

FILED 

IN THE  
SUPREME COURT OF THE REPUBLIC OF PALAU  
APPELLATE DIVISION

2014 MAY -8 PM 12: 54

SUPREME COURT  
OF THE  
REPUBLIC OF PALAU

-----X  
JACKSON M. HENRY,  
  
Appellant,  
  
v.  
  
MUTOU SHIZUSHI  
  
Appellee.  
-----X

CIVIL APPEAL NO. 14-004  
(Civil Action No. 09-072)

**ORDER**

Decided: May 8, 2014

Counsel for Mr. Henry: Tamara D. Hutzler  
Counsel for Mr. Shizushi: Elyze McDonald Iraitte

BEFORE: LOURDES F. MATERNE, Associate Justice; R. ASHBY PATE, Associate Justice; and KATHERINE A. MARAMAN.

Appeal from the Trial Division, the Honorable Arthur Ngiraklsong, Chief Justice, presiding.

PER CURIAM:

Before the Court are two motions: (1) Appellee Mutou Shizushi's (Shizushi) motion to dismiss the appeal, in which Shizushi argues that Appellant Jackson Henry's (Henry) appeal is untimely and should be dismissed for lack of jurisdiction; and (2) Shizushi's counsel's motion to withdraw and stay proceedings. For the following reasons, Shizushi's

motion to dismiss is **GRANTED** and his counsel's motion's to withdraw is **DENIED AS MOOT**. We will address each motion in turn.

### **I. Motion to dismiss the appeal**

#### **BACKGROUND**

On October 12, 2012, the trial court granted Shizushi's Motion for Summary Judgment, entitling Shizushi to collect a judgment in the amount of \$1,000,000.00 against Henry. As there are remaining unresolved claims in the case, Shizushi filed a motion for Rule 54(b) certification, seeking a ruling that the order granting Shizushi's summary judgment was a final judgment separable from the other unresolved claims in the case. On April 30, 2013, the trial court granted the Rule 54(b) motion.

On May 17, 2013, Henry appealed the orders granting Shizushi's motion for summary judgment and his motion for Rule 54(b) certification. However, on August 5, 2013, Henry moved to dismiss his appeal after concluding that, pursuant to ROP R. Civ. P. 58, it was premature. He reached this conclusion because Rule 58 requires that "[e]very judgment shall be set forth on a separate document" and no separate final judgment had been entered. *Id.* Accordingly, after withdrawing his appeal, Henry filed a motion requesting a final judgment that complied with Rule 58.

On October 21, 2013, with the agreement of Shizushi and Henry, the trial court issued a separate final judgment in compliance with Rule 58. Pursuant to ROP R. App. P. 4(a), Henry then had 30 days to file a notice of appeal. *See* ROP R. App. P. 4 (a) ("notice of

appeal shall be filed within thirty (30) days after the . . . service of a judgment or order in a civil case.”). ROP R. App. P. 4(a).

Subsequently, Shizushi filed post-judgment motions before the trial court and, on November 12, 2013, Henry filed a motion for extension of time to respond to the new motions, as well as a motion for an extension of time to file the notice of appeal. Pursuant to ROP R. App. P. 4(c), the trial court could only extend the time for filing the notice of appeal by 30 days and only for good cause or excusable neglect. ROP R. App. 4(c) (“Upon a showing of excusable neglect or good cause, the trial court may extend the time for filing the notice of appeal by any party *for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this subdivision*. Such an extension may be requested by motion before or after the time otherwise prescribed by this subdivision has expired.”) (emphasis added). The court granted Henry’s motion in full, allowing Henry until December 18, 2013, to file both the responses to the trial motions and to file his notice of appeal.

On December 11, 2013, with only one week to spare before the responses and notice of appeal were due, Henry obtained new counsel, who filed her appearance and requested yet another 45 day extension to respond to the trial motions and to file the notice of appeal. Apparently, Henry’s new counsel attempted to contact the trial court through repeated phone calls to the chambers clerk to obtain a ruling on the motion for extension of time, given the looming deadline.

On December 18, 2013, the day of the deadline, the trial court granted Henry an extension of time to respond to the trial motions, but did not grant the extension of time to file an appeal. In its order, the trial court stated, “[a]s to defendant's intention to file a notice of appeal, defendant has to explain why an appeal is still timely. The Court entered its final judgment on October 18, 2013.”<sup>1</sup>

The next day, Henry filed a response to the court’s inquiry pointing out that the court had previously granted a 30 day extension, such that December 18, 2013, was the new deadline. This was little more than a reminder to the court that the court had granted one extension already. Notably, the response did not address ROP R. App. 4(c)’s clear statement that a “trial court may extend the time for filing the notice of appeal by any party *for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this subdivision.*” ROP R. App. 4(c) (emphasis added). That is, the response did not explain how, if granted, an additional request for a 45 day extension, made *after* the trial court had already granted the first 30 day extension, could render an appeal timely under Rule 4(c)’s clear bar. The trial court issued no further order on the subject.

Concerned, counsel for Henry again repeatedly called the court’s chambers to obtain a decision as to whether the extension to file the notice of appeal had been granted. In her

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<sup>1</sup> We note that the trial court dated the final judgment near the signature line on October 18, 2013, which was a Friday, but, for administrative reasons, the judgment was not formally filed until October 21, 2013, the following Monday. The trial court erred in its order by referring to the date of signature rather than the date of filing as the date of final judgment, but because the three day difference has no bearing on the ultimate timeliness of the appeal or on the trial court’s inability to have granted an additional extension, we find that such error was harmless.

sworn affidavit, counsel argues that she “was finally told that the Court accepted the explanation and the extension was granted.” The affidavit goes on to state that she requested that another order be issued embodying the court’s decision to grant the additional extension, but that “both of his office staff said they specifically asked him about an order in light of [her] concerns and he said there was no need for the Court to issue a new order.” And then further, “I reasonably relied upon the Court’s judgment as to its procedure,” and “I believe the Chief Justice knows the procedures he used in his Court and relied upon representations of his staff . . . .” And lastly, “[t]his was the first Notice of Appeal I have filed in this jurisdiction.” Finally, over one hundred days after entry of the October 18, 2013 final judgment, Henry filed a notice of appeal on January 31, 2014.

#### APPLICABLE LAW

Rule 4(a) of the Rules of Appellate Procedure requires that the “notice of appeal shall be filed within thirty (30) days after the . . . service of a judgment or order in a civil case.” ROP R. App. P. 4(a). “Upon a showing of excusable neglect or good cause, the trial court may extend the time for filing the notice of appeal by any party *for a period not to exceed thirty (30) days from the expiration of the time otherwise prescribed by this subdivision.*” ROP R. App. P. 4(c) (emphasis added). The Appellate Division has repeatedly held that “[w]e are without jurisdiction to entertain an appeal where the notice of appeal is untimely filed.” *Bechab v. Anastacio*, 20 ROP 56, 60 (2013); *ROP v. Chisato*, 2 ROP Intrm. 227, 228 (1991); *Sebaklim v. Uehara*, 1 ROP Intrm. 649, 652 (1989); *Pamintuan v. ROP*, 14 ROP

189, 190 (2007) (“The late filing of a notice of appeal is a fatal jurisdictional defect”) (quoting *Tellei v. Ngirasechedui*, 5 ROP Intrm. 148, 149 (1995); *Babul v. Singeo*, 1 ROP Intrm. 123, 126 (1984)).

## DISCUSSION

Before turning to our decision on the merits, the controlling law on the issue of untimely appeals requires some semantic clarification. That is, although it is well settled that a late-filed notice of appeal bars review, our jurisprudence consistently refers to this bar as arising from a lack of “jurisdiction” and we are now are convinced that this is an imprecise and overly expansive use of the term. We take this opportunity to depart from our past use of the word “jurisdiction” for the following reasons.

Unlike the United States Constitution, which empowers Congress to determine a lower federal court’s subject-matter jurisdiction (*see* U.S. Const., Art. III, § 1), our Constitution contains no such limitation. *See* Const., Art. X, § 5 (“judicial power shall extend to all matters in law and equity”). We have previously construed our “law and equity” clause “as a grant of jurisdiction over any and all matters which traditionally require judicial resolution.” *Gibbons v. Seventh Koror State Legislature*, 11 ROP 97, 106 (2004). Consequently, expressing that we lack “jurisdiction” for an untimely appeal is imprecise.

The United States Supreme Court itself has noted past imprecision of the term “jurisdiction,” remarking that “[j]urisdiction [has been] a word of many, too many, meanings.” *Rockwell Int’l Corp. v. United States*, 549 U.S. 457, 467, (2007); *see also*

*Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004); *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 90 (1998). And in seeking to cure the semantic confusion, the United States Supreme Court has taken pains to clearly differentiate untimely filed cases, in which appellate review is barred on jurisdictional grounds, from untimely filed cases in which appellate review is precluded by non-jurisdictional court rules. See *Bowles v. Russell*, 551 U.S. 205, 211 (2007) (“[t]he distinction between jurisdictional rules and inflexible but not jurisdictional timeliness rules . . . turns largely on whether the timeliness requirement is or is not grounded in a statute”) (internal citations omitted).

Because jurisdiction in Palau is not limited by statute, we now hold that untimely appeals fail, not because of a lack of “jurisdiction” or any “jurisdictional defect” but because of the clear, inflexible time limits contained in our rules.<sup>2</sup> See *id.*

Having determined that the well-settled bar for untimely appeals is not based on jurisdictional grounds per se, but is instead a product of our own Rules of Appellate

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<sup>2</sup> We recognize that a statute addressing the time limits to file an appeal exists in Palau, but it does not limit our constitutional powers of jurisdiction. 14 PNC § 602:

When appeals may be taken. Any appeal authorized by law may be taken by filing a notice of appeal with the presiding judge or justice of the court from which the appeal is taken, or with the Clerk of Courts within thirty (30) days after the imposition of sentence or entry of the judgment, order or decree appealed from, or within such longer time and under such procedures as may be prescribed by rules of procedure adopted by the Chief Justice of the Trust Territory under section 202 of Title 5 of the Trust Territory Code, or by the Chief Justice of the Supreme Court of the Republic of Palau pursuant to Article X, section 14 of the Constitution.

Procedure, we now turn to consider Henry's arguments on appeal. In response to Shizushi's motion to dismiss his appeal, Henry makes two arguments that merit consideration.

First, he argues that he filed his notice of appeal within the time frame allowed by the trial court. More specifically, he suggests that he "reasonably relied" on an alleged oral extension that his counsel received ex parte through the Chief Justice's staff on December 19, 2013, and thus, his notice of appeal should be considered timely.

Our decision in *Sebaklim v. Uehara*, 1 ROP Intrm. 649 (1989) is particularly instructive in addressing Henry's first argument. In *Sebaklim*, the trial court entered final judgment on November 8, 1985. One month later, the appellants requested a 30 day extension of time to file their notices of appeal, claiming only that extra time was needed, and the trial court granted the request. Another month passed before the appellants requested an additional week extension, which was again granted. The notices of appeal were eventually filed 67 and 68 days after the issuance of the final judgment, beyond the time limits of Rule 4. On appeal, appellants argued that (1) Rule 4 included the flexibility to allow the Appellate Court to expand the filing time limit and create jurisdiction, and (2) appellants were entitled to additional time because the trial court erroneously granted an extension that violated the rule's time limits and appellants relied upon it. The Appellate Division disagreed, concluding that it lacked jurisdiction, and dismissed the appeal.

Because the facts of *Seblakim* track so closely to the facts here, we agree with the reasoning of *Sebaklim* and conclude that the untimeliness of Henry's notice of appeal

precludes review. To explain the reasoning underlying both opinions, one need only look at the absurdity of arriving at the opposite conclusion. As alleged, Henry asks us to give him the benefit of clear legal errors made by the trial court. This runs afoul of the very purpose of appellate review.

Henry's second argument is a corollary to his first. Specifically, he argues that the Court's rules may suspend the time limits of ROP R. App. P. 4 under ROP R. App. P. 2, which reads, "[i]n the interest of expediting a decision, or for other good cause, the Appellate Division may suspend the requirements of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction." *Id.*

We begin by recognizing that this Court has only suspended the Rules of Appellate Procedure once before, in order to expedite a writ of mandamus. *See Klongt v. Paradise Air Corp.*, 7 ROP Intrm. 142 (1999). And we further recognize that suspension of our rules should be prudentially limited to extraordinary circumstances. With respect to Henry's specific argument, it is not entirely clear that Rule 2 suspension can or should be used to enlarge the time for filing a notice of appeal. That is, the United States' Federal Rules of Appellate Procedure explicitly prohibit the suspension of Rule 4's time limits. Fed. R. App. P. 2 states "[o]n its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, *except as otherwise provided in Rule 26(b).*" Fed. R. App. P. 2

(emphasis added). Rule 26(b), in turn, provides that “the court may not extend the time to file a notice of appeal (*except as authorized in Rule 4*) . . . .” Fed. R. App. P. 26(b)(1) (emphasis added). Although our Rules of Appellate Procedure do not contain this explicit bar, the United States’ bar persuasively counsels in favor of employing heightened scrutiny before using Rule 2 suspension to enlarge the time for filing a notice of appeal.

Even assuming that the suspension of Rule 4’s time requirements is permissible under our rules, we determine that it is inappropriate in this case for the following three reasons. First, a notice of appeal is a formulaic motion that does not require substantive research or writing. It is generally no more than a few sentences. Requiring counsel, even newly-appointed counsel, to meet the time limits of Rule 4 is not an onerous burden. Even in this case, in which new counsel was hired with less than a week before the deadline, the filing of a notice of appeal does not require extensive review of “five years of pleadings” before doing so. Second, the time limits in which to file an appeal under the ROP Rules of Appellate Procedure are clear. Parties have 30 days, plus one 30 day extension, full stop. This brings us to the third reason. Our past jurisprudence has strictly applied the time limits of Rule 4. *Bechab*, 20 ROP at 60 (an appeal filed seven months after entry of judgment is untimely and must be dismissed); *Tellei* 5 ROP Intrm. at 148 (notice of appeal filed 47 days after service of the Trial Division judgment is untimely and dismissible); *Chisato*, 2 ROP Intrm. at 228 (notice of appeal filed three days late requires dismissal). We decline, under the circumstances here, to depart now.

A final note is important here regarding the handling of extensions of time. This has been, and continues to be, a serious problem for attorneys. Motions for extension of time, while often routine, are just like any other motions governed by ROP Rule of Civil Procedure 7. Opposing counsel is normally afforded up to 14 days to respond to them, unless a court affirmatively shortens the response time. Moreover, motions for extension of time, which are not indicated as being unopposed at the time of filing and which are filed shortly before the deadline (or on the day of the deadline, which is far too often the case in the Republic),<sup>3</sup> place both the court and opposing counsel, in a difficult position.

There appears to be a pervading sense that parties are entitled to having their motions for extension of time granted as matter of right. But, as the old saying goes, failure to plan on your part does not constitute an emergency on my part. Motions for extension of time must be granted or denied before they become effective—the act of filing it entitles parties to no relief. Further, filing motions for extension of time on the day of the actual deadline, barring some serious personal emergency, is simply sloppy. It prejudices the opposing party's right to respond, and often creates a situation in which the trial court must abandon the scheduling order agreed to by the parties and vacate future hearing or trial dates, which in turn results in the unnecessary delay of cases that should have been decided long ago.

For all of the foregoing reasons, Henry's appeal is dismissed.

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<sup>3</sup> We note here that, even in this case, after having been granted an impermissibly long extension to file a simple notice of appeal, Henry filed a motion for extension of time to file his opening brief on the day of the deadline.

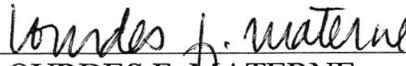
## II. Motion to Withdraw and Stay Proceedings

Shizushi's counsel has recently filed a Motion to Withdraw and Stay the Proceedings, pending an appearance of new counsel. Because we are dismissing the appeal, this motion is denied as moot.

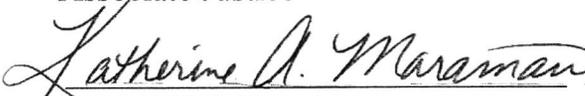
### CONCLUSION

Shizushi's Motion to Dismiss Appeal is **GRANTED**. The appeal is **DISMISSED** for failure to comply with the time limits of Rule 4. Mr. Shizushi's Motion to Withdraw and Stay Proceedings is **DENIED AS MOOT**.

SO ORDERED, this 8<sup>th</sup> day of May, 2014.

  
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LOURDES F. MATERNE  
Associate Justice

  
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R. ASHBY PATE  
Associate Justice

  
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KATHERINE A. MARAMAN  
Associate Justice