IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
TRIAL DIVISION

IN RE: MATTER OF QUIETING TITLE TO A LEASE AGREEMENT FOR THE LAND KNOWN AS "ROIS KEBESANG" IN NGERKEBESANG HAMLET OF KOROR STATE PARTICULARLY DESCRIBED AS CADASTRAL LOT NO. 026 A O1 TOCHI DAICHO LOT 1726

GEORGE KEBEKOL, RECHEBEI OLIKONG KATOSANG, FRANCISCO GIBBONS, and ELBUCHEL SADANG,
Petitioners,
v.
SANTOS IKLUK, IBEDUL YUTAKA GIBBONS, and JOHN and JANE DOEs 1 to 5,
Respondents.

Cite as: 2021 Palau 38
Civil Action No. 20-039

Decided: June 11, 2020[1]

BEFORE: GREGORY DOLIN, Associate Justice (sitting by designation)

OPINION AND ORDER DENYING MOTION TO RECUSE[2]

[¶ 1] Before the Court is Plaintiffs' Motion to Recuse the undersigned Justice from further participation in this case. For reasons stated below, the Court will deny the motion.

BACKGROUND

[¶ 2] This is a land ownership and clan title dispute. On March 13, 2020, Plaintiffs George Kebekol, Rechebei Olikong Katosang, Francisco Gibbons,

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[1] The opinion relies on the statutory language as it existed on the date of the decision rather than the date of publication.

[2] The Court, *sua sponte*, has corrected the caption to omit the titles that are in dispute. The Court takes this step in order to avoid the appearance of prejudging the competing claims to the relevant titles. The parties are **DIRECTED** to use the corrected caption in all future filings.

and Elbuchel Sadang (collectively Kebekol) filed a Complaint[3] alleging that they are titleholders of the Ngerkebesang Hamlet in Koror State and as such are invested with authority to lease out Ngerkebesang Hamlet's property. In the Complaint, Kebekol alleges that Defendants Santos Ikluk and Ibedul Yutaka Gibbons and five other unnamed individuals (collectively Ikluk) have interfered with their ability to enter into leases with respect to the Hamlet's land. Plaintiffs seek a declaration that they are the rightful titleholders of Ngerkebesang Hamlet and that Defendants, in turn, have no authority over the disposition of the land in question.

[¶ 3] On April 21, 2020, Defendants Santos Ikluk and Ibedul Yutaka Gibbons filed an Answer and Counterclaim. Ikluk's Answer denied Kebekol's allegations with respect to Kebekol's position in Ngerkebesang Hamlet and his power to enter into a lease agreement with third parties. The Counterclaim alleged that it is Defendants who are the titlebearers of the Hamlet and therefore they are the ones who have legal authority over the lot in question. Defendants seek a declaration regarding their claims to Ngerkebesang Hamlet's titles and the validity of the lease entered into by Plaintiffs.

[¶ 4] The case was originally assigned to Associate Justice Kathleen Salii. On March 24, 2020, Justice Salii recused herself from further participation in the case on the grounds of having actual bias stemming from her "close familial relationship" with George Kebekol. The case was thereafter reassigned to Associate Justice Lourdes F. Materne. On March 31, 2020, Justice Materne issued an order of recusal because of a "close familial relationship" with another named party, Francisco Gibbons. [4] The matter was referred to Oldiais Ngiraikelau, the Presiding Justice of the Supreme Court's Trial Division. On April 10, 2020, Justice Ngiraikelau recused himself, citing "genuine bias" stemming from multiple pre-existing personal and professional relationships with Defendants and their counsel. With the entirety of the Trial Division bench recused, the case was referred to the Acting Chief Justice John

[3] Although the document was styled as a "Petition," it was processed and served as a civil complaint and will be treated as such.

[4] Justice Materne issued an amended order of recusal the next day where she explicitly stated that her close familial relationship with Francisco Gibbons has created "actual bias."

Rechucher for reassignment. On May 12, 2020, the Acting Chief Justice assigned the matter to the undersigned Justice.

[¶ 5] On May 20, 2020, the Court held a Status Conference with the parties. During the conference, the Court noted that, in light of the Fourteenth Amendment which created the basis for the separation of the two division of the Supreme Court, it is unusual for a Justice normally assigned to the Appellate Division to hear cases in the Trial Division. The Court advised the parties that it would entertain objections to the undersigned Justice's continued handling of the case. On July 2, 2020, Kebekol filed a motion to recuse the undersigned Justice.

DISCUSSION

A.

[¶ 6] In support of his Motion to Recuse, Kebekol cites the Fourteenth Amendment and Rules Implementing the Separation of the Justices (hereinafter "Separation Rules") promulgated pursuant to that Amendment by then-Chief Justice Arthur Ngiraklsong on January 5, 2017. According to Kebekol, the Separation Rules do not permit Justices appointed to serve in the Appellate Division of the Supreme Court to preside over trial matters. For the reasons that follow, the Court rejects the argument.

[¶ 7] The Constitution of the Republic of Palau established the Supreme Court as a "Court of Record consisting of an appellate division and a trial division." ROP Const. am. XIV. Under the original text of the Constitution, all justices served as members of both divisions. ROP Const. art. X, § 2. The Fourteenth Amendment retained this structure, but provided for an eventual formal separation of the divisions once the "Olbiil Era Kelulau appropriate[d] funds for additional justices to serve on the appellate division." In 2016, this contingency came into effect and on January 5, 2017, Chief Justice Arthur Ngiraklsong promulgated formal rules formally separating the Supreme Court into two semi-autonomous divisions.

[¶ 8] In adopting the Fourteenth Amendment, the delegates to the Second Constitutional Convention were concerned with ensuring that "there would be no influence by the trial judges on the appellate court." *See* Second Palau

Constitutional Convention, Convention Journal at 1244 (June 10, 2005); *see also id.* at 570 (July 6, 2005); at 1168 (May 23, 2005). The concern was that the potential camaraderie between judges, all of whom constantly rotated between both divisions, would affect the determination of appeals. *See id.* at 1247 (June 10, 2005). At the same time, the delegates understood that even after the Fourteenth Amendment was fully implemented there would remain only a single Supreme Court. *See id.* at 574-75 (July 6, 2005). As a matter of both Constitutional and statutory law, that remains the case, and although the Separation Rules split up the operation of the Trial and Appellate Divisions, both divisions remain part of a single, unified Court.

[¶ 9] By its plain terms, the Fourteenth Amendment merely authorizes the Chief Justice to promulgate rules to "implement the separation of the Justices of the appellate division . . . ." If the Framers of the Amendment had meant to create a separate Court or build a wall and moat between the two divisions, they would likely have struck out the language specifying that "all [Justices] shall be members of both divisions" from the original text of the Constitution, or at the very least would have explicitly stated that this provision would cease to be operational once the Separation Rules were promulgated. The fact that the Framers chose to forego either of these two options strongly suggests that the Fourteenth Amendment did not alter the basic Constitutional structure of the Palau Judiciary, but merely provided for an administrative and operational separation of the two divisions without diminishing the status of Supreme Court's trial Justices.

[¶ 10] Three other Constitutional provisions are relevant to construing the scope of the Fourteenth Amendment. First, Article X, Section 1 specifies that "[a]ll courts *except the Supreme Court* may be divided geographically and functionally as provided by law, or judicial rules not inconsistent with law." ROP Const. art. X, § 1 (emphasis added). This language confirms that the Supreme Court has been and continues to be a single Court, notwithstanding the fact that the Court's members are primarily assigned to hear either trials or appeals. Indeed, the Separation Rules recognize that "[f]ormally, the trial and appellate divisions remain part of a single court: the Supreme Court." Separation Rules, Prefatory Report at 5. Second, the unamended portion of Section 2 continues to forbid Justices from "hear[ing] or decid[ing] an appeal of a matter heard by him in the trial division." *Id.* § 2. This sentence would be

entirely superfluous if the two divisions were unreservedly separate, because in such a system no Appellate Justice would ever hear a trial and no Trial Justice would ever hear an appeal. The fact that the Fourteenth Amendment, while creating a path for a separation between the Trial and Appellate Divisions, left this proviso undisturbed strongly suggests that the Framers foresaw and contemplated occasions where Justices would need to be assigned from one Division to another, even though such rotations would no longer be routine. Finally, Section 12, which was unaffected by the Fourteenth Amendment, empowers the Chief Justice to "assign judges from one geographical department or functional division of a court to another department or division of that court and he may assign judges for temporary service in another court." ROP Const. art. X, § 12. This too suggests that the Framers of the Fourteenth Amendment did not expect assignment of judges from one court or division to another to cease altogether. The picture that emerges from the interplay of all of these provisions is that the Fourteenth Amendment sought to improve the administration of justice by making the Trial and Appellate Divisions of the Supreme Court separate while retaining "fail-safe" provisions for cases where, because of recusal, vacancy, or some other cause, assignment of judges from one court to another is necessary.

[¶ 11] In short, the basic structure of our Judiciary was not altered by the Fourteenth Amendment—there still exists a single Supreme Court (and such inferior courts as Olbiil Era Kelulau may create) with each member of that Court having equal power to adjudicate cases at both the trial and the appellate levels. Furthermore, the Constitutional provisions, though expecting judges to have a dedicated assignment to a particular court, are designed to accommodate unusual circumstances where adjudication by regularly assigned judges is, for one reason or another, impossible. Thus, neither the Constitution's text, nor structure, nor history offers support to Plaintiffs' Motion to Recuse.

B.

[¶ 12] Turning next to the Separation Rules, the Court concludes that they do not require the recusal of the undersigned either. As an initial matter, it must be noted that the Separation Rules, though authorized by the Constitution, are subservient to it. *See* ROP Const. art. II, § 1 ("This Constitution is the supreme law of the land."); *see also id.* § 2 ("Any law [or] act of government . . . shall

not conflict with this Constitution and shall be invalid to the extent of such conflict."). Thus, to the extent the Separation Rules contradict the Constitutional injunction against dividing the Supreme Court either functionally or geographically, *see* ROP Const. art. X, § 1, they are invalid. At the same time, the Rules, being a quasi-legislative and constitutionally authorized enactment, are entitled to "a strong presumption of constitutionality." *Tulmau v. R.P. Calma & Co*., 3 ROP Intrm. 205, 208 (1992). Therefore, this Court "begin[s] [its] inquiry upon the long-established premise that there is a strong presumption of constitutionality of [legal enactments] and clear inconsistency with the provisions of the Constitution must be shown to overcome the presumption." *Id*. Fortunately, the Court need not resort to strained constructions or legal acrobatics in reaching the conclusion that the Separation Rules do not prohibit the assignment of Justices from the Appellate Division to sit in the Trial Division on an as-needed basis.

[¶ 13] In promulgating the Separation Rules, the Chief Justice recognized that conflict of interest situations may arise precluding Justices in either division from hearing matters before that division. The Chief Justice recognized that although following the implementation of separation rules Justices will no longer be "*regular* members of both the trial and appellate division," Separation Rules, Prefatory Report at 3 (emphasis added), some assignment from one division to another may continue to be necessary when conflicts of interest preclude a Justice regularly assigned to a division from hearing a case. In light of this recognition, the Rules explicitly provide that:

> If, through vacancy, disability, recusal, or other good cause, three justices of the Appellate Division are not available to hear a particular appeal, the Chief Justice shall designate a sufficient number of Justices of the Trial Division, Judges of the Court of Common Pleas, or Judges of the Land Court to serve in the Appellate Division and supplement the panel for that particular appeal.

Separation Rules, § V.

[¶ 14] Admittedly, the Separation Rules do not specifically contemplate the assignment of Appellate Justices to hear matters in the Trial Division. That is not surprising, however, because our Constitution requires that all appellate

matters be heard by a panel of at least three justices, but permits trial matters to be heard before a single justice. *See* ROP Const. amend. XIV. Naturally, it is easier to constitute a "panel" of one than it is to constitute a panel of three. When only a single Justice is needed, recusal usually does not present a problem because other Trial Division justices may be assigned to a case. When, however, a panel of three is needed, and there are only three appellate Justices to begin with, a recusal presents a much more substantial problem. This in the Court's view explains the presence of the provision permitting assignment of Trial Division Justices to the Appellate Division paired with the lack of a corresponding provision authorizing similar assignments in reverse. Nonetheless, the logic of the Separation Rules dictates that such assignments are permissible if, in the absence of such an assignment, "there would be no way for the Supreme Court to hear a trial." Separation Rules, Prefatory Report at 4. It is worth remembering that the undersigned Justice was assigned to this matter only after all three Justices regularly assigned to the Trial Division were recused due to non-waivable conflicts of interest. Accepting Kebekol's argument would bring about the very eventuality—having "no way for the Supreme Court to hear a trial"—that the Separation Rules were designed to avoid.

[¶ 15] Assigning a Justice from the Appellate Division to hear a case in the Trial Division when all the Trial Division Justices are recused is also consistent with Article X, Section 12, which as already discussed, *see ante* ¶ 10, authorizes the Chief Justice to "assign judges from one geographical department or functional division of a court to another department or division of that court and [] assign judges for temporary service in another court." ROP Const. art. X, § 12. To reiterate, the Supreme Court doesn't have fully separate divisions; it is a single court. *See* ROP Const. art. X, § 12; Separation Rules, Prefatory Report at 5. However, the Trial Division and the Appellate Division are *functional* divisions of this unified Court as that term is contemplated in Section 12. These functional divisions operate in a semi-autonomous manner so as to allow for litigants to have their cases adjudicated both in the first instance and on appeal by judges who are free not only from political coercion, but also from social pressure from their colleagues. *See Idid Clan v. Demei*, 17 ROP 221, 231 (2010) ("[P]arties to any legal proceeding are entitled to a fair, impartial arbiter. This goal is protected by both the Palau Constitution,

which requires due process of law, and various laws and professional standards."); *see also* ROP Code of Judicial Ethics, Canon 1.4. This semi-autonomy, however, is not an end in itself; it is a means to achieve the goal of a fair and impartial administration of justice. To that end, the Chief Justice is empowered to, after considering the needs of the litigants and the justice system, "assign judges from one . . . functional division of a court to another . . . division of that court." ROP Const. art. X, § 12; *see also* Separation Rules, § V. In this case, the Acting Chief Justice has determined that "it is both in the interest of justice and required by canons of judicial ethics" to have a judicial officer other than a Justice regularly assigned to the Trial Division hear this matter. This Court is not in a position to, and will not, second-guess a determination that the Constitution and the Separation Rules leave to the Chief Justice's judgment.

C.

[¶ 16] "It has been well-settled that [it] is emphatically the province and duty of the judicial department to say what the law is." *Gibbons v. Salii*, 1 ROP 333, 336 (1986) (quoting *United States v. Nixon*, 418 U.S. 200, 203, 94 S.Ct. 3090 (1974)). *See also Ochedaruchei Clan v. Thomas*, 2020 Palau 11 ¶ 26 (Dolin, J., concurring). At the same time, the "perceived impartiality of a judge is an essential ingredient to a judiciary's legitimacy," and a requirement of having an impartial presiding officer is both mandatory and not waivable by the parties. *Etpison v. Rechucher*, 2020 Palau 14 ¶ 15. Because all the Trial Division Justices have declared a conflict of interest based on their preexisting relationship with one or more of the parties, they are not permitted to preside over this matter *even if* the litigants were to consent to their participation. *Id.* (citing Code of Judicial Conduct, Canon 2.5). Yet the Judiciary's "obligation to resolve the material issues before it," *Beouch v. Sasao*, 16 ROP 116, 118 (2009), continues to exist. The Rule of Necessity was developed to resolve such conflicting obligations.

[¶ 17] The Rule of Necessity is usually invoked as an exception to disqualification which would otherwise be required under the Code of Judicial Conduct, but when it is not possible to assign the case to another judge. *See* Code of Judicial Conduct, Canon 2.5. In this instance, it is undisputed that the undersigned Justice has no conflict of interest. Instead, the challenge is based

on the undersigned Justice's lack of authority to preside over trial matters. Nonetheless, the logic of the "Rule of Necessity" is equally applicable to the present situation.

[¶ 18] The Rule of Necessity derives from an ancient common law principle that is best summarized as: "although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise." *United States v. Will*, 449 U.S. 200, 213 (1980) (quoting Sir Frederick Pollock, Bt., A First Book of Jurisprudence for Students of Common Law 270 (6th ed. 1929)). It has been incorporated in Code of Judicial Conduct Canon 2.5, which provides "disqualification of a judge shall not be required if constituting another tribunal to deal with the case is not practical or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice." This is such a case. Although it is certainly preferable that a trial is presided over by a Justice assigned to the Trial Division, whereas an appeal is heard by a Justice assigned to the Appellate Division, this case simply cannot be heard otherwise because all of the Trial Justices have declared that they are affected by actual bias rather than merely perceived bias. Actual bias is not waivable, and therefore absent an assignment of a judicial officer from outside of the Trial Division, the case would not be heard at all. *Cf.* Canon 2.5 ("Disqualification shall also not be required, *other than for actual bias*, if after the basis of disqualification is disclosed on the record, all parties and lawyers, independent of the judge's participation, agree in writing that the reason for the potential disqualification is immaterial or unsubstantial." (Emphasis added)).

[¶ 19] The question then is, who would be eligible for such an assignment. The options are as follows: 1) resident Justices of the Appellate Division; 2) non-resident Justices of the Appellate Division; and 3) Judges of the Land Court or the Court of Common Pleas. The Acting Chief Justice chose the first option in assigning the undersigned Justice to hear this case. The question is whether the other two options are unquestionably more consistent with the constitutional design and the Separation rules. If so, then the assignment of the undersigned in preference to the other two options would have been improper. If not, then given the Judiciary's "obligation to resolve the material issues before it," *Beouch*, 16 ROP at 118, the selection of any one of these three options would be equally proper.

[¶ 20] It is self-evident that there is no meaningful legal difference as it relates to the present matter between resident and non-resident Justices of the Appellate Division. Plaintiffs' argument that a Justice originally appointed to the Appellate Division is precluded from presiding over trials would necessarily encompass both resident and non-resident Justices because the Separation Rules do not differentiate between the two. Furthermore, it is unclear whether a non-resident Justice of the Appellate Division would be able to preside over the case while being absent from the Republic. Our statutes prohibit any Justice serving "on a temporary or part-time basis [from] issu[ing] any writ, order, ruling or other process or act while absent from the Republic." 4 PNC § 201. That would mean that a non-resident Justice would not be able to rule on any pre-trial motions (including, for example, the pending Motion for the Extension of Time to File an Answer to Counterclaims) without physically flying into Palau. That is unlikely to happen even in the best of times, and utterly impossible during the time of coronavirus when flights into the country have been indefinitely suspended for non-residents. Thus, assigning a non-resident Justice to preside over this matter would neither address Kebekol's objection nor be practicable.

[¶ 21] That leaves the question of whether assigning the judges of the Court of Common Pleas or Land Court in preference to Appellate Justices of the Supreme Court for service in the Trial Division would be more consistent with the requirements of Constitution, Palau National Code, and the Separation Rules. In the Court's opinion there is no basis to conclude that the legal authorities exhibit any preference for the assignment of judges of the Court of Common Pleas or the Land Court to preside over cases in the Trial Division over that of Justices of the Appellate Division.

[¶ 22] It should be noted that there are some significant inconsistencies between the constitutional provisions, statutory language, and Separation Rules. For example, the Constitution appears to give the Chief Justice *carte blanche* in choosing whether and how to assign judges for service on other courts. *See* ROP Const. art. X, § 12 (authorizing the Chief Justice not only to "assign judges from one geographical department or functional division of a court to another department or division of that court," but also to "assign judges for temporary service in another court."). In contrast, the authority granted the Chief Justice under the National Code is much more circumscribed. Under the

Code, the Chief Justice has the authority to assign: 1) Justices of the Supreme Court to the National Court and vice versa,[5] *see* 4 PNC §§ 201, 202; and 2) Judges of the Court of Common Pleas for service in the Land Court. *Id.* § 203(c). The Code does not authorize the Chief Justice to assign judges of the Court of Common Pleas or the Land Court for service in the Supreme Court. Finally, the Separation Rules authorize the Chief Justice to "designate . . . Judges of the Court of Common Pleas, or Judges of the Land Court to serve in the Appellate Division . . . for [a] particular appeal." Separation Rules, § V. The Rules do not explicitly authorize the assignment of Judges of the Court of Common Pleas or the Land Court for service in the Trial Division. Thus, the Separation Rules appear to be broader than Chief Justice's statutory, but narrower than his constitutional, authority. These inconsistencies potentially raise an interesting constitutional question—are the statutory and regulatory limitations imposed on the Chief Justice unconstitutional as inconsistent with the language of Section 12? Fortunately, the Court need not resolve this issue in order to reach its decision.

[¶ 23] Plaintiffs base their objection to the undersigned Justice continuing to preside over this matter solely on the language of the Separation Rules. Although Kebekol's motion is light on analysis, the argument seems to be that the Separation Rules "restricts [*sic*] Justice Dolin to hearing and deciding matters related to filings in the Appellate Division." But if so, then the very same Rules restrict the ability of Court of Common Pleas and Land Court Judges to hearing cases in their respective courts and, if assigned by the Chief Justice, the Appellate Division only. *See* Separation Rules, § V. Thus, because the Separation Rules do not provide for the temporary assignment of *any* judges to the Trial Division, if the Court were to adopt Plaintiffs' argument it would mean either that one of the Trial Division Justices would have to preside over a case where they have declared an actual bias, or this case could never be resolved at all. Because, when sitting in the Trial Division, the undersigned Justice is bound by the decisions of the Appellate Division, the Court has to conclude that allowing judges to preside over a case in which they have an actual bias is foreclosed by the Appellate Division's recent decision in *Etpison*

[5] The National Court existed briefly during the early days of the Republic, but no judges have been appointed to that court since the first (and only) judge to have served on it resigned. *See, e.g.*, Second Palau Constitutional Convention, Convention Journal at 1169 (May 23, 2005).

v. Rechucher, ante. *See also Idid Clan*, 17 ROP at 231 n. 7 ("[D]ue process [] requires . . . that a presiding judge be free of actual bias") (emphasis omitted). On the other hand, leaving litigants without the ability to have their dispute resolved by a judge does not comport with the duties and obligations of the Judiciary, and violates litigants' rights of access to impartial justice.

[¶ 24] The Constitution requires an impartial judicial officer to preside over all cases filed in all of the Republic's courts. *See id*. Neither statutes nor administrative rules can supersede this basic requirement. *See* ROP Const. art. II, §§ 1, 2. Usually, when no conflicts of interest cast a shadow over a case, this requirement is met by having a Judge or Justice hear cases in the court to which that Judge or Justice has been appointed. But though conflicts of interest do arise, they do not and cannot lessen the constitutional obligations of the Judiciary to provide, or the right of litigants to receive, impartial justice. For this reason, the Court is of opinion that whenever all Judges or Justices of a particular court or division are unable to hear a case due to actual bias, the temporary assignment of Judges or Justices from another court or division to hear the case is not merely permissible, but mandatory.

CONCLUSION

[¶ 25] Kebekol's Motion presents an argument that, if adopted, would make it impossible for some cases to be resolved in any of the courts of the Republic. Because such an outcome would violate both the Judiciary's obligations and litigants' rights, the Court will not sanction it. Accordingly, Plaintiffs' motion is **DENIED**.