

Silmai v. Kumangai, 1 ROP Intrm. 47 (Tr. Div. 1982)
**SADANG N. SILMAI, MECHUTEDIL
NGIRAIWET, BEKETAUT TOWAI,
REMENGESAU ADERKEROI, FERISTA TOWAI, and ERRENGAS BUKRINGANG,
Representing NGARDMAU MUNICIPAL
COUNCIL and the PEOPLE OF
NGARDMAU MUNICIPALITY,
Plaintiffs,**

v.

**MAGISTRATE OF NGARDMAU
MUNICIPALITY, AICHI KUMANGAI,
Clerk of Ngardmau Municipal Council,
FELIX PERRIN, and President of the
Republic of Palau, HARUO I. REMELIIK,
Defendants.**

CIVIL ACTION NO. 95-82

Supreme Court, Trial Division
Republic of Palau

Judgment

Decided: September 15, 1982

BEFORE: MAMORU NAKAMURA, Chief Justice.

This matter came on regularly before this Court for trial on August 13, 1982. Plaintiffs were represented by Johnson Toribiong, Esq., and defendants Aichi Kumangai and Felix Perrin were represented by John K. Rechucher, Esq. Defendant Haruo I. Remeliik was dismissed from the action during the pre-trial conference held on August 11, 1982. The trial lasted for three (3) days, and the counsel presented their closing arguments on August 17, 1982. On August 25, 1982, the Court rendered its oral judgment in open court. After the presentation of the oral judgment, the Court advised the counsel and the parties that a written judgment would follow. The assessor was Mr. Augusto U. Demei.

The pertinent facts of this case are as follows. Pursuant to Section 3 of Ngardmau Municipal Ordinance No. 81-003, as amended by Ngardmau Municipal Ordinance No. 81-004, the Ngardmau Constitutional Convention convened on August 11, 1981, to formulate and adopt a draft constitution for Ngardmau State. The Convention met for thirty-five (35) days and adjourned on October 31, 1981, without completing its work.

148 Pursuant to Ordinance No. 81-003, as amended, the referendum was scheduled to be held by November 15, 1981, the election or appointment of the state officials on December 15, 1981, and the installation of the constitutional government by January 10, 1982. Unfortunately, none

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of the three foregoing scheduled events, the referendum, election or installation, occurred.

On November 12, 1981, the Ngardmau Council passed an ordinance establishing a Post Convention Committee consisting of seven (7) members. The ordinance was signed by the President of the Republic of Palau on December 3, 1981, and became Ngardmau Municipal Ordinance No. 81-005. This ordinance empowered the Post Convention, among other things, to be responsible for political education, the referendum, completion of the Convention records and other unfinished work of the original Constitutional Convention. The installation of the Constitutional Government was postponed until February 20, 1982.

On December 16, 1981, the Municipal Council passed another ordinance for the re[-] convention of the Ngardmau Constitutional Convention, “for the sole purpose of review the English translation of the draft Ngardmau Constitution as adopted by the Ngardmau Constitutional Convention and to reconcile with its Palauan version; to amend Ngardmau Municipal Ordinance No. 81-005 to change the dates of the constitutional referendum, election of the officials of the constitutional government, effective date of the draft constitution, installation of the constitutional government and its officials, to extend the terms of the Magistrate and Council, and for other purposes.” The ordinance was approved by the President on January 6, 1982, and became known as Ngardmau Municipal Ordinance No. ND-01-82.

The Convention reconvened but failed to accomplish its tasks as mandated by Ordinance No. ND-01-82.

On January 13, 1982, the Municipal Council met and passed another ordinance authorizing the Convention to reconvene “for the purpose of reviewing the draft Ngardmau Constitution adopted by the Ngardmau Constitutional Convention and to reconcile the English and Palauan versions thereof; to amend Ngardmau Municipal Ordinance No. ND-01-82 to change the dates of the constitutional referendum, election of the officials of the Constitutional government, effective date of the draft constitution, installation of the constitutional government and its officials, to extend the terms of the Magistrate and Council, and for other purposes.” The Ordinance was signed by the President on January 19, 1982, and became known as Ngardmau Municipal Ordinance No. ND-02-82.

149 Pursuant to Section 1 of Ordinance No. ND-02-82, the Convention reconvened on March 3, 1982. Even though the Convention was authorized to meet for a period of twenty-eight (28) days, on March 5, 1982, the officers of the Convention, except the Vice-President, made a report to the Magistrate and the Council that it could not proceed with its work (Plaintiff’s Exhibit No. 15), and had to adjourn. In this report, the officers stated that the Convention could not proceed with its work because there was no cooperation amongst the delegates, consequently creating political chaos in the State of Ngardmau. The report recommended that the resolution of the Draft Constitution for the State of Ngardmau be deferred until there is peace within the community of Ngardmau. It further recommended that an election of the Magistrate be held no later than June 1, 1982.

On March 28, 1982, upon the call of the Magistrate, the Council met and passed yet

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another ordinance. The ordinance became Ngardmau Municipal Ordinance No. ND-03-82. Section 1 of the said Ordinance states:

The Convention met on March 3, 1982, and decided that it was not able to perform its task as mandated by Section 1 and 2 of Ngardmau Municipal Ordinance No. ND-02-82 for a number of reasons. Such reasons includes uncooperativeness among the members of the Convention, lack of funds, and internal disputes among the Chiefs of Ngardmau State. The Council, after considering these reasons realizes the difficulties faced by the convention and decides to accept its inability. It finds however the Post Convention Committee can perform the task under close supervision and direction of the Council and that Committee has sufficient funds remaining available now that can be used to accomplish the mandates of Ngardmau Municipal Ordinance No. ND-02-82. (Plaintiff's Exhibit No. 11).

The members of the Post Convention met and revised the Draft Constitution originally drafted by the Constitutional Convention. The Post Convention Committee made written report dated May 10, 1982, to the Magistrate and the Council, recommending that a referendum on the Revised Draft Constitution be held on May 31, 1982.

The referendum was held on May 31, 1982, and the 150 revised draft constitution was approved by a majority of the voters of Ngardmau State. It was subsequently certified by the Vice-President of the Republic of Palau.

On June 7, 1982, the plaintiffs filed a complaint requesting the Court to declare Ordinance No. ND-03-82 null and void, and also to invalidate the May 31, 1982, referendum. An Amended Complaint was filed on July 16, 1982, and the Answer to the Amended Complaint was filed on August 3, 1982. As mentioned herein above, the trial commenced on August 13, 1982.

The basic issue in this case is the validity of Ngardmau Municipal Ordinance No. ND-03-82 (hereinafter referred to as the Ordinance). The plaintiffs contend that the Ordinance was not enacted pursuant to applicable law, as a proper quorum was not present during its passage on March 28, 1982. Consequently, they argue it is null and void, along with the subsequent acts taken by the Post Convention Committee pursuant to the Ordinance. The plaintiffs contend that the referendum, held on May 31, 1982, regarding the Revised Draft Constitution is also invalid.

The defendants contend that there was a quorum present and that the Ordinance was properly enacted as mandated by RPPL No. 1-7. They further contend that even if the Ordinance was not passed according to proper procedures, any defects in the procedure were cured by the subsequent ratification of the Revised Draft Constitution by the electorate of Ngardmau State. They also contend that the plaintiffs are guilty of laches since they waited to file their Complaint until after the referendum had taken place.

Section 1, Article II of Ngardmau Municipal Ordinance No. 5-59 lists the members of the

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Council. Section 1 states:

The Council shall be composed of the magistrate; the duly recognized hereditary paramount municipal chief, Beouch; the three (3) duly recognized hamlet chiefs; the duly elected representative or representatives of Ngardmau Municipality to the Olbiil Era Kelulau era Belau, known as Chadal Olbiil; the Presiding Community Court Judge of Ngardmau; and the heads of Ngarachekil, Ngarabekall, and Ngaratumetum societies.

The total membership, as listed in Ordinance No. 5-59, is eleven (11).

Since Municipal Ordinance No. 5-59, which was enacted **L51** and approved in January, 1959, has never been amended, modified, or repealed, it is incumbent upon the Court to make factual findings as to the status of each seat of the Municipal Council; whether it is vacant, filled or has been repealed by implication of law.

The Court concludes that two (2) of the eleven (11) seats have been repealed by implication of law. They are the seats for the representatives to the Olbiil Era Kelulau (National Congress) and the Presiding Community Court Judge of Ngardmau.

Pursuant to Section 1, Article II of Municipal Ordinance No. 5-59, the membership of the Council includes “. . . the duly elected representative or representatives of Ngardmau Municipality to the Olbiil Era Kelulau era Belau, known as Chadal Olbiil . . . [.]” The Court finds that this provision is in conflict with the Constitution of the Republic of Palau which became effective on January 1, 1981. In particular, it conflicts with Section 10, Article IX of the Constitution of the Republic of Palau. Section 10 reads in part:

. . . A member may not hold any other public office or public employment while a member of the Olbiil Era Kelulau . . . [.]

The Court finds that membership in the Municipal Council of Ngardmau State is holding a public office.

Pursuant to Section 2, Article II of the Constitution of the Republic of Palau, “any law, act of government, or agreement to which a government of Palau is a party shall not conflict with this Constitution and shall be invalid to the extent of such conflict.” (Emphasis added). Therefore, the Court concludes that the provision in Section 1, Article II of Municipal Ordinance No. 5-59 providing for a Council seat for the representative to the Olbiil Era Kelulau is invalid as it is in conflict with Section 10, Article IX of the Constitution of the Republic of Palau. However, as this provision of Municipal Ordinance No. 5-59 has never been challenged, the Court’s decision today will not be applied retroactively. Therefore, for purposes of this action, the presence of Delegate Akiko Sugiyama, will be counted in determining whether a quorum was present at the March 28, 1982, meeting of the Ngardmau Municipal Council.

With respect to the position of the Presiding Judge of the Community Court, the Court

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concludes that the position was repealed when the courts for the Republic of Palau were **L52** established and certified on December 23, 1981. RPPL No. 1-17, which established the various courts of the Republic of Palau, did not establish community courts for the various states. Consequently, pursuant to RPPL No. 1-17, and Section 3(a), Article XV of the Constitution, the community courts for the various municipalities which were in existence prior to December 23, 1981, were repealed by implication of law. The total membership of the Municipal Council therefore, has been reduced from eleven (11) to nine (9). The Court concludes that the other nine (9) seats are either filled or vacant.

The question then is whether or not a proper quorum was present at the time the Ordinance was adopted on March 28, 1982.

According to Section 2, Article III of Ordinance No. 5-59, "A quorum shall consist of the two-thirds (2/3) of the total membership of the Council . . . [.]" Two-thirds (2/3) of nine (9) is six (6); consequently, at least six (6) of the nine (9) members of the Council must be present to conduct municipal business. There must be four (4) affirmative votes to enact and pass a proper ordinance.

It is not in dispute that there were seven (7) persons present at the March 28, 1982 meeting of the Council. They are: 1) Aichi Kumangai, the Magistrate; 2) Ngirucherong Rechelulk, acting as Beouch; 3) Masaomi Kumangai as Acting Ngirkebai, Chief of Urtmau hamlet; 4) Arbedul ra Teblak Renguul as chief of Ngerutoi hamlet; 5) Delegate Akiko Sugiyama in her capacity as representative to the Olbiil Era Kelulau; 6) John K. Rechucher as Acting Adekeroi; [and] 7) Eangel Adekeroi as head of Ngaratumetum society.

Let us look at each of the seven (7) persons who attended the meeting and determine whether he or she was bona-fide member of the Municipal Council on March 28, 1982.

Plaintiffs do not challenge the membership of Magistrate Aichi Kumangai and Arbedul Renguul in the Council. In addition, although Beketaut Towai and Masao Miyozawa were not present at the March 28, 1982, meeting, their membership in the Council is also not in dispute. Plaintiffs, however, contest the membership of Delegate Akiko Sugiyama, Ngirucherong Rechelulk, Masaomi Kumangai, John K. Rechucher, and Eangel Adekeroi.

As discussed above, Delegate Akiko Sugiyama, as a member of the Olbiil Era Kelulau, is prohibited by the Constitution of the Republic of Palau from holding another public office such as membership in the Ngardmau Municipal **L53** Council. However, as stated above, her presence at the March 28, 1982, will be considered in establishing a quorum.

With respect to Ngirucherong Rechelulk, the Court concludes that he was not Beouch at the time of the meeting. The minutes of the Municipal Council meeting held prior to the March 28, 1982, meeting clearly show that even though he was allowed to sit in those meetings, the Council never recognized his membership. Furthermore, he has not been recognized by the National Council of Chiefs as a traditional chief from Ngardmau. The record is amply clear that since the impeachment of Acting Chief Beouch Ngiratmab by the Ngarardmau in July of 1981,

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the position of Beouch has been and still is vacant. Consequently, Ngirucherong Rechelulk's presence and vote in the passage of the Ordinance must be disregarded.

John K. Rechucher claims that he was appointed as Acting Adekeroi by Ngirchurong Rechelulk on March 28, 1982, the day on which the ordinance was voted on and passed. It is interesting to note that Mr. Rechucher has never been a member of the Council prior to March 28, 1982, nor did he participate as a member of the Council prior to that date. Furthermore, the record amply shows that Masao Remengesau was Adekeroi, and that he had participated in the previous meeting of the Council. The Court therefore concludes that Masao Adekeroi was and still is a member of the Council. Since Ngirucherong Rechelulk was not the Beouch, his appointment of Mr. Rechucher must fail[,] and it has no legal effect.

In regard to Masaomi Kumangai, the Court concludes that he was not a bona-fide member of the Council on March 28, 1982. He was appointed by Aichi Kumangai, who claims to be Ngirkebai, as Acting Ngirkebai. The dispute between Aichi Kumangai and Sadang Silmai as to who is the rightful title bearer of Ngirkebai is still pending before the Court of Common Pleas. While Sadang Silmai has not been declared as Ngirkebai, he has participated in the Municipal Council since 1977 as Ngirkebai. More importantly, in Civil Action No. 12-78, Aichi Kumangai, the plaintiff in that case, and Sadang Silmai, the defendant, stipulated for the dismissal of the case with the condition that "Sadang Silmai shall continue to hold the title Ngirkebai of Ngirkebai clan of Ngardmau Municipality until further notice . . . [.]” That stipulation is still in effect today and will not be disregarded by this Court. The Court concludes that even though the dispute over the titleship of Ngirkebai is still pending, Sadang Silmai is a member of the Ngardmau Municipal Council for purposes of this action. Accordingly, Aichi Kumangai's appointment of his younger brother, Masaomi Kumangai, as Acting Ngirkebai must fail.

154 Eangel Adekeroi voted in the March 28, 1982, meeting as head of Ngaratumetum. Ngaratumetum is a traditional association of the young women of Ngardmau State. Defendants contend that Eangel replaced Felista Towai as head of Ngaratumetum prior to the March 28, 1982 meeting. But the record does not support such a contention. The minutes of the previous meetings of the Council clearly show that Felista Towai had attended the meetings of the Council prior to the March 28, 1982 meeting. Even the Magistrate and the Clerk of the Municipal Council recognized her as a member. This was evidenced by the fact that she was notified by them to attend the meeting on March 28, 1982, several times. After learning that she refused to attend the meeting, Eangel Adekeroi attended the meeting in her place. The Court finds that as Eangel Adekeroi is not the head of Ngaratumetum, she is not a member of the Council. Therefore, her presence at the March 28, 1982 Council meeting had no legal effect in determining the existence of a quorum.

Defendants next contend that Ngarachekil, the traditional association of older women of Ngardmau, has ceased to exist. Plaintiffs argue that it is still in existence. There was conflicting testimony regarding its existence, but the Court concludes that Ngarachekil is very much alive today even though there is dissension among its members. The Court finds that the association is headed by Mutechedil Ngiraiwet and that therefore, she is a member of the Council although she

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was not present at the March 28, 1982 meeting.

In summary, the Court concludes that there were only three (3) bona-fide members of the Municipal Council who attended the meeting held on March 28, 1982. They are: Aichi Kumangai, the Magistrate, Delegate Akiko Sugiyama and Arbedul ra Teblak Renguul, as chief of Ngerutoi hamlet. Consequently, there being no legal quorum, the Ordinance is null and void. See 56 Am. Jur. 2d., *Municipal Corporation*, § 163.

As a result of the above findings, the Court finds the following persons are the present members of the Ngardmau Council: 1) Aichi Kumangai, the Magistrate; 2) Sadang Silmai, head of Urtmau hamlet; 3) Masao Adekeroi, head of Ngarabekall; 4) Beketaut Towai, Acting Principal of Ngardmau Elementary School; 5) Masao Miyozawa, representative of Errengas, head of Ngetbong hamlet; 6) Renguul Arbedul, head of Ngerutoi hamlet; 7) Mechutedil Ngiraiwet, head of Ngarachekil; and 8) Felista Towai, head of Ngaratumetum. The seat of Beouch is vacant.

Defendants argue that even if there were procedural defects in the passage of the Ordinance in question, the ratification of the Revised Draft Constitution by the voters of L55 Ngardmau State cured the defects. The Court finds this contention without merit.

The absence of a quorum is not a procedural defect. Section 2, Article III of Ordinance No. 5-59 calling for a quorum, is a mandatory provision and must be strictly complied with. As stated earlier in this decision, “acts done when less than a legal quorum is present are void.”

Ratification of the Revised Draft Constitution by the voters of Ngardmau State did not validate the Ordinance. As the Court finds that the Post Convention Committee was not properly authorized by the Ordinance to revise the original Draft Constitution of Ngardmau State, the referendum on the Revised draft Constitution must be set aside.

Defendant’s final argument is that the plaintiffs are guilty of laches, and consequently they should be estopped from challenging the validity of the Ordinance. The Court concludes that the doctrine of laches is not applicable to the facts and circumstances of this case. The plaintiffs voiced their objections to the defendants’ action to appropriate officials as early as March 31, 1982 (Plaintiff’s Exhibit No. 17). Therefore, the Court finds no unreasonable delay on the part of the plaintiffs in bringing this action.

In passing, it should be emphasized that the Municipal Council is a creature of the Administering Authority. It was established through a Charter issued by the High Commissioner in 1959. The Council is a representative form of government, and as such it should be governed by democratic principles. Notification of meetings must be given to each member well in advance so that each member may attend the meeting. This applies, particularly where there have been no formal rules of procedure adopted by the Council, such as the case at hand.

The March 28, 1982, meeting was a special session called by the Magistrate. The notices for the meeting were prepared on March 27, 1982, and were sent to the members on the same day. Some of the members did not receive their notices and others received them while they

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were in Koror. Such short notice, violates due process of law.

Another point which should be emphasized here is that for a legislative body such as Ngardmau Municipal Council to function properly, it must maintain stability and continuity in its membership. Frequent changes in membership inevitably lead to political chaos.

156 IT IS THEREFORE ADJUDGED AND ORDERED as follows:

1. That Ngardmau Municipal Ordinance No. ND-03-82 is hereby declared null and void;
2. That the May 31, 1982, Ngardmau State Constitutional referendum is hereby set aside, the results thereof declared null and void.