Heirs of Drairoro v. Yangilmau, 10 ROP 116 (2003)

HEIRS OF DRAIRORO and BALTAZAR,
Appellants,

v.

FLORENTINE YANGILMAU, KUTERBIS KUTERMALEI,
ELIA SABINO, and FLAVIAN CARLOS,
Appellees.

CIVIL APPEAL NO. 03-04
Civil Action No. 354-93

Supreme Court, Appellate Division
Republic of Palau

Decided: June 13, 2003

Counsel for Appellants: Mariano W. Carlos

Counsel for Appellees: Yukiwo P. Dengokl

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

⊥117 Appellants Heirs of Drairoro and Baltazar appeal from an order issued by the Trial Division on January 9, 2003, disqualifying their counsel from representing them at trial. We hereby conclude that an order disqualifying an attorney is not an appealable order and dismiss their appeal.

BACKGROUND

In this third appeal of this case regarding land in Echang Village on Ngerkebesang Island, Appellants contest the Trial Division's order issued on January 9, 2003, granting Appellee Yangilmau Claimants' motion to disqualify Mariano Carlos from continuing to proceed as Appellants' counsel.[1] The Yangilmau Claimants argued to the Trial Division that allowing Mr. Carlos to continue to represent Appellants would be adverse to the interests of Mr. Carlos's former client, Kuterbis Kutermalei. Kutermalei had previously been represented in this same matter, along with the rest of the Appellants, by Mr. Carlos. However, on December 23, 1999,

[1]For a more complete recitation of the background of this case, see *Heirs of Drairoro v. Yangilmau* , 9 ROP 131 (2002).

Kutermalei contacted counsel for the Yangilmau Claimants requesting representation.

The Trial Division concluded that allowing Mr. Carlos to continue to represent Appellants would result in a violation of ABA Model Rule 1.9(b), which prohibits a lawyer who formerly represented a client in a matter from representing another person in the same or substantially related matter "in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." The Trial Division also disqualified Mr. Carlos pursuant to ABA Model Rule 3.7, which prohibits a lawyer from being a trial advocate in a case in which he is likely to be a necessary witness. The Trial Division reached this conclusion based on the Yangilmau Claimants' assertion that they intended to call Mr. Carlos as a witness at trial. Appellants seek to have this order overturned.

DISCUSSION

We have not had the opportunity to determine whether a party may take an appeal from a order disqualifying counsel. In *Edaruchei Clan of Ngerdelolk v. Edaruchei Clan of Ngerkeyukl* , 4 ROP Intrm. 63 (1993), we stated that "an order denying a motion to disqualify counsel is not subject to an interlocutory appeal. In the rare instance when a party can prove irreparable harm from proceeding to trial without review of the denial of a disqualification motion, that party may seek relief through a writ of mandamus." *Edaruchei Clan*, 4 ROP Intrm. at 64-65.[2]

Appellants maintain that Article X, Section 6 of the Palau Constitution requires us to hear their interlocutory appeal. We disagree. Section 6 provides that "[t]he appellate division of the Supreme Court shall have jurisdiction to review all decisions of the trial division and all decisions of lower courts." As we have previously observed: "The Constitution does not state when in the judicial process decisions of the Trial Division should be reviewed. However, we have long adhered to the premise that the proper time to consider appeals is after final ⊥118 judgment." *ROP v. Black Micro Corp.* , 7 ROP Intrm. 46, 47 (1998) (citing cases). We have adopted the "final judgment rule" not because of any particular constitutional limit on jurisdiction, but rather as a matter of economy, recognizing that piecemeal appeals disrupt the trial process, extend the time required to litigate a case, and burden appellate courts. *Id.*

Because our final judgment rule is based on prudential policy considerations and not on constitutional or statutory jurisdictional limitations, we have recognized certain exceptions to the rule, including the "collateral order" exception. *Id.* (citing *Cohen v. Beneficial Indus. Loan Corp.*, 65 S. Ct. 631 (1945)). As the United States Supreme Court has described it, "[t]o fall within the collateral order exception, an order must, at a minimum, satisfy three conditions: It must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.'" *Richardson-Merrell, Inc. v. Koller* , 105 S. Ct. 2757, 2761 (1985) (quoting *Coopers & Lybrand v. Livesay*, 98 S. Ct. 2454, 2458 (1978)).

Appellants contend that an order disqualifying counsel falls within the collateral order

[2]Despite stating this rule, we reached the merits of the appeal because neither party had briefed the issue of whether an appeal from such an order could be taken. *Edaruchei Clan*, 4 ROP Intrm. at 64.

exception. They insist that this order will be effectively unreviewable on appeal because it will be impossible for them to show that their lack of success on the merits at trial resulted from the disqualification of counsel. In *Koller*, the United States Supreme Court analyzed whether an order disqualifying counsel fell within the collateral order exception and concluded that it did not. *Id.* at 2766. The court ruled that orders disqualifying counsel cannot satisfy either the second or the third prongs of the collateral order exception. We agree.

With regard to whether an order disqualifying counsel is "completely separate from the merits of the action," the court observed that such orders are typically inextricably bound to the merits. For instance, "orders disqualifying attorneys on the ground that they should testify at trial involve an assessment of the course of the trial and the effect of the attorney's testimony on the judgment." *Id.* at 2765 (citing *Kahle v. Oppenheimer & Co.* , 748 F.2d 337, 339 (6th Cir. 1984)). With regard to whether an order disqualifying counsel would be effectively unreviewable on appeal from a final judgement because, as Appellants maintain, it would be impossible to prove prejudice, the court noted: "If a showing of prejudice is a prerequisite to reversal, then the ruling is not 'completely separate' from the merits because [prejudice] cannot be assessed until a final judgment has been entered; on the other hand, if a showing of prejudice is not required, then the ruling can be effectively reviewed on appeal of the final judgment." *Id*. at 2764 (quoting *Flanagan v. United States*, 104 S. Ct. 1051 (1984)).

We agree and adopt this reasoning. Accordingly, we hold that an order either granting or denying a motion to disqualify counsel is not subject to an interlocutory appeal. In the rare instance when a party can prove irreparable harm from proceeding to trial without review of an order granting or denying a disqualification motion, that party may seek relief through a writ of mandamus. Appellants' appeal is hereby DISMISSED.