Olikong. v. Salii, 1 ROP Intrm. 406 (1987)

SANTOS OLIKONG,
IBEDUL YUTAKA GIBBONS
and ALFONSO R. OITERONG,
Plaintiffs/Appellants,

v.

LAZARUS E. SALII,
President of the Republic of Palau,
and JOHN O. NGIRAKED,
Compact Referendum Commissioner,
Defendants/Appellees.

CIVIL APPEAL NO. 21-87
Civil Action No. 104-87

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: July 15, 1987

BEFORE: ARTHUR NGIRAKLSONG, Associate Justice; PAUL J. ABBATE, Associate Justice; ROBERT A. HEFNER, Associate Justice.

PER CURIAM:

This opinion more fully sets forth the reasons for the decision announced by the Court on June 21, 1987, which was to cancel the June 23, 1987, referendum election on the Compact of Free Association.

BACKGROUND

On May 1, 1987, the Olbiil Era Kelulau (OEK) passed Public Law 2-27 and with the President's signature on May 6, 1987, it became law. It provides for a referendum on the Compact of Free Association and its Subsidiary Agreements between the Republic of Palau and the United States. The purpose of the election is to ascertain if there are sufficient votes to implement the Compact and the Agreements.

Public Law 2-27 provides, inter alia, that the President is authorized to set an election date sometime on or before June 30, 1987. He is to serve as a Referendum Commissioner or is to designate someone to serve in that position. The Referendum Commissioner is to conduct the referendum in accordance with Public Law 2-27 and the election law of the Republic of Palau (Title 23 PNC) except where the latter is inconsistent with the former. The Referendum Commissioner is to promulgate rules and regulations to govern the conduct of the election.

⊥407 A fairly elaborate system is established for polling places. Observers from both the administration and the legislative branch are to be stationed at all polling places and each ballot box is to have three locks. The Referendum Commissioner, the administration representative, and the legislative representative are to each have a lock and the ballot box is to be opened only in the presence of the officially designated ballot counters and tabulators. (Sec. 12, Public Law 2-27).

The Referendum Commissioner is also authorized to establish polling places outside of Palau. Where there is no established polling places, the voter may cast an absentee ballot. Section 16 of Public Law 2-27 reads:

> (16) Voting by absentee ballot shall be accomplished according to the provisions of 23 PNC Chapter 15, Subchapter II. However, requests for absentee ballots may be made in writing to the Referendum Commissioner no later than the day before the date of the referendum. The absentee ballots shall be mailed or delivered to the Referendum Commissioner no later than the established closing hour of the referendum election on the day selected for the referendum, provided that, if mailed, it should be postmarked no later than the day of the referendum. In order to be valid, an absentee ballot must be received by the Referendum Commissioner no later than two days after the date selected for the referendum.

Pursuant to the authority granted by Public Law 2-27, rules and regulations were promulgated on May 15, 1987 by the Referendum Commissioner. [1] Section 9 in pertinent part of the ⊥408 rules and regulations provide:

> Section 9. DISPOSITION OF ABSENTEE BALLOTS. Completed absentee ballots shall be returned to the Referendum Commissioner not later than 8:00 p.m. on June 23, 1987, provided that, if mailed, it should be postmarked no later than June 23, 1987 and in order to be valid, such absentee ballots must be received by the Referendum Commissioner not later than June 25, 1987. All absentee ballots shall be held, unopened, in a place to be designated by the Referendum Commissioner, until after June 25, 1987, at which time they shall be

[1] Throughout these proceedings, Mr. John O. Ngiraked has been construed to be the President's designee as the Referendum Commissioner. At the trial court hearing, Mr. Ngiraked indicated he was "the Election Commissioner representative to conduct the referendum." (Tr. p. 3, lines 14-15). Since Mr. Ngiraked promulgated the rules and regulations and all parties have considered him to be the Referendum Commissioner, it is assumed by this Court that that is not a fact in issue. It is noted however, that there appears to be no formal designation of Mr. Ngiraked as Referendum Commissioner by the President. Any designation is found in Section 2 of the rules and regulations which states that the Minister of State (Mr. Ngiraked) shall be the Referendum Commissioner. The rules and regulations are signed only by Mr. Ngiraked. It also appears that the terms "Election Commissioner" and "Referendum Commissioner" are interchanged and refer to the same person. We also use the terms to describe the same individual.

counted in the manner prescribed in subsection (a) of this section.

In order to facilitate participation of the widely scattered citizens of Palau abroad, the Election Commissioner or his appropriate designees may establish voter's service stations outside of Palau. The purpose of such stations shall be to publish and to distribute information materials, including requests for and delivery of absentee ballots and related documents.

In so doing, each and all election officials assigned to such balloting service stations abroad shall be principally guided by the primary objectives for eliminating defects in the documentation process or errors in mailing.

An Absentee-Ballot may be delivered in person to an appropriate Referendum Official at balloting service stations outside Palau and such ballot shall be deemed delivered to the Election Commissioner pursuant to law.

⊥409 Thereafter election officials were dispatched to various places throughout the Pacific and the United States to establish the service stations. [2] By June 13, 1987, election officials had collected absentee ballots from certain U.S. locations. (Tr. pp. 12-14).

The absentee voter at a service station has two options. He may mail the ballot along with his/her affidavit directly to the Election Commissioner in Palau or he or she may hand deliver it to the election official at the service station. (Tr. p. 15, lines 8-20). Should the absentee voter decide to give the ballot to the election official, the latter ". . . is under the instruction to mail it at the post office provided he finds the money to buy the stamps and mail it under the regular postal service and delivery." (Tr. p. 15, lines 23-27, p. 16, lines 1-2). According to Mr. Ngiraked, any mailing from the U.S. mainland is to the Liaison Office in Honolulu. (Tr. pp. 27, lines 7-19). It is then up to the office in Honolulu to deliver the ballots to the Election Commissioner in Palau. (Tr. p. 28, lines 3-9).

No polling places were established outside of the Republic of Palau.

On June 9, 1987, the plaintiffs filed this lawsuit challenging the legality and use of the service stations. The relief requested was in the form of injunctive relief so that any votes delivered to the election officials at the service stations not be counted and the use of the service stations would be enjoined.[3]

The matter was heard in the trial court on June 13th and the relief requested by the

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[2] According to Mr. Ngiraked, service stations were established in Guam, Saipan, Hawaii (2), Oregon, California (3), Colorado, Texas, Arizona, Washington and District of Columbia (Tr. p. 30 lines 18-21). In some cases such as Guam and Honolulu, the regular Liaison Officer's office was established as the service station. The latter required no new personnel. However, in places such as Oregon, an election official needed to travel there to set up the service station.

[3] By June 9th, it appears that the only service stations "open for business" were located in Hawaii, Guam and Saipan. The others had been closed after collecting the absentee ballots.

plaintiffs was denied on two grounds. It was found that the plaintiffs failed to prove the service station concept was illegal and that further, it was too late to disrupt the election process. The court treated the hearing as one for a request for preliminary injunction since a full hearing, including the receipt of testimony, was had. The plaintiffs filed a "Notice of Interlocutory Appeal"on June 16th. On the same date the defendants filed a motion to dismiss the appeal on the ground that there was not final judgment or order to appeal from.

⊥410 Due to the impending election date, June 23rd, a panel of this Court was assembled and a notice of hearing of the appeal was set for June 20th. In the next few days a continuance motion by the defendants, an appellant's brief and appellee's brief were filed.

THE MOTION FOR CONTINUANCE

The defendants have raised the issue of the timing and haste of this appeal--and rightfully so. At first blush, it appears everyone connected with this appeal has discarded or ignored the regular procedures for a calculated and time-spaced appeal. [4] It goes without much discussion that normally, defendants' motion would be granted with a flick of the pen. However, the Court is faced with a very unique situation which dictates that this matter be resolved as quickly as possible. The reasons for this unusual approach to the matter is a combination of circumstances. First, of course, is the impending election date. The issues raised by the plaintiffs go to the very heart of the election. The election code and Public Law 2-27 as well as the panoply of Constitutional rights pertaining to elections demand that a fair and legal election be conducted. Should the Court find that the use of the services stations are legal, the election would proceed with full assurance that any subsequent attach on the use of the service stations would be held for naught. On the other hand, if the service stations are illegal, it is to the benefit of everyone that this be known in advance so that there not be a waste of time, resources, and money. Both sides to this litigation as well as all the voters in the election are to be served by a determination of the legality of the election before it is held if that is possible.

⊥411 In this case, we find it is possible to accomplish a full and fair appellate hearing because of the specific issue presented, the narrow scope of research required of counsel, and the ability to focus on the specific portions of the law involved. There are no factual issues involved. The legal issue is one that can be addressed succinctly by counsel. Indeed, the transcript reflects that the arguments made there are echoed in the briefs filed with this Court.

Research of counsel and the Court basically narrows the authorities which may assist in the resolution of this matter to cases cited at 97 A.L.R. 2d, p. 281 et seq, and a short annotation in American Jurisprudence 2d, Elections. Except for general propositions of law concerning absentee ballots, cases from other jurisdictions are of little assistance and guidance because the specific statutes (Public Law 2-27 and 23 PNC §§ 1524, 1525) and the rules and regulations promulgated for the election are crucial and determinative of the matter.

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[4] The court must mention that both counsel have performed a herculean task in assembling the record and filing comprehensive briefs in a very short time. It probably appears ironic to the defendants that since they were able to file an appellee's brief, this took some of the wind out of their sails in so far as their motion for continuance is concerned.

Lastly, the Court is convinced that since the issue to be decided is so narrow in scope and both sided have fully presented their sides to the controversy, it can proceed to make a fully informed and reasoned decision notwithstanding the speed this matter has proceeded. The motion for continuance is denied.

THE MOTION TO DISMISS

The assertion by defendants that this matter is not in a posture to be appealed may be summarily treated. It is clear that the order of the trial court effectively disposed of the issue presented to it. Once the court found the absentee ballot procedure using the service station was legal, there was no need for any further proceedings at the trial level. There was no prospect nor need to explore further any other factual or legal issue. The order finally determined the issue and dispute between the parties. Defendants cite *Trust Territory v. Kanou*, 7 TTR 331 (App. Div. 1975) as the authority for the proposition that an appeal does not lie from the denial of a preliminary injunction. But as *Konou* recognized, if by the granting or denying the preliminary injunction this ends the action, there is an appealable order.

The key to the determination of whether a judgment or order is final is the substance of the decision rather than its form or name. If the trial court has adjudicated the rights of the parties and no further judicial act is required, the judgment or order may be appealed. In this case, though the request of the plaintiffs was for injunctive relief and the appeal was styled as an interlocutory appeal, it is clear that the trial court's order, in substance, is a final one.

⊥412 The motion to dismiss is denied. This panel has jurisdiction of the appeal.

THE MERITS-STANDING OF PLAINTIFFS AND THE FALL OF THE RULES AND REGULATIONS

With the preliminary issues behind us, we now turn to the crux of this matter and a determination as to whether the ballot service station system established by the rules and regulations comports with Public Law 2-27 and the election laws.

Standing is accorded the plaintiffs as citizens and registered voters of the Republic of Palau.

The right to vote is provided to all eligible citizens of Palau by Article VII of the Constitution of the Republic of Palau. This right has been clarified, safeguarded and preserved in the election law, Title 23 PNC and Public Law 2-27. It has been held in the Republic of Palau, Trust Territory, and states of the United States that voters have standing to bring suit when the election process is not carried out according to law. *Koshiba v. Remeliik*, (Civ. 17-83); *Bedor v. Remengesau*, 7 TTR 317 (Tr. Div. 1976); *Chutaro v. Election Commissioner* , 8 TTR ___ (App. Div. 1981); *Johnston v. Ing*, 441 P.2d 128 (Haw.).

The defendants attempt to distinguish *Koshiba* by arguing that since the plaintiffs are not

absentee voters they don't have standing to challenge the absentee ballot procedure. Defendants miss the mark. The thrust of this action, as well as *Koshiba* and the other election cases is that the election is not being processed and conducted in a manner prescribed by law. Whether the plaintiffs are absentee voters is not important. The fact that they are voters is. The ultimate result, a fair election according to law, is the purpose of the action. Any voter who discerns an illegal procedure in the election process which has the effect of distorting or nullifying the votes cast has standing. Actual fraud need not be shown--only the fact that the election is not being conducted according to law. This right of suit is also granted by statute should the Attorney General fail to act. 23 PNC § 106(b).

⊥413 A few general observations can be made as to the processing and casting of absentee ballots pursuant to 23 PNC §§ 1521-1526. Basically, these provisions were adopted from the Trust Territory Election Code, Title 43. The specifics of how a voter applies for an absentee ballot, votes and returns the ballot are not remarkable nor unusual. They appear to be the generally accepted manner of processing this kind of ballot.

It can be generally stated that since absentee voting is not a recognized right of common law and must be afforded voters by statute, it is a privilege and not an absolute right. 26 Am. Jur.2d Elections, § 243. As noted at 97 ALR2d § 23 at p. 281, one of the initial issues to be resolved is whether the statutory provisions are mandatory or merely directory.

A reading of the pertinent provisions of the Palau election law for absentee voters leads us to the conclusion that they are mandatory. Not only are the provisions specific and detailed in nature but certain provisions such as the manner in which the ballot is to be returned to the Election Commissioner require strict observance. Section 1524 states that after the absentee voter has voted and sealed both the ballot envelope and reply envelope, the voter shall mail the material to the Election Commissioner. Were this not enough to indicate a mandatory direction, § 1525(b) makes it clear that such is the case. Pursuant to that subsection, if the absentee voter does not comply with the requirements of § 1524, the ballot envelope is not even opened and the Election Commissioner is to reject the ballot.

Public Law 2-27 makes certain changes in the absentee voting procedure such as the return date (from 7 to 2 days after the referendum) but there is nothing in the law which amends the law to make it only directory.

The defendants seize upon the words in Public Law 2-27 to support their argument that the ballot service stations are permissible and those two words are found in § 16. The one sentence in question is: "The absentee ballots shall be mailed or delivered to the Referendum Commissioner no later than the established closing hour of the referendum election on the day selected for the referendum, provided that, if mailed, it should be postmarked no later than the day of the referendum." (underlining added)

It is the argument of the defendants that delivery of the ballot by the absentee voter to the election official at the service stations is delivery to the Referendum Commissioner. This argument is patently and fatally flawed.

⊥414 There is only one Referendum Commissioner and defendants can't point to any provision in the law that the person employed to operate a service station is the Referendum Commissioner or even a designee of the Referendum Commissioner. As noted above, Mr. Ngiraked is the Referendum Commissioner. Section 8 of Public Law 2-27 neither allows nor envisions more than one Referendum Commissioner. Defendants argue that generally anyone in an official position can delegate authority--which is generally true. However, this does not transfer the statutorily created position to the delegate. Some of the duties and responsibilities may be assigned but the title and position remain in the same official and when that official is the only one to perform a certain function under the statute creating his position, it is not possible to circumvent the law by creating surrogates.

The fallacy of defendants' argument is further apparent when the procedure as outlines by Mr. Ngiraked is examined. If the election official at a service station is the Referendum Commissioner, that official, pursuant to 23 PNC § 1525(a) has the authority and responsibility to dispose of the ballot. Yet the defendants disclaim this authority and as an alternative state that the Referendum Commissioner (the service sation official) may mail or deliver the ballot to "himself" (another Referendum Commissioner at the Liaison Office in Honolulu) who in turn mails or delivers it to "himself," the Referendum Commissioner or Election Commissioner in Palau.

The reliance of the defendants on the words "or delivered" is simply misplaced. Delivery to the Referendum Commissioner or Election Commissioner is only that--delivery by the absentee voter to the one official who has that title. In practical use, the only time an absentee voter will deliver his/her ballot to the Election Commissioner is if he meets the latter after voting, or the Election Commissioner comes to the place of confinement of a confined person (23 PNC § 1522).

The establishment of the service stations has, in practical effect, converting polling places into unsupervised voting places without any of the safeguards the legislature was so careful to set forth in section 12 of Public Law 2-27. A clear and illegal circumvention of the law has occurred as soon as any election official at the service station receives and takes possession of the absentee ballots. Contrary to the position of the government, the absentee voter at the service station manned by the employee of the Referendum Commissioner did not have an option. Under the law, the only proper procedure was for absentee voter to mail the ballot to the Election Commissioner in Palau.

⊥415 The Court need not dwell on the reasons for the requirements of mailing.[5]

[5] The defendants argue that the mail can be unreliable and even if the absentee voter mails his/her ballot to the Election Commissioner, fraud can occur between the post office and the counting room. This, of course, is true, but the answer to this argument is simple. It is the clear intention of the legislature to commit the temporary custody of a ballot to the United States mails for delivery and there is no intention to allow such custody, even temporarily, to any other person or agency except the Election Commissioner. The fact that skulduggery may Occur with the use of the mails does not dictates that the entire absentee voter system be subjected to the

The defendants assert, and properly so, that the plaintiffs have not shown any voter fraud or manipulation of the absentee ballots. [6] However, the plaintiffs need not do so. Under 23 PNC §§ 1524 and 1525, once the ballots were delivered to the service station election official they did not comply with the law and became void. Needless to say, the procedure of having up to possibly 20% of the total vote in the briefcases or pockets of various election officials for up to several weeks is, at the least disconcerting. [7] Indeed, there is not even the assurance that all the ballots will ever reach Palau.

It is our conclusion that the balloting service stations are an illegal substitute for polling places and the absentee ballots delivered to the election official at said stations are void.

THE REMEDY

This Court has strived to somehow save the election now set for the 23rd of June. Yet it is deemed that there is no alternative. The election must be canceled and a new referendum date scheduled.

⊥416 The plaintiffs only asked that the absentee votes delivered to the election officials at the service stations be voided. This solution is not possible because it disenfranchises a substantial segment of the electorate. These voters would be penalized for relying on the rules and regulations promulgated by the Referendum Commissioner.

One alternative considered by the Court was to proceed with the election but to have the absentee voters vote again so that the votes comply with the election law. This avenue is fraught with peril because it bifurcates the election. In addition, the Court would have to judicially legislate the return date of the absentee ballots. Administratively, there are problems of getting ballots, affidavits, and envelopes to absentee voters. This Court is not certain if a definitive list exists for such voters with their addresses.

In short, no other recourse is available and a new election date must be selected. [8] Pursuant to Public Law 2-27, Section 2(1) the President must set a new date up to and including June 30th by Executive Order. If this is not done, the OEK will have to enact new legislation.

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possible skulduggery amplified two or three times by using the defendants' system.

[6] The records indicates that for some unexplained reason an additional 2,000 ballots were printed. Though this has caused concern with the plaintiffs this is not tantamount to proving election fraud.

[7] Mr Ngiraked testified that in the past elections 20% of the ballots cast were by absentee ballots. However, due to non-compliance with the statutory provision only about 30% of the votes cast were actually counted and not rejected.

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[8] Since the election date of the 23rd is cancelled, it follows that all absentee votes cast must be discarded and the whole process begun anew.