IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

ULIMANG HAMLET COUNCIL OF CHIEFS and IRRUNG CLAN, rep. by NGIRAIRUNG ISAAC SOALADAOB, and AUGUSTINO BLAILES,
Appellants,
v.
OTONG LINEAGE, a.k.a. OTONG CLAN, rep. by EVANGELISTO ONGALIBANG, et al.,
Appellees.

Cite as: 2024 Palau 10
Civil Appeal No. 22-024
Appeal from Civil Action No. 15-009

Decided: March 21, 2024

Counsel for Appellant Ulimang Hamlet Council ..... Vameline Singeo
Counsel for Appellant Augustino Blailes ..... Johnson Toribiong
Counsel for Appellee ..... J. Uduch Sengebau Senior

BEFORE: JOHN K. RECHUCHER, Associate Justice, presiding
FRED M. ISAACS, Associate Justice
KEVIN BENNARDO, Associate Justice

Appeal from the Trial Division, the Honorable Antonio L. Cortés, Associate Justice, presiding.

ORDER DENYING PETITIONS FOR REHEARING AND MOTION TO DISQUALIFY[1]

PER CURIAM:

[¶ 1] Before the Court are two Petitions for Rehearing, one filed by Ulimang Hamlet Council of Chiefs on February 23, 2024, and another filed by

[1] Pursuant to the October 15, 2020, Memorandum from the Chief Justice governing "Publications of Opinions, Decisions, and Orders," normally, the Appellate Division will "not publish any order denying a petition for rehearing or motion for reconsideration . . . unless the Chief Justice directs otherwise." In this matter, the Chief Justice is recused and has delegated

Augustino Blailes on February 24, 2024, as well as a Motion to Disqualify Associate Justice Rechucher filed by Augustino Blailes on February 26, 2024. Petitioners ask this Court to reconsider its Opinion published as 2024 Palau 5 (February 9, 2024) pursuant to ROP R. App. P. 40.

[¶ 2] Under Rule 40(a), this Court may, at its discretion, entertain a petition to reconsider an opinion it has issued. Rule 40 provides that the party seeking rehearing shall "state with particularity each point of law or fact that the petitioner believes the Court has overlooked or misapprehended" in its original consideration of the matter.

[¶ 3] On February 9, 2024, this Court filed its Opinion, in which it affirmed the trial court's decision to deny a Rule 60(b) Motion, to find that there was no right of way through the Cadastral Lot at issue, and to impose sanctions. Opinion at ¶ 12. Petitioners now assert that this Court "overlooked or misapprehended" crucial points of law in its analysis and that it should reconsider its Opinion.

[¶ 4] Petitioner Ulimang Council asserts that the Court misinterpreted the customary law on the historical access to the bai, but presents no precedent that supports this interpretation of custom. Ulimang Council then argues that an easement can be created without requiring an initial unity of title, but once again provides us with no law to support this statement. ROP R. App. P. 40 explicitly requires petitioners to show how the law was misapprehended, but Ulimang Council does not cite to any authority illustrating how this Court misapprehended the law governing easements or Palauan customary law. *Idid Clan v. Demei*, 17 ROP 221, 233 n.9 (2010) ("[T]he Court may refuse to consider unsupported arguments."). In addition, these arguments were clearly discussed in the Opinion of the Court. Opinion at ¶¶ 18-20. The Court did not misapprehend custom or the law on these points.

[¶ 5] Petitioner Augustino Blailes first asserts we misunderstood the evidence considered in the trial court's findings because Blailes had an evidentiary basis for holding himself out as *Beches*—the letter from Ereong

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his authority to decide whether to publish the present order to the undersigned Panel. The Panel, being of the view that the present opinion contains substantive analysis that will be a helpful guide to the lower courts and future panels of this Court, has decided to publish the opinion. *See Ngirakesiil v. ROP (Ngirakesiil II)*, 2021 Palau 24 ¶ 1 n.2.

Remeliik dated July 22, 2015. Once again, the Court already addressed this point in the Opinion, and Blailes only seeks to rehash what has been decided against him. Opinion at ¶ 25. The trial court explained at length why it imposed sanctions when Blailes kept holding himself out as Beches after his claim was rejected in the 2009 Decision.

[¶ 6] Finally, Blailes maintains in both the Petition and the Motion to Disqualify that Associate Justice Rechucher should have recused himself as he is related to Ereong Remeliik. This is the first time that Blailes raises such argument.

[¶ 7] Under Canon 2.5 of the Judicial Code of Conduct, "[a] judge shall disqualify himself . . . from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially." With regard to familial relations, Canon 2.5.5 provides that grounds for disqualification will be present where "the judge is related within the first or second degree, either by consanguinity or affinity, to a party, lawyer, or material witness." The Code goes on to define that "'[w]ithin the second degree' includes persons related to the judge by consanguinity or affinity as a natural or adoptive grandparent, uncle, aunt, first cousin, first cousin once removed, first cousin twice removed, or first cousin thrice removed." ROP Code of Judicial Conduct, Canon 8.4.9.

[¶ 8] As a general rule, issues that were previously available may not be raised for the first time on a Petition for Rehearing. *See Nakatani v. Nishizono*, 2 ROP Intrm. 52, 54 (1990) ("This new and novel argument was neither made in appellant's brief nor offered at oral argument and, therefore, it cannot now be raised."); *Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, 35 (2006) (refusing to consider whether trial judge should have recused himself from presiding in the case where the argument was raised for the first time on appeal).

> The law is clear that a party must move for recusal at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim. The requirement of a timely filing is one of substance and not merely one of form, and the basis of requiring a timely

> objection is that courts disfavor allowing a party to shop for a new judge after determining the original judge's disposition towards a case. An untimely objection or motion to disqualify waives the grounds for recusal, and this is particularly true when the party seeking disqualification, knowing of the possible prejudice, waits until after it receives an adverse ruling to raise the issue. Finally, there is at least some authority that judicial acts taken before recusal may not later be set aside unless the litigant shows actual impropriety or actual prejudice; an appearance of impropriety is not enough to poison the prior acts.

Idid Clan v. Demei, 17 ROP 221, 227 (2010) (internal citations and quotations omitted); *see also Toribiong v. Tmetbab Clan*, 22 ROP 116, 118 (2015) ("Particularly prohibited are late-filed motions for recusal.").

[¶ 9] However, we later established that the perceived impartiality of a judge is not an issue that is waivable by the parties. *Etpison v. Rechucher*, 2020 Palau 14 ¶ 15. Reading *Etpison* in conjunction with *Idid Clan*, we determine that while a litigant may raise disqualification at any time, once judicial acts are taken, the litigant must show actual impropriety or actual prejudice to retroactively set aside these judicial acts. To meet such a high burden, the litigant must also establish that she was unaware of the potential conflict beforehand, or show extraordinary circumstances preventing her from timely raising disqualification. *See Idid Clan*, 17 ROP at 234 (noting that the litigant raising disqualification made no mention of when it purportedly learned of the potential conflict, which alone made it insufficient to meet the burden).

[¶ 10] The Motion argues that Justice Rechucher should have recused himself, as he is related to Ereong Remeliik within the second degree and recused himself in Civil Action 19-120, which involved a dispute over the burial of Ereong Remeliik.[2] Blailes argues that Ereong Remeliik's letter, which

[2] We emphasize that Blailes assumes that Associate Justice Rechucher recused himself in Civil Action 19-120 because of his relationship to Ereong. As Otong Lineage pointed out, one of the

claims to name Blailes as *Beches*, was material evidence upon which the trial court relied to impose sanctions, and that this makes Ereong a material witness.

[¶ 11] We do not find these facts sufficient for Blailes to meet his burden to prove actual prejudice or impropriety, as the introduction of Ereong's letter does not necessarily make her a material witness. Nor does Blailes present any convincing argument as to why he is only raising the alleged conflict at this late stage of the appellate proceedings, when the identities of the panel justices were known to the parties and their counsel more than a year prior to the decision being handed down. We note that Civil Action 19-120 involved Baulang Kumangai as a party, who is Ereong's sister. Blailes was a party to Civil Action 19-120, and as such, should have been fully aware of the familial relationship between Justice Rechucher and Ereong. He has no justification for not raising the potential conflict earlier. Accordingly, we see no grounds warranting Justice Rechucher to prospectively recuse himself, or for this Court to retroactively vacate its prior Opinion.[3]

CONCLUSION

[¶ 12] Having considered the arguments presented, the Court finds Petitioners have failed to show that this Court overlooked or misapprehended any point of law in its Opinion. The Petitions for Rehearing are hereby **DENIED**. We further **DENY** Augustino Blailes' Motion to Vacate Order and Disqualify Associate Justice Rechucher.

parties of the Civil Action is Baulang Kumangai, who is Ereong's sister and also related to Justice Rechucher in the second degree.

[3] This Court also note that even if Justice Rechucher were to recuse himself and be replaced by a different Justice, the Opinion would still stand insofar as it garnered two votes from the panel members.