Conclusion of Law no. 6 that "[Makapono] has . . . paper title to the subject property that is superior to . . . Defendant [July's] claim."

Adverse Possession

It is well-established that a person claiming title to real property by adverse possession "must bear the burden of proving by clear and positive proof each element of actual, open, notorious, hostile, continuous, and exclusive possession for the statutory period." Petran v. Allencastre, 91 Hawai'i 545, 556-57, 985 P.2d 1112, 1123-24 (App. 1999) (quoting Lai v. Kukahiko, 58 Haw. 362, 368-69, 569 P.2d 352, 356 (1977) (citations and brackets omitted)).

Adverse possession requires five elements. It must be [(1)] hostile or adverse; (2) actual; (3) visible, notorious and exclusive; (4) continuous; and (5) under claim of ownership. The party who claims adverse possession has the burden of proving that the foregoing elements have existed for the statutory period of not less than 20 years. In addition, [that party] must prove, by clear and positive evidence the location of the boundaries [that party] claims. Such boundaries must be established at the inception, during the continuance, and at the completion of the period of adverse possession.

Campbell v. Hipawai Corp., 3 Haw. App. 11, 13-14, 639 P.2d 1119, 1120-21 (1982).

⁵ All parties, other than Defendant-Appellant July Simeona, were defaulted out of the action in one manner or another.

NOT FOR PUBLICATION

The evidence shows that Joseph Duarte acquired the Land by deed dated April 25, 1938, recorded in the Bureau of Conveyances on September 18, 1939, in Liber 1522 at page 341. Thereafter, until the property was conveyed to Makapono in 1999, Joseph Duarte and his family visibly occupied and utilized the Land for cattle ranching, maintaining approximately fifty to eighty heads of cattle on the property. The Land is bounded by a stone wall. The interior of the property is sectioned and divided by stonewalls and fences. In addition, Duarte and his successors paid the real property taxes. No one was allowed to enter or remain on the property without the Duartes' permission. Neighboring property owners recognized that the Land was the property of Duarte and his family.

The record validates the circuit court's Conclusion of Law no. 7 that "[Makapono] and their [sic] predecessors-in-interest have possessed the subject property under color of title and have occupied it, adversely, with hostile intent, notoriously, exclusively and continuously since 1938."

July's Defenses

July's claim to title is based on his following argument:

Said real estate TMK 1-5-016:010 in [Makapono's] complaint is recognized as Crown Lands readily accepted and confirmed by the Great Mahele of 1848 as inalienable and classified "allodial" owned without obligation and has absolute title. As such, the

NOT FOR PUBLICATION

absolute title to lands of the Great Mahele, exists only in the persons mane [sic] and his heirs. The HRS. 172-11 titled "Land Patents on Land Commission Awards: to whom, for whose benefits [sic]" states,] in pertinent part;

"Every land patent issued upon an award by the Board of Commissioners to Quiet Land Titles, shall be in the name of the persons to whom the original award was made, even though these persons are deceased, or the title to the real estate thereby granted has been alienated; and all land patents so issued shall inure to the benefit of the heirs and assigns of the holders of the original award."

(Emphases in original.)

In other words, July's argument is that: (1) the Land is a part of the "crown lands" and (2) absolute title to the Land was vested in Kalua and his heirs, in perpetuity, and Kalua and his heirs did not have the legal power to convey the Land. In support of his argument, July cites HRS § 172-11 (1993), which provides as follows:

Every land patent issued upon an award of the board of commissioners to quiet land titles, shall be in the name of the person to whom the original award was made, even though the person is deceased, or the title to the real estate thereby granted has been alienated; and all land patents so issued shall inure to the benefit of the heirs and assigns of the holder of the original award.

July's argument is without merit. This issue was considered in Brunz v. Smith, 3 Haw. 783 (Hawai'i King. 1877). In Brunz, the court considered The Act of 1872, entitled, "An Act to Regulate the Issuing of Royal Patents" (Section 1 of which is identical to HRS § 172-11), and decided that patents based upon award do not confer or confirm title of later holders because the latter's names do not appear in the original grant of land. Id. at 787. Rather, an award of land through royal patent operates as a quitclaim of interest by the government and other claimants

must prove their interest in the land through deed or other means. Id. at 787-88; Mist v. Kawelo, 11 Haw. 587, 589 (Hawai'i Rep. 1898). Hence, titles awarded by Royal Patent may not be vested for "perpetuity," as July seems to suggest, but rather, all subsequent claimants of land must derive their title from the person to whom the original award was made. Brunz at 787.

July also misapprehends the Land as being a part of the "crown lands" and as being classified as "public lands" under the Great Mahele of 1848. Through the Great Mahele of 1848, King Kamehameha III divided land in Hawai'i into four principal categories: (1) lands held by the King as his private lands, known as "crown lands," and (2) of the remaining lands, one-third would be granted to the government, one-third to the chiefs, and the remaining one-third to the tenants. State by Kobayashi v. Zimring, 58 Haw. 106, 112-13, 566 P.2d 725, 730 (1977). See also Application of Robinson, 49 Haw. 429, 437-38, 421 P.2d 570, 576 (1966); The Fundamental Law of Hawaii, 3. Any land which was overlooked or not covered in the above categories remained part of the public domain. Thurston v. Bishop, 7 Haw. 421, 428-30 (Hawai'i King. 1888). Portions of the public domain were later sold to purchasers under Grants or Royal Patent Grants. Zimring, 58 Haw. at 114, 566 P.2d at 731. Any applicant claiming title to land or to be the recipient of land under the above categories, excluding the "crown lands," could petition the Board of

Commissioners to Quiet Land Titles (Land Commission) for a Grant or Royal Patent to quiet title to the land. Robinson, 49 Haw. at 432, 421 P.2d at 573; The Fundamental Law of Hawaii, 138. The award of a Land Commission patent conferred legal title over the land to the successful applicant. Robinson, 49 Haw. at 438-39, 421 P.2d at 576; The Fundamental Law of Hawaii, 137-39.

The Land was originally awarded to Kalua under Land Commission Award 7354, Royal Patent Nos. 8032 and 8033. The Land was not a part of the "crown lands" because it was not a portion of the lands which the King held for his private use. Zimring, 58 Haw. at 112-13, 566 P.2d at 730. Rather, the Land was awarded under a valid Land Commission Award, and is more properly characterized as being from one of the other categories established under the Great Mahele of 1848. Id. Since Kalua held legal title to the Land under a valid Land Commission award, he could freely devise or alienate it at his discretion. Id. at 114, 566 P.2d at 731 ("[t]o establish legally cognizable private title to land in the great majority of cases, one must show that he or a predecessor-in-interest acquired a Land Commission Award, a Royal Patent, a Kamehameha Deed, a Grant, a Royal Patent Grant, or other government grant for the land in question").

Jurisdiction

In contradiction of his request for the venue of the case to be transferred to Honolulu, July questions the

jurisdiction of the courts of the State of Hawai'i. However, we follow the Hawai'i Supreme Court's conclusion that the various constitutions promulgated during the Hawaiian Kingdom were abrogated by the 1894 Constitution of the Republic of Hawai'i, which overthrew the then-existing monarchy. State v. Lee, 90 Hawai'i 130, 141-42, 976 P.2d 444, 455-56 (1999). The Hawai'i Supreme Court further noted that "it is clear that the various constitutions of the kingdom do not bind the current government of the state of Hawai'i." Id. at 142, 976 P.2d 456. As a resident of the State of Hawai'i, July was properly subject to the jurisdiction of the circuit court and subject to the jurisdiction of this court. State v. French, 77 Hawai'i 222, 228, 883 P.2d 644, 650 (App. 1994) (defendant subject to jurisdiction of the circuit court even if citizen of Kingdom of Hawai'i) (citing State v. Lorenzo, 77 Hawai'i 219, 883 P.2d 641 (App. 1994) (defendant failed to meet burden proving that the Kingdom of Hawai'i continued to exist and that State of Hawai'i did not have jurisdiction over him)).

Constitutionality of Article XVI, Section 12
of the Hawai'i State Constitution

In his response to this court's minute order dispensing with oral arguments in this case, July points to law stating that "[u]pon the demise of an owner of Real Property, said property shall be inherited [sic] by the owners heirs[,]" and argues that

Article XVI, Section 12 of the Hawai'i State Constitution⁶ is unconstitutional because it violates that part of the 14th Amendment of the United States Constitution stating that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." It appears that July fails to recognize that the law he cites applies only "[u]pon the demise of an owner of Real Property," and it does not apply upon the demise of a person who conveyed his or her real property during his or her life.

July's Request for Costs, Fees and Other Expenses

July requests the court to grant him costs, fees, and other expenses incurred in "defending his rights." His request may be construed as a request for fees and expenses and is properly governed by Rule 53(b) of the Hawai'i Rules of Appellate Procedure (2003).⁷ That rule permits a "request for fees

⁶ See footnote 3 above.

⁷ Hawai'i Rules of Appellate Procedure Rule 53(b) (2003) states, in pertinent part, as follows:

Parties claiming attorney's fees pursuant to statute or contract may submit requests for the fees no later than 14 days after entry of judgment. A request for fees pursuant to statute or contract shall be submitted in a form that substantially complies with Form 8 in the Appendix of Forms. Objections and replies may be submitted in the manner and within the times provided by Rule 39(d).

NOT FOR PUBLICATION

pursuant to statute or contract[.]” Until July cites a relevant statute or contract, his request will not be considered.

CONCLUSION

Accordingly, we affirm the Final Judgment entered by the circuit court on February 12, 2001, in favor of Plaintiff-Appellee Makapono Partners, LLC.

DATED: Honolulu, Hawai‘i, April 14, 2003.

On the briefs:

July Simeona,
Defendant-Appellant, *pro se*.

Chief Judge

Robert D. Triantos and
Edmund W. K. Haituka
(Carlsmith Ball LLP)
for Plaintiff-Appellee.

Associate Judge

Associate Judge