ICHIRO RECHEBEI and BRERENG KYOTA,
Appellants,

v.

ILAPSIS NGIRANGEANG NGIRALMAU,
Appellee.

CIVIL APPEAL NO. 09-021
Civil Action No. 05-032

Supreme Court, Appellate Division
Republic of Palau

Decided: March 30, 2010

[1] **Appeal and Error:** Standard of Review

An appellate court reviewing the denial of a Rule 60(b) motion can only review the trial court's Order denying that motion.

[2] **Judgments:** Relief from Judgments

Unlike Rules 60(b)(1)-(5), which outline specific reasons for relief from judgment, such as (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; and (3) fraud, Rule 60(b)(6) is the catch-all provision of Rule 60(b) and affords relief from a final judgment only under extraordinary circumstances.

[3] **Judgments:** Relief from Judgments

Foremost, Rule 60(b)(6) and the first five clauses of ROP R. Civ. P. 60(b) are mutually exclusive; relief cannot be granted under Rule 60(b)(6) if it would have been available under one of the earlier clauses. This exclusivity is crucial because, if the motion could have been brought as a Rule 60(b)(2) motion, then the relief contemplated under Rule 60(b)(6) will be wholly unavailable regardless of how extraordinary the circumstances may or may not be.

Counsel for Appellants: Clara Kalscheur

Counsel for Appellee: John K. Rechucher

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES MATERNE, Associate Justice; HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

Appellants Ichiro Rechebei and Brereng Kyota ("Rechebei and Kyota") appeal a June 8, 2009 Decision, in which the trial court denied their ROP R. Civ. P. 60(b) motion for relief from judgment. Specifically, Rechebei and Kyota claim that the trial court erred by failing to consider that the original trial court, presided over by Associate Justice Kathleen M. Salii, did not disclose her potential conflict of interest on the record in 2005. Rechebei and Kyota also allege that Justice Salii's failure to do so caused their delay in not seeking her recusal until 2008, long after the trial and the appeal for this matter were concluded. For the reasons that follow, we AFFIRM the June 8, 2009 Decision of the trial court.

BACKGROUND

This case was initially brought by Appellees Ilapsis Ngirangeang Ngiralmau and members of his family ("Appellees"). On February 3, 2005, Appellees applied for a Temporary Restraining Order ("TRO"), Preliminary Injunction, and Permanent Injunction to preclude Rechebei and Kyota from burying their sister, Dirraechetei Ito, in a stone platform on Smengesong Clan land ("Smengesong"). The case was assigned to Justice Salii.

In her chambers prior to the TRO hearing, Justice Salii disclosed that she had a familial relationship with one of the Appellees. Counsel for both parties were present at the time and, after consulting with their respective clients, neither counsel moved for a recusal. Justice Salii then heard and denied Appellees' motion for a TRO. Rechebei and Kyota buried their sister at Smengesong on February 5, 2005.

A few months later, Ilapsis Ngirangeang Ngiralmau ("Ngiralmau"), the primary named Appellee, died. Not surprisingly, Rechebei and Kyota filed their own TRO to preclude the remaining Appellees from burying Ngiralmau on the stone platform at Smengesong. Justice Salii denied this motion, and the remaining Appellees buried Ngiralmau at Smengesong, creating a situation in which both parties' dead were buried alongside one another on the stone platform.

Shortly before Ngiralmau's burial, the remaining Appellees also filed a complaint for Declaratory Judgment, Mandatory Injunction, and Damages, asking the court to exhume the remains of Rechebei and Kyota's sister from the stone platform. As grounds for exhumation, Appellees claimed that they—not Rechebei and Kyota—are the strong senior members of Smengesong Clan and have the sole authority to decide who gets to be buried at Smengesong. Not surprisingly, Rechebei and Kyota challenged this claim in their answer, insisting instead that they are the strong senior members. Justice Salii presided over the trial of this case in August 2006 and, on November 15, 2006, issued her Decision and Judgment, finding in favor of the remaining Appellees. Rechebei and Kyota appealed the Decision. On February 14, 2008, the Appellate Division affirmed Justice Salii's decision in a *per curiam* opinion. *See Rechebei v. Ngiralmau,* 15 ROP 62 (2008).

After their case had been affirmed on appeal, Appellees sought to enforce the Judgment by demanding, in a letter to Rechebei and Kyota, that they exhume the remains of their relatives buried at Smengesong. Rechebei and Kyota refused. On July 7, 2008, Appellees filed a motion for an order in aid of judgment. At Rechebei and Kyota's request, Justice Salii held a status conference on October 29, 2008. At the conference, Rechebei and Kyota's counsel voiced concern over Justice Salii's potential conflict of interest with respect to her relationship to one of the remaining

Appellees, Santos Ngirasechedui.[1] Rechebei and Kyota moved for Justice Salii's recusal.

Although she granted Rechebei and Kyota's motion for recusal, Justice Salii stated that the "Court disclosed on the record its dislike for this seeming display of forum shopping, nearly four years after the case was filed and after the issuance of both trial and appellate decisions, but more importantly, after [Justice Salii] disclosed in chambers the potential conflict, which parties, through counsel, waived and agreed to have the case heard by the undersigned justice." *Ngiralmau v. Rechebei*, Civ. Act. No. 05-032, Order Granting Defense Motion For Recusal And To Reassign Case at 2 (Tr. Div. Nov. 26, 2008)).

The case, which by now required only a determination of the motion for order in aid of judgment, was reassigned to Associate Justice Alexandra Foster. On March 9, 2009, Justice Foster granted Appellees' motion and ordered to have the remains of Rechebei and Kyota's sister exhumed from Smengesong. Two months later, Rechebei and Kyota filed an ROP R. Civ. P. 60(b) ("Rule 60(b)") motion, seeking relief from the judgment and asking for a new trial on the basis that Justice Salii failed to disclose the extent of the family relationship earlier in the case. Rechebei and Kyota's Rule 60(b) motion pointed to a number of factors justifying relief and a new trial, including Justice Salii's alleged assistance with—and attendance at—a funeral that occurred in July of 2006, as well as Justice Salii's failure to include her original disclosure of the potential conflict of interest on the record.

In denying Rechebei and Kyota's Rule 60(b) motion, the trial court began by stating,

> this funeral occurred before the trial, before the decision, before Defendants filed their appeal, and almost two years before Defendants' current motion. Defendants acknowledge a delay in filing, but seek to justify the delay by explaining that Defendants' counsel first spoke to a witness on May 7, 2009, and filed this motion and the witness' accompanying affidavit the next day. The issue is not the delay between learning of the evidence and filing the motion, the issue is the delay in learning of the evidence.

Ngiralmau, Civ. Act. No. 05-032, Rule 60(b) Decision at 4 (Tr. Div. June 8, 2009). The trial court went on to express disbelief that it could have taken Rechebei and Kyota so long to uncover Justice Salii's involvement in such a public funeral. The trial court addressed Rechebei and Kyota's argument regarding Justice Salii's failure to include her original disclosure of the potential conflict of interest on the record in a more cursory fashion. The trial court noted that, "[i]t does not appear that Defendants inquired into, or investigated, the

[1] "Santos's wife, Bersik, and the mother-in-law of [Justice Salii], Itab, are cousins. Their biological mothers, Korang and Babelsau, are sisters. [Justice Salii's] husband . . . lived with Santos Ngirasechedui and his wife while attending PMA High School from 1980-1983." *Ngiralmau v. Ichiro Rechebei*, Civil Action No. 05-032, Order Granting Defense Motion For Recusal And To Reassign Case at 2 (November 26, 2008)).

Court's disclosed relationship with one of the Plaintiffs at the time of the disclosure, or any time after the disclosure, up until May 7, 2009." *Id.* at 5. The trial court made sure to note that, at the time of the disclosed conflict, Rechebei and Kyota never sought recusal. In a footnote, the trial court continued, stating "Defendants allege that their attorney—who is not Defendants' current attorney—did not inform them of this relationship. Defendants, not Plaintiffs, 'should bear the burden of [their] attorney's alleged shortcomings.'" *Id.* at 5 n.5 (citing *Sugiyama v. NECO Eng'g Ltd.*, 9 ROP 262, 266 (Tr. Div. 2001)).

The trial court denied the 60(b) motion, based in large part on Rechebei and Kyota's failure to meet the deadlines and standards required under ROP R. Civ. P. 60(b)(2) ("Rule 60(b)(2)") and ROP R. Civ. P. 59(a)"(Rule 59(a)"). Rule 59(a) requires the injured party to file its motion before the Court within 10 days of the entry of judgment. *See* ROP R. Civ. P. 59(b). Alternatively, Rule 60(b)(2) allows a Court to relieve a party from a final judgment based on "newly discovered evidence," which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), but such a motion must be made "not more than one year after the judgment, order, or proceeding was entered or taken." ROP R. Civ. P. 60(b).

The trial court concluded that Rechebei and Kyota sought to avoid the one-year deadline by making their claim instead under ROP R. Civ. P. 60(b)(6) ("Rule 60(b)(6)"), which allows the court to relieve a party from a final judgment "for any other reason justifying relief from the operation of the judgment." ROP R. Civ. P. 60(b)(6). The trial court noted that, because clause (6) and the first five clauses are mutually exclusive, relief could not be granted under (6) if it would have been available under one of the first five. *See Ngiralmau*, Civ. Act. No. 05-032, Rule 60(b) Decision at 5 (citing *Secharmidal v. Tmekei*, 6 ROP Intrm. 83, 85-86 (1997)). Concluding, the trial court finally stated that

> to the extent Defendants had an argument for recusal, they could have raised it before trial or after trial, within the strictures of ROP R. Civ. P. 59 or 60(b)(2). Alternatively, Defendants could have raised this issue in their appeal. Instead they now seek to use this information one year after the appellate opinion, two years after the trial decision, and four years after initial disclosure of the information. They provide no justification for this delay and it is therefore unacceptable. Defendant's Rule 60(b) motion is DENIED.

Id. at 6-7. This appeal followed.

STANDARD OF REVIEW

[1] An appellate court reviewing the denial of a Rule 60(b) motion can only review the trial court's Order denying that motion. *Secharmidal v. Tmekei,* 6 ROP Intrm. 83, 85 (1997) (citing *Browder v. Dir., Dep't of Corrections of Illinois*, 98 S. Ct. 556, 560 at

n.7 (1978)).[2] Thus, the substance of the judgment by either trial court below is beyond the purview of this Court's consideration. The standard of review for the trial court's order denying a request for relief from judgment is whether the trial court abused its discretion. *Sugiyama v. Ngirasui*, 4 ROP Intrm. 177, 181 (1994). Under this standard, a trial court's decision will not be overturned unless it was "clearly wrong." *Tmichjol v. Ngirchomlei*, 7 ROP 66, 68 (1998).

DISCUSSION

Rechebei and Kyota's opening brief identifies five issues, the first three of which address actions by the original trial court in this case.[3] Because decisional law in Palau is clear that an Appellate Court's review of the denial of a Rule 60(b) motion is limited to the trial court's Order denying that motion, we will not address these issues standing alone. However, to the extent that Rechebei and Kyota made similar arguments in their 60(b) motion below, we shall address the trial court's denial of those issues as pertains to the 60(b) motion itself, under the appropriate standard of review.

I. Whether the trial court erred in denying Appellants' Rule 60(b) motion

[2] Despite the myriad arguments offered in the briefs, the central issue in Rechebei and Kyota's current appeal is whether the trial court erred in denying their Rule 60(b) motion. Rechebei and Kyota filed their Rule 60(b) motion on May 8, 2009, specifically seeking relief under Rule 60(b)(6), which allows a court to relieve a party from a judgment for "any other reason justifying relief from the operation of the judgment." ROP R. Civ. P. 60(b)(6). Unlike Rules 60(b)(1)-(5), which outline specific reasons for relief from judgment, such as, *inter alia*, (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; and (3) fraud, Rule 60(b)(6) is the catch-all provision of Rule 60(b) and affords relief from a final judgment only under extraordinary circumstances. *Irruul v. Gerbing*, 8 ROP Intrm. 153, 154 (2000) (citing *High v. Zant*, 916 F.2d 1507, 1509 (11th Cir. 1990)).

In making their Rule 60(b)(6) argument, Rechebei and Kyota stated that, during the time that they were in the process of briefing issues about the propriety of exhumation in this case, "additional information came to the attention of Defendants' counsel, giving specific information as to the closeness of the relationship of Justice Salii and her husband to the Plaintiffs." (Rechebei and Kyota's Rule 60(b) Mot. at 4 (Civ. Act. 05-032, Tr. Div. May 8, 2009)). This information provided evidence that, during the months leading up to

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[2] ROP R. Civ. Pro. 60(b) is derived from United States Fed. R. Civ. P. 60(b). It is therefore appropriate for this Court to look to United States case law construing Rule 60(b) for guidance. *Gibbons v. Gov't of Republic of Palau*, 1 ROP Intrm. 547 (1988).

[3] Rechebei and Kyota identify these issues as (1) Did the original trial court err in failing to disqualify itself and in failing to place its conflict of interest on the record; (2) Did the original trial court err in failing to recuse itself prior to trial, and; (3) Did either error by the original trial court regarding its conflict of interest constitute reversible error such that a new trial is required. (Rechebei and Kyota's Opening Br. at 4.)

the trial of this matter, Justice Salii had visited Bersik Santos at the hospital and at her home during her illness. *Id.* Rechebei and Kyota also allegedly learned that, when Justice Salii's husband was in high school, he lived with one of the plaintiffs in the underlying case, Santos Ngirasechedui. Rechebei and Kyota claimed that this additional evidence threw "a very large doubt on the issue of whether Defendants [Appellants] had a fair and impartial hearing of their claim." *Id.* at 5.

In addition to learning of Justice Salii's attendance of the funeral, Rechebei and Kyota claimed that Justice Salii's failure to disclose on the record the extent of this relationship caused their admittedly extensive delay in filing the Rule 60(b)(6) motion. *Id*. at 6. Even though they conceded that Justice Salii did disclose this relationship to the parties in chambers at the outset of the case, Rechebei and Kyota stated "[a] judge should disclose *on the record* information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification" for precisely the reason that has caused difficulties in the present case. *Id.* (quoting ABA Model Code of Judicial Conduct, Commentary to Canon 3.E.(1)) (emphasis added). However, in their Rule 60(b) motion, as well as in their briefs on appeal, they failed to brief the issue of Justice Salli's failure to place the conflict on the record more extensively.

Finally, Rechebei and Kyota cited to the *Estate of Tmetuchl v. Siksei*, 14 ROP 129 (2007), in which the Appellate Division reversed the trial court's denial of a Rule 60(b) motion, holding that the presence of inconsistent judgments as to the owner of certain mahogany trees in Aimeliik was sufficient to satisfy the "extraordinary circumstances" requirement for Rule 60(b)(6) motions. Rechebei and Kyota claimed that providing a fair and impartial trial as to the strength of members of a lineage is as extraordinary as the presence of inconsistent judgments in the *Estate of Tmetuchl* case.

In ruling upon Rechebei and Kyota's Rule 60(b) motion, however, the trial court stated that

> Defendants [Appellants] seek to avoid the deadlines and requirements of ROP R. Civ. P. 59 and 60(b)(2), by making their claim under ROP R. Civ. P. 60(b)(6). ROP R. Civ. P. 60(b)(6) allows the court to relieve a party from a final judgment "for any other reason justifying relief from the operation from judgment." Clause (6) and the first five clauses are mutually exclusive; relief cannot be granted under (6) if it would have been available under one of the earlier clauses. . . . Here, Defendants could have sought relief under Rule 60(b)(2), but failed to do so in a timely manner.

Ngiralmau, Civ. Act. No. 05-032, Decision at 5 (Tr. Div. June 8, 2009) (internal citations omitted). In transforming Rechebei and Kyota's Rule 60(b)(6) motion to a Rule 60(b)(2) motion, the trial court spent little time responding to the portions of Rechebei

and Kyota's arguments regarding Justice Salii's failure to include her potential conflict on the record, opting instead to focus on the one-year time bar of Rule 60(b)(2). By filing the putative Rule 60(b)(2) motion one year after the appellate opinion, two years after the trial decision, and four years after the initial disclosure of the potential conflict in Justice Salii's chambers, Rechebei and Kyota clearly did not meet the prescribed time limit under the rule.

As we noted before, Rule 59(a) requires the injured party to file its motion before the Court within 10 days of the entry of judgment. *See* ROP R. Civ. P. 59(b). Alternatively, Rule 60(b(2) allows a Court to relieve a party from a final judgment based on "newly discovered evidence," which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), but such a motion must be made "not more than one year after the judgment, order, or proceeding was entered or taken." ROP R. Civ. P. 60(b). Because of the clear time bar, the question for us, here, is whether the trial court's decision to transform the Rule 60(6) motion to a Rule 60(b)(2) motion was an abuse of discretion. We hold that it was not.

[3] Foremost, Rule 60(b)(6) and the first five clauses of ROP R. Civ. P. 60(b) are mutually exclusive; relief cannot be granted under Rule 60(b)(6) if it would have been available under one of the earlier clauses. *See Secharmidal v. Tmekei*, 6 ROP Intrm. 83, 85-86 (1997). This exclusivity is crucial here, because, if Rechebei and Kyota's motion could have been brought as a Rule 60(b)(2) motion, then the relief contemplated under Rule 60(b)(6) would be wholly unavailable to Rechebei and Kyota, regardless of how extraordinary the circumstances may or may not be. To be sure, the parties have pointed to no contrary authority to this rule of mutual exclusivity, nor has the Court found any in its own research.

In assessing whether the trial court properly construed Rechebei and Kyota's motion as a 60(b)(2) motion, the case of *Idid Clan v. Olngebang Lineage*, 12 ROP 111 (2005) is particularly instructive. In this Land Court case, the Koror State Public Lands Authority ("KSPLA"), after losing at trial, filed a motion for relief from judgment under Rule 60(b)(1) and (2), based upon the discovery of a 1966 government document, entitled "Land Gazette," which referred to the lands in dispute and which significantly bolstered KSPLA's claim. In assessing whether to construe KSPLA's motion under Rule 60(b)(1) for mistake, inadvertence, surprise, or excusable neglect, or Rule 60(b)(2) for newly discovered evidence, the Court acknowledged that the discovery of the Land Gazette months after trial did not fit easily into either of the prescribed provisions. However, using a common sense approach, it ultimately concluded that the KSPLA motion sought relief based on the Land Gazette being newly discovered evidence because "where a claim sounds very much like a claim regarding newly discovered evidence, the claim is controlled by 60(b)(2) and should not be labeled as if brought under a different provision of Rule 60(b). *Idid Clan,* 12 ROP at 119 (quoting *Kalamazoo River Study Group v. Rockwell Int'l Corp.*, 355 F.3d 574, 588 (6th Cir. 2004)).

Here, we recognize that the discovery of Justice Salii's potential conflict likewise does not fit easily into a prescribed category.

For that very reason, however, we cannot say that the trial court abused its discretion in construing it as newly discovered evidence, especially in light of the approach taken in the *Idid Clan* case. Perhaps another trial court could have viewed the discovery of Justice Salii's failure to disclose her relationship on the record as something other than newly discovered evidence—perhaps even a circumstance that fit more precisely within the catch-all provision. This trial court did not and, based on the *Idid Clan* case and on the language used by the parties themselves, we cannot say that it was "clearly wrong" in doing so. *Tmichjol v. Ngirchomlei*, 7 ROP 66, 68 (1998). We therefore AFFIRM the June 8, 2009 Decision of the trial court as to this issue.

II. Whether the trial court erred in granting exhumation on the basis of affidavits or customary experts rather than holding a hearing

Rechebei and Kyota make one final argument, which, although unconvincing, is worth noting briefly. Rechebei and Kyota contend that it was an abuse of the trial court's discretion to order exhumation without holding a hearing to elicit expert testimony. They state, "[w]hen deciding an issue of such importance, and where customary experts disagree, it was incumbent upon the Trial court to hold a hearing so that the issue could be fully heard and resolved. Its failure to hold a hearing was error." (Rechebei and Kyota's Br. at 28). Although we agree that exhumation is a serious issue that could, under certain circumstances, warrant a hearing, on December 10, 2008, the parties agreed at a status conference to resolve the issue without one. The trial court's subsequent order read,

> At this morning's conference, the parties agreed to file motions concerning whether Plaintiffs, as senior strong members of the clan, are entitled to require that Defendants remove the remains of Dirraechetei Ito and Johana Rechebei from a stone platform on Smengesong. . . . The parties have agreed to try to resolve this matter short of a hearing. Both parties will file motions . . . to answer this question by close of business on February 11, 2009.

Ngiralmau, Civ. Act. No. 05-032, Order (Tr. Div. Dec. 10, 2008).

In their appellate briefs here, Rechebei and Kyota do not dispute that they agreed to submit briefs instead of holding a hearing. Rather, they make an unconvincing argument focusing on the word "try," i.e., we promised we would "try" to resolve the issue without a hearing, not that we would in fact resolve it without one. Needless to say, Rechebei and Kyota never moved for a hearing subsequent to their apparent agreement at the status conference in December of 2008. As has been the pattern for Rechebei and Kyota in this action, they come with too little, too late, after having orally agreed to the contrary of their current requests, and after having had the opportunity to object at a far more auspicious time than the present. As to this issue, the trial court clearly did not err in granting exhumation solely on the basis of the affidavits of customary experts.

CONCLUSION

For the reasons set forth above, the June 8, 2009 Decision of the trial court is AFFIRMED.