IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

SHALLUM ETPISON,
Appellant,
v.
GEORGE RECHUCHER,
Appellee.

Cite as: 2020 Palau 14
Civil Appeal 20-006
Appeal from Case No. SP/B 19-00265
(Ref. Case No. LC/N 00-259)

Argued: May 20, 2020
Decided: May 22, 2020

Counsel for Appellant ..... R. Ashby Pate, Lalii Chin Sakuma, & Steven R. Marks

Counsel for Appellee ..... Kevin N. Kirk & Rachel A. Dimitruk

BEFORE: GREGORY DOLIN, Associate Justice
DANIEL R. FOLEY, Associate Justice
KEVIN BENNARDO, Associate Justice

Appeal from the Land Court, the Honorable Rose Mary Skebong, Acting Senior Judge, presiding.

OPINION

BENNARDO, Associate Justice:

[¶ 1] In November 2019, Appellant Shallum Etpison filed a Motion to Intervene with the Land Court in Case No. LC/B 00-259. The land at issue in that case was adjudicated by the Land Court, per Judge Senior, in April 2000. The Land Court assigned Etpison's 2019 motion a new case number, Case No. SP/B 19-00265, and a new judge, Judge Skebong.

[¶ 2] After receiving Appellee George Rechucher's response, Judge Skebong denied Etpison's Motion to Intervene in January 2020. Because we find that Judge Skebong should have disqualified herself from deciding Etpison's motion, we **VACATE** the denial of Etpison's Motion to Intervene, **REMAND** the matter to the Land Court, and order that a new judge be assigned to consider Etpison's motion.

BACKGROUND

[¶ 3] Like many land disputes, this one comes to us with a long history. We summarize below only the parts that are relevant to our disposition.

[¶ 4] In April 2000, the Land Court ordered that a determination of ownership be issued naming Techereng Baules Sechelong as the fee simple owner of property known as *Ngerbechedesau* in Ngermid Hamlet, Koror State. The Determination of Ownership identified the property as both Tochi Daicho Lot Nos. 148, 149, and 150, and as New Lot No. K-167.

[¶ 5] Etpison was not a claimant in Case No. LC/B 00-259. He makes no claim to Tochi Daicho Lot Nos. 148, 149, or 150. Instead, he claims that the boundaries of Lot K-167 were improperly drawn to include property that fell outside the boundaries of Tochi Daicho Lot Nos. 148, 149, and 150. He claims that this error in drawing the boundaries of Lot K-167 caused some of his property to be mistakenly included in the new lot that was awarded to Baules.

[¶ 6] According to Etpison, he did not become aware of the asserted error until after the Land Court awarded Lot K-167 to Baules in April 2000. In June 2000, Etpison's attorney wrote a letter to Judge Senior regarding the claimed error. Etpison's attorney asked for a status conference with the court and with Baules's attorney "to determine whether it is simply a survey error or a boundary dispute" regarding Lot K-167.

[¶ 7] Etpison was not granted a status conference. Instead, he received a response letter signed by Rose Mary Skebong as Land Court Legal Counsel. Skebong's letter indicated that Judge Senior had instructed her to review the matter and respond. In the letter, Skebong stated that a status conference was unnecessary "since the boundaries of Lot K-167 are deemed to be proper."

[¶ 8] Etpison's counsel replied in July 2000 with a letter addressed directly to Rose Mary Skebong. The letter points out some potential confusion regarding whether they were consulting

the same maps and sketches and again asks for a conference "to clear our differences." This letter apparently received no response.

[¶ 9] In the subsequent twenty years, Baules conveyed the property to Rechucher, the appellee in the present appeal. Etpison has attempted to resolve the boundary issue through various means. For example, he raised it in a subsequent Land Court proceeding that adjudicated the adjacent property in his favor, but the Land Court did not comment upon Etpison's boundary arguments and Etpison did not appeal. That Land Court proceeding, Case Nos. LC/B 07-565 and LC/B 07-566, was decided in 2010 by Judge Skebong. More recently, Etpison brought a quiet title action in 2016 in the Trial Division; however, we vacated that proceeding as falling outside the Trial Division's jurisdiction. *Rechucher v. Etpison*, 2019 Palau 25. Following that decision, Etpison filed the underlying Motion to Intervene in Land Court Case No. LC/B 00-259. The Land Court, per Judge Skebong, denied the motion in January 2020, and Etpison appealed.

DISCUSSION

[¶ 10] A significant part of Etpison's current argument in favor of intervention is that his attorney's letters to Judge Senior and Legal Counsel Skebong at the Land Court in 2000 should be treated as motions to intervene. Through Legal Counsel Skebong's response to the first letter and subsequent non-response to the second one, he argues that he was improperly denied the opportunity to present his argument to the Land Court in the summer of 2000.

[¶ 11] Thus, following along with Etpison's argument, whether the Land Court's response in 2000, through Legal Counsel Skebong, was proper or improper is an issue that bears directly on his 2019 Motion to Intervene. Judge Skebong, through her correspondence with Etpison's counsel, functions (or at the very least appears to function) as something akin to a fact witness to that response.

[¶ 12] We are very concerned about whether Judge Skebong's prior participation in the Land Court's 2000 response creates, at a minimum, the appearance that she would have difficulty impartially ruling today on the propriety of her own twenty year old response. We find that it does. Canon 2.5 of the Code of Judicial Conduct requires a judge to disqualify herself "from participating in any proceeding 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." (emphasis added). Thus, Judge Skebong should have disqualified herself from deciding Etpison's 2019 Motion to Intervene.

[¶ 13] Etpison, however, raised the issue of judicial disqualification neither to Judge Skebong nor in his opening brief on appeal. We typically limit our review to arguments that were raised below and in the appellant's opening brief. *See, e.g.*, *Kumer Clan v. Koror State Pub. Lands Auth.*, 20 ROP 102, 105 (App. Div. 2013) ("Generally, arguments not raised in the Land Court proceedings are deemed waived on appeal."); *Anderson v. Kim*, 2018 Palau 23 ¶ 4 (noting that the issues presented in an appellant's opening brief govern the scope of the appeal).

[¶ 14] According to Etpison's counsel, he only learned that the Motion to Intervene was assigned to Judge Skebong when he received the Order denying it. While a lack of opportunity may excuse Etpison's failure to raise the issue in the Land Court, there is nothing to excuse his failure to raise any argument regarding the propriety of Judge Skebong's participation in his opening brief to this Court. Etpison first mentioned the issue in his reply brief, and it then featured prominently in his counsel's presentation at oral argument. We must therefore decide whether such failure resulted in the waiver of the argument.

[¶ 15] We find that the perceived impartiality of a judge is not an issue that is waivable by the parties. The language of the rule is mandatory, and the rule is directed at the judge rather than the parties. *See* Code of Judicial Conduct Canon 2.5 ("A judge shall disqualify himself or herself…").[1] More importantly, the rule exists to protect much more than the interests of the parties involved in the dispute. The perceived impartiality of a judge is an essential ingredient to a judiciary's legitimacy. *See* Preamble to Code of Judicial Conduct ("[A] competent, independent, and impartial Judiciary is essential for the courts to uphold and protect the Constitution and the rule of law."). Thus, like matters involving the limits of a court's jurisdiction, the parties alone do not get to decide whether a judge's impartiality is an issue that needs to be addressed. *See, e.g.*, *Gibbons v. Seventh Koror State Legislature*, 11 ROP 97, 103 (App. Div. 2004) ("[A] defect of subject matter jurisdiction never can be cured or waived by the consent of the parties." (quoting 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1393 (2d ed. 1990)).

[¶ 16] For example, litigants could not agree to have their dispute decided by a judge or justice who had a direct pecuniary interest in the outcome of the dispute. Since the parties are unable to waive such a defect by agreement, it is likewise not waived by a party's failure to properly raise it. A court has not only the *sua sponte* authority, but also a responsibility, to safeguard against violations of Judicial Canon 2.5. We therefore find no waiver of the issue of the propriety of Judge Skebong's participation in the Land Court's determination of Etpison's Motion to Intervene.

[¶ 17] Thus, the Land Court's Order denying Etpison's Motion to Intervene is vacated, and the matter is remanded to the Land Court with instructions that it be re-assigned to a different judge. However, before we close, we take this opportunity to issue some guidance on what the Land Court should consider when deciding a Motion to Intervene.

[¶ 18] For good reason, the Land Court operates under a relatively relaxed set of procedural rules. *See, e.g.*, Land Ct. R.P. 2 (noting that the Land Court Rules of Procedure are to "be construed to ensure fairness in the conduct of hearings and presentation of claims with or without assistance of legal counsel"). Unlike suits in the Trial Division or the Court of Common Pleas,

[1] While the language of the relevant Land Court Rule of Procedure, Land Ct. R.P. 4, places the burden on the parties to timely request judicial disqualification, this rule does not diminish the judge's duties under the Code of Judicial Conduct.

the Rules of Civil Procedure do not apply to Land Court proceedings. *See* ROP R. Civ. P. 1(a). Of particular current importance, the Land Court has no formal rule governing third-party interventions. *See Etpison v. Ngeruluobel Hamlet*, 2020 Palau 10 ¶ 18.

[¶ 19] We note that Judge Skebong's now-vacated Order on Etpison's Motion to Intervene addressed only the timeliness—and, by implication, the prejudice to Appellee—of Etpison's request. In the Land Court, the timeliness of a motion to intervene is a proper consideration, as is any prejudice to others that would be caused by permitting the intervention.

[¶ 20] However, Judge Skebong's Order communicated no assessment of the legitimacy of Etpison's claim. In considering a motion to intervene, we hold that the Land Court should consider the legitimacy of the would-be intervenor's claim. If the Land Court perceives that a would-be intervenor's claim is frivolous or has little chance of success, it is natural and appropriate to weigh that assessment against permitting intervention. However, if the Land Court perceives that a would-be intervenor's claim raises substantial arguments, it is natural and appropriate to weigh that assessment in favor of permitting intervention. We are not implying that the Land Court should commit itself to pre-judging the merits of the would-be intervenor's claim or that the parties should be required to essentially hold a trial on the merits of the would-be intervenor's claim at the intervention stage. Rather, we simply recognize that it is natural and appropriate to consider the legitimacy of the would-be claim as part and parcel of the determination of whether to allow the claim to come in.[2]

[¶ 21] Assessing the legitimacy of a claim as a factor relevant to a preliminary determination is not a new idea. For example, a trial court considers a party's likelihood of succeeding on the merits as part of its determination on whether to issue a preliminary injunction. *See, e.g.*, *Max v. Airai State Pub. Lands Auth.*, 18 ROP 155, 156 (Tr. Div. 2011). Trial courts also consider a losing party's likelihood of success on appeal as a factor when ruling on a motion to stay pending appeal. *See, e.g.*, *Peleliu v. Koror*, 5 ROP Intrm. 189, 191 (App. Div. 1996). In the context of a motion to intervene in a Land Court proceeding, the legitimacy of the intervenor's claim need not be the deciding factor. As we've already noted, timeliness and its cousin prejudice are also appropriate considerations. *See supra* ¶ 19.

[¶ 22] In deciding these motions, the Land Court should balance the various factors. The more time that has elapsed since the decision that would be undermined by the motion to intervene, the higher the odds of prejudice to those that have relied on that decision and consequently the stronger the movant's case will have to be. Of course, given the importance of land and secure titles thereto, at some point the prejudice to the current rights-holder would outweigh even the most meritorious motion to intervene. *Cf. Ngeruburk Clan v. Skebong*, 2019 Palau 39 ¶ 10 ("Today we hold that a statute of limitations must apply to collateral attacks on Land Court judgments, regardless of the type of proceeding in which they are made."). When

[2] Indeed, if the potential merits of the intervenor's claim had no relevance to the question of intervention, there would be little reason for a would-be intervenor to describe the basis for her claim in her motion to intervene.

that point is reached will depend on the circumstances of each case (*e.g.*, a case where the property has been improved and is used for business may well be different in terms of prejudice suffered by the present rights-holder from a case where the land sits fallow). No one consideration will always take prominence over the others. However, the Land Court must consider all the relevant factors and give each its due weight prior to ruling on a motion to intervene.

[¶ 23] Thus, when deciding Etpison's Motion to Intervene on remand, the Land Court should consider the legitimacy of Etpison's claim along with his motion's timeliness and any prejudice that granting it would impose. We offer no opinion on what outcome those considerations should lead to for Etpison's motion. We only note that those considerations should bear on the Land Court's decision on remand.

CONCLUSION

[¶ 24] Accordingly, the Land Court's January 13 Order denying Etpison's Motion to Intervene is **VACATED**. The matter is **REMANDED** to the Land Court with instructions that it be re-assigned to a different judge.