

**KIONE ISECHAL,  
Appellant,**

**v.**

**UMERANG CLAN, HILARIA SBAL,  
SABINO SBAL, MITSKO SBAL,  
VICENTA S. OLKERIIL, FRANCISCA  
SENGBAU, and BASILIUS SBAL,  
Appellees.**

CIVIL APPEAL NO. 09-026  
Civil Action No. 05-222

Supreme Court, Appellate Division  
Republic of Palau

Decided: August 11, 2011

[1] **Professional Responsibility:**  
Conflict of Interest

When considering whether a judge has a conflict of interest on a case, the Court will look to whether the facts would cause a reasonable observer to conclude that the judge is able to decide the case impartially.

ORDER DENYING APPELLANT'S  
MOTION TO SET ASIDE OPINION AND  
INSTITUTE NEW APPELLATE PANEL

Counsel for Appellant: Oldiais Ngiraikelau  
Counsel for Appellees: Raynold B. Oilouch

BEFORE: KATHLEEN M. SALII,  
Associate Justice; LOURDES F.  
MATERNE, Associate Justice; RICHARD  
H. BENSON, Part-Time Associate Justice.

PER CURIAM:

Before the Court is Appellant Kione Isechal's June 6, 2011, motion to set aside opinion and institute new appellate panel. After reviewing Appellant's motion, Appellees' response, and Appellant's reply, the Court hereby **DENIES** Appellant's motion.

The basis of Appellant's motion is that there is a question as to the appearance of partiality with respect to Justice Salii and Justice Materne. In support of his motion, Appellant sets forth three reasons to question the impartiality of the justices. First, Appellant points to a house warming party held on September 19, 2005, for Fleming Umiich Sengebau ("Umiich"), one of Appellee Francisca Sengebau's sons, which Justice Salii and Justice Materne allegedly attended. Second, Appellant states that Justice Salii's mother is a fourth cousin of Appellee Francisca Sengebau's late husband, Augusto Sengebau. Third, Appellant states that Justice Materne is the presiding judge for Civil Action No. 07-350, which involves the same land that is the subject of this appeal, that both cases involve the same material issue of ownership of the land, and that Appellant Isechal is a party defendant in the civil action. Appellees refute each of Appellant's contentions in their response. Appellant's reply requests an evidentiary hearing to resolve the factual disputes between the parties and requests that another justice be assigned to hear and decide the motion.

### RELEVANT STANDARDS

Appellees response sets forth the standards relevant to the motion seeking disqualification. The ROP Code of Judicial Conduct, promulgated on March 1, 2011,

provides the standards by which judges and justices should comport themselves.<sup>1</sup> Canon 2, concerning impartiality, provides that "Impartiality is essential to the proper discharge of the judicial office. Impartiality is essential not only to the decision itself, but also to the process by which the decision is made." ROP Code of Judicial Conduct Canon 2. In the application of Canon 2, the Code elaborates that a judge shall be disqualified from "participating in any proceedings 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." *Id.* at 2.5. Such a proceeding specifically noted by the Code is one in which "the judge is related within the first or second degree either by consanguinity or affinity, to party, lawyer, or material witness." *Id.* at 2.5.5.

Canon 4, concerning propriety, provides that "Propriety and the appearance of propriety, are essential to the performance of all the activities of a judge." *Id.* at Canon 4. In the application of Canon 4, the Code provides that "[a] judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities, both professional and personal." *Id.* at 4.1. More specifically, "a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office and the laws of Palau." *Id.* at 4.2. With respect to familial and other relationships, "[a] judge shall not participate in the determination of a case in which any member of the judge's family

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<sup>1</sup> As there is no case law interpreting the new ROP Code of Judicial Conduct, we will consider U.S. case law regarding similar canons or rules of judicial ethics to serve as guidance in interpreting our canons. *See* 1 PNC § 303.

represents a party or is associated with the litigation,” *id.* at 4.4, and that “[a] judge shall not allow family, social, or other relationships to improperly influence the judge’s social conduct and judgment.” *Id.* at 4.7.

Finally, 4 PNC § 304, regarding judicial disqualification, states:

No justice or judge shall hear or determine, or join in hearing and determining an appeal from the decision of any case or issue decided by him. No judge, justice or assessor shall sit in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to, or connected with, any party or his attorney as to render it improper, in his opinion, for him to participate in hearing and determination of the case.

### DISCUSSION

[1] Appellant’s motion to set aside appellate opinion and institute new appellate panel is without merit. First, Justice Salii and Justice Materne’s attendance at a house warming party held at Umiich’s house, which Appellee Francisca Sengebau attended, would not lead a reasonable observer to conclude that they were unable to decide this appeal impartially. Second, Justice Salii’s familial relationship to Appellee Francisca Sengebau is so distant that it does not violate the Code’s canons of impartiality and propriety. Third, Justice Materne’s assignment to a civil action involving the same material issue as concerns

this appeal does not call into question her impartiality or propriety on this appeal because she has made no decision in the civil action and she did not decide the trial case on which this appeal is based.

The Court will begin by addressing Appellant’s request that this motion be decided by another justice. Ordinarily, a motion to recuse directed at an appellate judge is decided by that judge. *Ngerketiit Lineage v. Ngirarsoal*, 8 ROP Intrm. 50, 50 n.1 (1999). Accordingly, it is entirely appropriate for Justice Salii and Justice Materne to consider this motion requesting their disqualification from this appeal, and the Court denies Appellant’s request that another justice decide the motion.

As to Appellant’s request for an evidentiary hearing, there are no factual issues that are dispositive of the resolution of this motion. Accordingly, this request is also denied.

#### *(1) Justice Salii’s and Justice Materne’s Attendance at House Warming/Farewell Luncheon*

The parties dispute the facts as to the event at which Justices Salii and Materne were allegedly in attendance. Appellant states that the event in question was a house warming for Umiich, Appellee Francisca Sengebau’s son, that took place on September 19, 2005. In response, Appellees state that the event was not Umiich’s house warming but a farewell luncheon for J. Uduch Sengebau Senior, who was leaving the bench, held at Umiich’s house some time in late-2006 or early-2007. The exact date and nature of the event are not material for the purposes of

determining whether the justices are disqualified from serving on this appellate panel because, under either event described, their impartiality is maintained. Still, for purposes of this motion, we will use Appellant's statement of the facts. The question to be answered is whether "it may appear to a reasonable observer that the judge is unable to decide the matter impartially." ROP Code of Judicial Conduct 2.5

We disagree with Appellant that a reasonable observer would conclude that Justice Salii and Justice Materne would be unable to decide this appeal impartially because they were present at Umiich's house warming party on September 19, 2005, which Appellee Francisca Sengebau attended. House warming parties are a common occurrence in Palau, and it is customary for many people to attend these events, including close family members and more distant acquaintances. Palau is a small community, in which the population of 20,000 is isolated to a few small islands and a judge's social interaction with prospective parties is inevitable. That a judge knows socially one or more of the parties does not by itself mandate disqualification. 46 Am. Jur. 2d Judges § 141 ("Prejudice growing out of . . . social relations generally is insufficient to disqualify a judge."). This is especially so in rural areas, where it is not uncommon for a judge to have a friendly relationship with numerous members of the community. *Id.* However, there may be situations in which the social relations between a judge and a party are substantial enough to merit recusal. *Id.* This is not the case here. Appellant points to only one event that the justices allegedly attended, not a repeated series of events. Any possibility of bias is further attenuated by the

fact that the house warming took place four years before the notice of appeal was filed in this case and that the relationships between the justices and Appellant Francisca Sengebau are distant, at best. Justice Salii's mother is a fourth cousin of Appellant Francisca Sengebau's deceased husband, Augusto Sengebau, and Appellant has not established Justice Materne's affiliation with Appellee Francisca Sengebau.

Contrary to Appellant's argument, a reasonable observer would conclude that Justice Salii and Justice Materne's presence at an event, also attended by Appellee Francisca Sengebau, held four years before the notice of appeal was filed does not violate the Code's canon of impartiality and mandate disqualification. To conclude otherwise would require judges to recuse themselves from all cases in which they have ever associated with any of the parties in any casual, social capacity. Such a rule would make it exceedingly and unreasonably difficult to assign cases to judges, particularly in a country like Palau with a small population and close-knit community, and would result in a greater frequency of recusals in cases where there is no violation of the canons.

*(2) Justice Salii's Relationship to Appellee Francisca Sengebau*

The parties agree that Justice Salii's mother is Christine Salii, and that Christina Salii is a fourth cousin of Joseph Augusto Sengebau, the deceased husband of Appellee Francisca Sengebau. One of the issues here is whether "it may appear to a reasonable observer that the judge is unable to decide the matter impartially." ROP Code of Judicial Conduct 2.5. Canon 2 specifically notes that

a judge shall disqualify himself or herself from a case in which the judge is related within the first or second degree to a party, lawyer, or material witness. A second issue is whether any member of the judge's family is associated with the litigation, in violation of canon 4. The Code defines a "Judge's family" as "a judge's spouse, son, daughter, son-in-law, daughter-in-law, and any other close relative or person who is a companion or employee of the judge or who lives in the judge's household." *Id.* at 8.4.3.

Again, Appellant's argument that Justice Salii's distant familial relationship to Appellee Francisca Sengebau calls for her recusal on the basis of partiality or impropriety is without merit. The Code specifically identifies those familial relationships that require the disqualification as relations within the first or second degree, either by consanguinity or affinity. Here, the relationship between Justice Salii and Appellee Francisca Sengebau is one of affinity of the fourth degree. If the Code considered such a familial relationship a threat to a judge's impartiality, it would have included it in application 2.5.5. Although application 2.5 states that it is not limited to the instances listed, it does identify specific family relationships and a relation of affinity of the fourth degree is not among those. Under the ABA Model Code of Judicial Conduct and the majority of U.S. jurisdictions, a judge should disqualify himself or herself if the judge is related to a party within the third-degree. Model Code of Judicial Conduct Rule 2.11 (2007); 46 Am. Jur. 2d Judges § 112. Notably, Palau's Code of Judicial Conduct is more lenient in its rule, as it limits judges from hearing cases in which a relation of the second-degree is party to the case. Even

under the more stringent ABA and U.S. rules, the relationship between Justice Salii and Appellee Francisca Sengebau would not be a ground for recusal. Finally, no member of Justice Salii's family as defined in the Code is associated with this appeal and thus cannot call into question the propriety of Justice Salii sitting on this appellate panel.

*(3) Justice Materne's Assignment to Civil Action No. 07-350*

The parties are in agreement as to the facts regarding Justice Materne's assignment to Civil Action No. 07-350. The civil action and the civil appeal involve the same piece of land: *Remiang*; the same material issue: the ownership of *Remiang*; and one of the same parties: Appellant Isechal. The first question here is whether "it may appear to a reasonable observer that the judge is unable to decide the matter impartially." ROP Code of Judicial Conduct 2.5. The second question is whether the judge has conducted herself "in a way that is consistent with . . . the laws of Palau." *Id.* at 4.2 The law of interest here is that "[n]o justice or judge shall hear or determine, or join in hearing and determining an appeal from the decision of any case or issue decided by him." 4 PNC § 304.

Justice Materne's assignment to both Civil Action No. 07-350 and Civil Appeal No. 09-026 raises no issue regarding her impartiality to remain on the panel for this appeal. Under application 2.5, a situation in which a judge must disqualify herself is when the judge's ruling in a lower court is the subject of review. ROP Code of Judicial Conduct 2.5.4. However, even where a judge sits on one appeal and then sits on a subsequent appeal in the same or a related

case, there may be no finding of bias. *Ngerketiit Lineage*, 8 ROP Intrm. at 50–51. In *Ngerketiit Lineage*, appellant sought disqualification of all three justices on the appellate panel on the basis that each was a member of the appellate panels that previously heard and decided appeals between the parties to the current appeals. 8 ROP Intrm. at 50. Concluding that there were no grounds for recusal, the Court held that “neither is there any appearance of partiality or anything at all unusual in the fact that a judge who sat on one appeal may sit on a subsequent appeal in the same or a related case.” *Id.* at 50–51.

The case at bar concerns even less involvement by Justice Materne in a similar case than the justices on the *Ngerketiit Lineage* panel. Indeed, Justice Materne has made no findings in the civil action, and, in fact, halted those proceedings while this appeal is ongoing. Although application 2.5 does not provide an exhaustive list of the situations that might result in a reasonable observer concluding that the judge is unable to decide a matter impartially, the current situation does not run afoul of Canon 2. A reasonable observer would conclude that there is no threat to her impartiality during this appeal because she is not reviewing any decision she made in the trial court, and she is not making any decisions below that will affect the outcome of this appeal. Also, Justice Materne’s conduct raises no concern under Canon 4 regarding propriety because she did not preside over the civil action that gave rise to this case. Accordingly, she has conducted herself in a way that is consistent with 4 PNC § 304 and with Canon 4.

Finally, should the parties to the civil action decide that there is a question as to

Justice Materne’s impartiality following her involvement with this appeal, those parties should seek redress in that forum. However, at this time, there is no reason to question Justice Materne’s impartiality with regard to his appeal.

### CONCLUSION

For the reasons stated above, the Court hereby **DENIES** Appellant’s motion to set aside appellate opinion and institute new appellate panel.