Estate of Olkeriil v. Ulechong v. Akiwo, 3 ROP Intrm. 83 (1992)

**ESTATE OF JONAS W. OLKERIIL:
TEMPORARY ADMINISTRATOR JOHNSON TORIBIONG
SUBSTITUTED FOR JONAS OLKERII, DECEDENT,
Plaintiff/Appellant,**

v.

**LAURENTINO ULECHONG,
Defendant/Third Party Plaintiff/Appellee,**

v.

**RAYMOND AKIWO,
Third Party Defendant/Appellant.**

CIVIL APPEAL NO. 25-91
Civil Action Nos. 232-89, 428-90

Supreme Court, Appellate Division
Republic of Palau

Ruling on motions
Decided: February 20, 1992

Counsel for Appellee: Mariano W. Carlos

Counsel for Appellant: Douglas F. Cushnie

BEFORE: FREDERICK J. O'BRIEN, Associate Justice; ROBERT A. HEFNER, Associate Justice; and ALEX R. MUNSON, Associate Justice

O'BRIEN, Associate Justice:

Before the Court for decision are Appllee Ulechong's motions for: (1) relief from the Order of October 29, 1991, grant ing Appellant's motion for an extension of time to file his opening brief, (2) to strike Appellant's opening brief, and (3) to dismiss this appeal.

On July 3, 1991, the Trial Division entered summary judgment. On July 30, 1991, Appellant filed his notice of appeal, in which he designated "the entire records, transcripts, exhibits, and any other documents on file" as the content of the record on appeal.

⊥84 On September 12, 1991, Appellant moved for an extension of time to file his opening brief. The record had not yet been certified, so the Chief Justice dismissed the motion and ordered that Appellant file his opening brief within 45 days of certification of the record. Appellee Ulengchong did not challenge this ruling.

On October 29, 1991, Appellant moved for a further extension, and the Chief Justice granted it the same day. Appellee Ulengchong seeks relief from this ruling pursuant to ROP App. Pro. 27(b), but his position argument the ruling on the earlier motion as well.

In *Becheserrak v. Koror State*, Civil Appeal No. 4-88, decided June 3, 1991, the Appellate Division stated:

> ROP App. Pro. 31(b) is the operative rule (Slip Opinion, p. 3).
>
> Accordingly, we hold that the word "transcript" is limited to testimony and evidence (Slip Opinion, p. 4)
>
> Since none of the trial court hearings dealt with testimony and evidence, the Clerk should have served the certification of record on the date the notice of appeal was filed. The Clerk's failure to serve the certification of record on the date the notice of appeal was filed was an error (Slip Opinion, p.4).

The notice of appeal was filed on July 30, 1991, two months after the appellate decision in *Becheserrak, supra* , so Appellant and Appellee must be presumed to have known that *transcript* means testimony and evidence. Thus, Appellant's inclusion of the word *transcripts*, when he knew there had been no testimony, was mere surplusage. It was the responsibility of the Clerk of Courts to, first, ascertain that there were no transcripts (the judgment was rendered on the pleadings and affidavits) and second, to certify the record as soon as that conclusion was reached. That procedure would have resulted in the record having been certified, thus notifying all parties of the 45-day deadline for Appellant to file his opening brief. The Clerk took no such action, and therefore committed an error of omission, as in *Becheserrak, supra*.

On September 12, 1991, when Appellant moved for an extension of time to file his opening brief, the Chief Justice ruled:

> The Court has reviewed the status of this appeal and it appears that no certification of ⊥85 record has been entered. Accordingly, it is hereby Ordered that this motion be, and the same is, hereby Dismissed.
>
> It is further Ordered that Appellant shall file his opening brief within forty five (45) days from the date of the certification of record by the Clerk of Courts.

While it is true that the net effect of the Chief Justice's disposition of the motion was to give Appellant the extension he had requested, it is equally true that Appellant's brief did not have to be filed until forty-five days after the certification of the record, so Appellant got no

more than that to which he was entitled under the rules. ROP App. Pro. 31(b), the *operative rule* cited in *Becheserrak, supra*, provides:

> Appellant's brief shall be filed within forty-five days after the notification (service) of certification of the record . . . or if a transcript is not designated or is waived, then within forty-five (45) days after the filing of the notice of appeal . . . .

Appellee argues that regardless of the Clerk's failure to certify the record on July 30th, Appellant's opening brief should have been filed by September 13th, so the Chief Justice erred in ordering Appellant that day to file his brief within 45 days of certification of the record.

We decline to accept this argument. In *Echerang Lineage v. Tkel* , Civil Appeal No. 22-84, decided October 21, 1988, the Court said ". . . we find that the initial eighteen (18) months hiatus was attributable to Court personnel and, therefore, not chargeable to Appellant." In *Remeliik v. Luii* , 1 ROP Intrm. 592 (App. Div. Apr. 1989), the court said, ". . . it would not be appropriate to punish the appellants for these administrative problems . . ." (the Clerk's failure to produce a transcript). This Court can find no rational basis for a departure from these precedents.

Inasmuch as the Trial Court judgment being appealed from was a summary judgment, there would be no transcript since testimony was not adduced. If the Clerk of Court (and Appellee's counsel) had appreciated this, there would have been no confusion resulting from Appellant's erroneous inclusion of the word *transcripts* in his designation of the record. Since the error was administrative in nature, we cannot penalize Appellant for it and, therefore, we deny the motion for relief on that ground.

⊥86 Appellee's other argument is directed to the grounds stated by Appellant's counsel in his affidavit. Appellee asked the Court to compare that affidavit side-by-side with the affidavit filed by Appellant himself when he filed the prior motion for an extension. The Court has compared the affidavits and does not see the perjury which Appellee finds there, and so denies the motion for relief on that ground as well.

WHEREFORE, the foregoing considered, the motions to strike Appellant's brief and to dismiss the appeal, which are grounded on the same arguments, are hereby denied.

Resorting to our inherent supervisory powers, we direct the Clerk of Courts henceforth to carefully scrutinize each notice of appeal to determine whether a *transcript* (limited to "testimony and evidence") needs to be prepared and, in the event that no transcript is necessary, to forthwith certify the record and notify the parties pursuant to ROP App. Pro. 10(d).