JOHNSON TORIBIONG
v.
TMETBAB CLAN ET AL.

Civil Appeal No. 14-028
Appeal from C/A No. 13-137

Supreme Court, Appellate Division
Republic of Palau

Decided: August 11, 2015

Counsel for Johnson Toribiong ..... Pro Se
Counsel for Tmetbab Clan et al. ..... Raynold B. Oilouch
Debra Lefing

BEFORE: C. QUAY POLLOI, Associate Justice Pro Tem
ROSE MARY SKEBONG, Associate Justice Pro Tem
HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem

Appeal from the Trial Division, the Honorable Kathleen M. Salii presiding.

[1] **Appeal and Error**: Rehearing

As a general rule, issues that were previously available may not be raised for the first time on a Petition for Rehearing. Particularly prohibited are late-filed motions for recusal.

[2] **Courts**: Jurisdiction

A court, uniquely and universally, has the power and duty to examine and determine whether it has jurisdiction of a matter presented before it. That power includes the authority to resolve factual and legal disputes that bear on the question of jurisdiction.

[3] **Courts**: Judges

When temporarily assigned to the Supreme Court pursuant to Palau Const. Art X § 12, a lower court "judge" temporarily becomes a Supreme Court "justice."

[4] **Courts**: Judges

The temporary assignment power granted by Palau Const. Art. X § 12 may be used to temporarily assign judges of lower courts to the Supreme Court.

[5] **Appeal and Error**: Rehearing

Neither the reassertion of a more complicated version of the same argument rejected by the opinion of the Court nor arguments that could have, and perhaps should have, been presented during appeal, are appropriate bases for a petition for rehearing.

Order Denying Petition for Rehearing

Per Curiam:

Before the Court is Appellant Johnson Toribiong's Petition for Rehearing pursuant to ROP R. App. P. 40. Appellant raises four enumerated arguments and theories under which he believes our June 19, 2015 opinion "obviously and demonstrably contains errors of law that draw into question the result of the appeal." Responsive briefing was permitted, and filed by Appellees, on the sole question of the jurisdiction of this panel to resolve this appeal.[1] For the reasons that follow, Appellant's Petition is denied.

STANDARD OF REVIEW

Petitions for rehearing shall be granted exceedingly sparingly, and only where the Court's original decision "obviously and demonstrably contains an error of fact or law that draws into question the result of the appeal." *Rengiil v. Republic of Palau*, 20 ROP 257, 258 (2013) (quoting *W. Caroline Trading Co. v. Phillip*, 13 ROP 89, 89 (2006)). Petitions for rehearing, the appellate equivalent of motions to reconsider, are highly disfavored and are not a vehicle "for affording parties a second opportunity to present their cases." *See Sadang v. Ongesii*, 10 ROP 100, 102–03 (2003).

DISCUSSION

I. The Jurisdiction of This Panel

Appellant's Petition challenges the jurisdiction of this panel to deliver the opinion of the Court. Appellant raises this issue for the first time in such Petition, and, by a separate (and untimely filed) motion, further requests that the members of this panel recuse themselves from ruling on their own jurisdiction.

A. Procedural Notes

[1] We begin with several procedural and prudential concerns. First, we would be remiss if we failed to remind future litigants that 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

[1] Appellant also filed a reply brief, which was not requested by the Appellate Division. Pursuant to ROP R. App. P. 40(a), which prohibits unrequested responsive briefing, it is disregarded.

made in appellant's brief nor offered at oral argument and, therefore, it cannot now be raised."). Particularly prohibited are late-filed motions for recusal.

> 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.

Idid Clan v. Denei, 17 ROP 221, 227 (2010) (internal citations and quotations omitted).

Appellant was served with notice on April 16, 2015, more than two months prior to the issuance of our opinion, informing him that the undersigned judges had been appointed to temporary service in this Court and on this panel pursuant to Article X, section 12 of the Palau Constitution. Appellant is presumed to be intimately familiar with and to understand this process and practice, as he has appeared in numerous appeals before panels including at least one judge appointed for temporary appellate service. We see absolutely no reasonable or justifiable explanation, and none has been offered, for Appellant's failure to raise either of these professed issues in a timely fashion when they presented in April.

Instead, Appellant, in what can only be considered a tacit admission that he intentionally withheld such argument pending the outcome of his appeal, argues in his initial petition that jurisdictional defects cannot be waived, and that jurisdiction cannot be gained by estoppel. On this point, he is correct. However, we assume, without deciding, that Appellant did not believe that controlling legal authority prohibited this panel from ruling on his appeal as he requested, because a failure to disclose any such authority *while requesting that this Court reverse the underlying Trial Division decision* would constitute a serious breach of an attorney's duty of candor towards the tribunal. *See* ABA Model R. of Prof. Responsibility 3.3(a)(2). That a jurisdictional defect cannot be waived does *not* mean a lawyer ethically can abuse a defect to obtain a second appellate review.

[2] We further see no merit to Appellant's request that the undersigned recuse themselves from consideration of this Court's jurisdiction to decide this case. It is well established that a court, uniquely and universally, "has the power and duty to examine and determine whether it has jurisdiction of a matter presented before it. That power includes the authority to resolve factual and legal disputes that bear on the question of jurisdiction." *Roman Tmetuchl Family Trust v. Ordomel Hamlet*, 11 ROP 158, 160 (2004) (internal quotations and citations omitted). This has been established for centuries. *See Koror State Gov't. v. W. Caroline Trad. Co.*, 2 ROP Intrm. 306, 309 (1991) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). Having determined that a defect of subject matter jurisdiction is not waivable, and that this Court itself can decide and

must be satisfied of its own authority to rule, we must address whether such a defect exists.

B. The Temporary Appointment Power of Article X, Section 12

Article X, section 12, of the Palau Constitution expressly provides that the Chief Justice "may assign judges for temporary service in another court." Appellant, who does not contest that the Supreme Court of Palau is a "court" or that the undersigned are "judges," contends that this provision does not allow for the assignment of judges of the Land Court or the Court of Common Pleas to temporary service in the Supreme Court. He relies primarily on the linguistic distinction between the terms "justice," which the Constitution uses to refer to the members of the Supreme Court, and "judge," which the Constitution uses when referring to the members of the National Court and which the enabling acts creating the Land Court and the Court of Common Pleas use in referring to their members. Because "[a]ll appeals shall be heard by at least three justices," Palau Const. Art. X, § 2, he asserts that the undersigned temporarily assigned judges may not hear or decide an appeal and that the temporary assignment power does not include assignment to the Supreme Court.

[3] Related constitutional provisions, however, are never read in a vacuum; they must be read in conjunction with each other and harmonized, for neither can be presumed to be without meaning. *See Remeliik v. The Senate*, 1 ROP Intrm. 1, 5 (High Ct. 1981); *see also Bond v. United States*, 134 S. Ct. 2077, 2098 (2014). Considering the constitutional composition of the judiciary in the context of the temporary service clause, it is clear that this exact process must have been anticipated and intended, and that, when temporarily assigned to the Supreme Court, a lower court "judge" must temporarily become a Supreme Court "justice."

[4] The Constitution requires the existence of only two courts: the Supreme Court and the National Court. Palau Const. Art X, § 1. The existence of all other courts is left to the discretion of the political branches. *Id.* The members of the Supreme Court include the Chief Justice and no fewer than three Associate Justices; the members of the National Court include a Presiding Judge and such other judges as may be provided for by law. *Id.* §§ 2, 4. No other courts or judicial officers are necessary or presumed to exist, so, as such, the temporary service power *must* apply to the judges of the National Court—the only "judges" the Constitution presumes to exist. But the only other *court* presumed to exist is the Supreme Court; if the temporary service power necessarily applies to judges of the National Court, such judges must be eligible to sit, temporarily, on the Supreme Court. Were this not the case, the temporary assignment clause could be superfluous, a construction that must be avoided. Indeed, the Appellate Division reached and exceeded such conclusion in *ROP v. Dercherong*, 2 ROP Intrm. 152, 160 (1990) where it noted, apparently in dicta, that "the Presiding Judge of the National Court can be temporarily assigned *only* to the Supreme Court." *Id.* Consequently, we decline to adopt Appellant's argument that the temporary

assignment power can be used only to assign judges to courts other than the Supreme Court.

Additionally, Appellant alleges that the Court failed to follow a required statutory procedure outlined in 4 PNC § 201, which requires that, if the Chief Justice determines that between one and four temporary or part-time Associate Justices are required, he notify the President and the presiding officers of the Olbiil Era Kelulau with the specific reasons therefor. But we do not believe this statute applies to the Chief Justice's constitutional authority to temporarily assign sitting judges to different courts. First, given that the temporary assignment power is constitutionally granted to the Chief Justice, without reservation, condition, or limitation, section 201 would be unconstitutional to whatever extent it was read to restrict the Chief Justice's expressly delineated authority as it would violate the separation of powers. Second, section 201, which admittedly uses the term "temporary" as well as "part-time," describes the process by which the Part-Time Associate Justices—not the undersigned—were and are appointed to the Supreme Court.[2] The Court has historically distinguished between Associate Justices appointed under these separate sources of authority by designating a permanent, yet part-time, justice as a "Part Time Associate Justice" and by designating a temporarily reassigned judge as an "Associate Justice Pro Tem."

Finally Appellant, without any authority to support this proposition, insists that "[a]t the very least, there should have been one [permanent] member of the appellate division on the panel." We see absolutely no reason for this conclusion, particularly given that Appellant cites *Nguyen v. United States*, 539 U.S. 69 (2003), in the previous sentence. *Nguyen* held that an appellate opinion issued by two properly seated judges and one improper judge was void, because the participation of a single improperly seated judge created a jurisdictional defect that the other two properly seated judges could not cure. Consequently, his argument that the presence of a single permanent Supreme Court justice could have cured such a jurisdictional defect in this case is perplexingly random. Nevertheless, because of the Chief Justice's authority to temporarily assign members of other Palauan courts to service in the Supreme Court, and because the undersigned have been so duly assigned, we decline to reconsider our previous opinion for lack of jurisdiction.

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[2] The current part-time Associate Justices include Katherine A. Maraman, Richard H. Benson, and Daniel R. Foley. They are members of courts in Guam and Hawaii, and thus cannot be assigned for temporary service pursuant to the Chief Justice's constitutional power because they are not otherwise judges of a Palauan Court. Given that the undersigned are each, separate and apart from any temporary duties in the Supreme Court, properly appointed judges of a Palauan Court, the Chief Justice's temporary assignment power is applicable.

II. Appellant's Other Arguments

[5] Appellant's Petition, in sections two through four, asserts "hardly more than a complicated version of the same argument[s] that [were] rejected by the Trial Division and then again by the Appellate Division." *See Rengiil v. ROP*, 20 ROP 257, 258 (2013). Appellant has been reminded that such arguments are *not* an appropriate basis for a Petition for Rehearing on any number of occasions, nor are arguments that could have, and perhaps should have, been presented during the original appeal. *See, e.g.*, *Hanpa Indus. Dev. Corp v. Asanuma*, 10 ROP 39 (2002); *Renguul v. Airai State Pub. Lands Auth.*, 8 ROP Intrm. 323 (2001); *Tarkong v. Mesebeluu*, 7 ROP Intrm. 107 (1998); *Lulk Clan v. Estate of Tubeito*, 7 ROP Intrm. 63 (1998).

We restate and now expand upon what we said in *Espangel and Ucheliou Clan v. Tirso*, 3 ROP Intrm. 282 (1993), because, despite such announcement more than two decades ago, the extensive use of frivolous Petitions for Rehearing and Motions to Reconsider has not substantially changed in the Republic.

> It ought to be understood, or at least believed, whether it is true or not, that this Court, being a Court of last resort, gives great consideration to cases of importance and involving consequences like this, and there should be a finality somewhere. This custom of making motions for a rehearing is not a custom to be encouraged. It prevails in some [jurisdictions] as a matter of ordinary practice to grant a rehearing on a mere application for it, but that practice we do not consider a legitimate one in this Court. It is possible that in the haste of examining cases before us, we sometimes overlook something, and then we are willing to have that pointed out, but to consider that this Court will reexamine the matter and change its judgment on a case, it seems to me, is not taking a proper view of the functions of this Court.

Cahill v. New York, New Haven, & Hartford R. Co., 351 U.S. 183, 186 (1956) (Black, J., dissenting). We reviewed the decision below, the record, and the arguments presented by all parties in great detail in arriving at our opinion. Appellant's assertion that we misapprehended or overlooked elements of his argument, ironically, misapprehends and overlooks significant discussion in our opinion resolving such argument. We will not rehash our opinion here merely because Appellant, improperly, has chosen to do so.

CONCLUSION

For the foregoing reasons, Appellant's Petition for Rehearing is **DENIED**.