

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

EP NO. 27 OF 2017

IN THE MATTER OF THE ORGANIC LAW ON NATIONAL AND
LOCAL LEVEL GOVERNMENT ELECTIONS

AND

IN THE MATTER OF DISPUTED RETURN FOR THE NUKU OPEN
ELECTORATE

BETWEEN:

ANDREW KUMBAKOR
Petitioner

AND:

JOE SUNGI
First Respondent

AND:

ELECTORAL COMMISSION
Second Respondent

WAIGANI: Nablu, J
2017: 15 November
8 December

ELECTION PETITION – PRACTICE & PROCEDURE – Objection to competency – time limit to file election petition – s 208 (e), Organic Law on National and Local – Level Government Elections – 40 days’ time limit – whether Public Holidays excluded – computation of time – 40 days’ time limit stipulated under s. 208 includes weekends and public holidays – mandatory requirement – Petition filed one day out of time – Objection to competency upheld – Petition dismissed.

Cases cited:

Chan v. Apelis [1998] PNGLR 408

Counsel:

Mr I. Mamei for the Petitioner

Mr P Tabucchi for the First Respondent

Mr S Ranewa for the Second Respondent

RULING ON OBJECTION TO COMPETENCY

8 December 2017

1. **NABLU, J:** The Petitioner disputed the result of the election for the Nuku Open Electorate which returned the First Respondent as the elected representative for the people of Nuku following the 2017 National General Elections.
2. It is not disputed that the declaration returning the First Respondent was made on the 20th of July 2017. According to the evidence before me that date is consistent with the declaration date pleaded in the Petition and the Writ.
3. The petition was filed at the Waigani Registry on 30th August 2017. That fact is agreed to by all parties.
4. The Objection to competency was lodged by the First Respondent on the 25th September 2017 within 21 days of the Petition. The First Respondent's objection is based on two grounds firstly that the Petition was filed out of time. The second ground is that the Petition lacked form and is incompetent. The Second Respondent supported the objection. At the hearing of the Objection, the First Respondent/Objector abandoned the second ground of the objection and chose to pursue the first ground.

5. The First Respondent through counsel submitted that the issue is simply a matter of mathematical calculation. The First Respondent contends that the Petition is incompetent because it is filed outside of the mandatory time limit specified in Section 208 of the *Organic Law on National and Local-Level Government Elections* (herein referred to as *Organic Law*).

6. Mr Tabuchi of counsel for the First Respondent submitted that it is not disputed that the date of the declaration is 20th July 2017. It is also not disputed that the Petition was filed on 30th August 2017. The issue for determination by the Court is whether the two public holidays which were Remembrance Day which fell on 23rd July 2017 and the National Repentance/Prayer Day which fell on 26th August 2017 should be excluded from the 40 days time period to file an election petition.

7. The First and Second respondents submitted that the last day to file a Petition was 29th August 2017.

8. Mr Mambei of counsel for the Petitioner submitted that this is an issue as to the construction of Section 208(e) of the *Organic Law*. It is a simple matter of statutory interpretation. Schedule 1.16 of the *Constitution* is applicable in interpreting Section 208 of the *Organic Law*. The Petitioner argued that the exclusion of the Public Holidays is necessary. It was not practicable because the National Court Registry is closed for business during the Public Holiday. The Petitioner argued further that with the exclusion of the Public Holidays, the 40th day or the last date to file would be the 31st of August 2017 therefore the Petition is filed within time.

9. The issue before the Court for determination is a narrow issue of whether the two (2) gazetted public holidays are excluded from the 40 days' time limit prescribed in Section 208 of the *Organic Law*. Another issue raised by the Petitioner is whether Schedule 1.16 of the *Constitution* is applicable in the present case? I have had regard to the parties' oral and written submissions.

10. The requisites of an election petition are stipulated in Section 208 of the *Organic Law*. A petitioner is compelled to observe the strict requirements of Section 208 of the *Organic Law*. It is necessary to set out Section 208 of the *Organic Law* as follows:

"208. Requisites of petition

A petition shall –

- (a) set out the facts relied on to invalidate the election or return; and*
- (b) specify the relief to which the petitioner claims to be entitled; and*
- (c) be signed by a candidate at the election in dispute or by a person who was qualified to vote at the election; and*
- (d) be attested by two witnesses whose occupations and addresses are stated; and*
- (e) be filed in the Registry of the National Court at the Port Moresby or at the court house in any Provincial headquarters within 40 days after the declaration of the result of the election in accordance with Section 175(1)(a)." (emphasis mine)*

10. At the outset, the mandatory terms of Section 208 (e) are unequivocal. The requirements to file an election petition are clear. A petition must be filed within 40 days after the declaration of the election result. The preponderance of case law indicates that the forty (40) days includes all the days of the week including the weekends. I am of the view that this includes Public Holidays.

11. Mr Mamei of counsel for the petitioner submitted that Schedule 1.16 of the *Constitution* is applicable because it was impracticable for the petitioner to file the petition during the Public Holidays when the National Court Registry was closed for business. However, Mr Tabuchi of counsel for the First Respondent submitted in response that the issue of whether Schedule 1.16 of the *Constitution* was applicable was judicially considered in the case of *Chan v. Apelis* [1998] PNGLR 408.

12. It is necessary to set out Schedule 1.16 of the *Constitution*.

"Sch.1.16. Effect of time limits.

(1) Where in a Constitutional Law a time limit is imposed for the doing of an act (whether the provision is mandatory, directory or permissive, and whether it is positive or negative), and in a particular case it is not practicable to comply with the limitation, the period shall be deemed to be extended by whatever period is necessary to make compliance practicable.

(2) The operation of Subsection (1) is not excluded by a provision that unqualifiedly specifies a time limit or a maximum time limit."

13. Upon careful consideration of the case of *Chan v. Apelis* (supra), I am persuaded that the forty (40) days envisioned under Section 208 of the *Organic Law* includes gazetted Public Holidays. Therefore, it is trite law that the time limit stipulated in a Constitutional Law is mandatory and the Court does not have the jurisdiction to extend the time.

14. The facts of the case of *Chan v. Apelis* (supra) were that the 40th day to file an election petition lapsed on a Saturday when the National Court Registry was closed for business. The Court dismissed an amended Petition which was filed on the following Monday because it was filed out of time.

15. His Honour, Justice Injia (as he then was) stated at page 411 that:

"The principles of law in relation to the interpretation of s 208(e) and s 3(2) of the OLNLGE and Schedule 1.1 of the Constitution were settled by the Supreme Court in Biri v. Ninkama and there is no dispute as to what those principles are. The OLNLGE is a Constitutional Law and s 11 of the Interpretation Act (Ch. No. 2) which applies to interpretation of ordinary statutes has no application to interpreting provisions of the OLNLGE. For the purposes interpreting s 3(2) and s 208(e) of the OLNLGE, Schedule 1 (which includes Schedule 1.1 and Schedule 1.16) of the Constitution applies. The combined effect of Schedule 1.1 and s 3(2) and s 208 (e) in imposing a mandatory time limit of 40 days within which

to file an election petition precludes the application of Schedule 1.16 to s 208(e)."

16. I agree and adopt His Honours' views. Schedule 1.1 of the *Constitution* is clear; the rules contained in the Schedule are applicable except where the contrary intention appears, in the interpretation of the *Constitution* or *Organic Law*. His Honour continued on to state that the 40 days stipulated in Section 208(e) include all the days of the week from Monday through to Sunday inclusive of weekends (see page 412 of that Judgement). I was not referred to any other decisions which indicate a contrary view. Therefore, I accept that this is the correct approach.

17. Therefore, I am not persuaded by the Petitioner's submissions. With respect, the submissions are misconceived and without merit. In the present case, I find that by filing the Petition on the 30th of August 2017, it was filed on the 41st day; one day after the 40 day mandatory time limit imposed under Section 208(e) of the *Organic Law* lapsed.

18. I accept the First and Second Respondents' submissions that the Petition was filed out of time and is therefore incompetent and should not be allowed to proceed further. For the forgoing reasons I uphold the objection to competency.

19. Now turning to the issue of costs, the First Respondent seeks costs on a full indemnity basis. According to the Affidavit of Philip Tabuchi filed on 1st November 2017, the issue of the Petition being filed out of time was brought, through various correspondences to the Petitioner through his lawyers. Despite this being brought to the notice of the lawyer, the Petitioner pursued the Petition. The Second Respondent sought costs on a party-party basis.

20. It is trite law that the awarding of costs is discretionary. I am not persuaded that the conduct of the Petitioner or his lawyer was so improper, unreasonable or blameworthy that they should be punished by such an order. I am minded to order that costs follow the event and therefore, the Petitioner is to pay the First and Second Respondents' costs on a party-party basis to be taxed if not agreed. I will also order that the Security deposit of K5, 000.00 held by the Registrar of the National Court shall be paid to the respondents in equal portions.

21. For the foregoing reasons and in the exercise of my discretion, I uphold the First Respondent's objection as to competency and dismiss the entire Petition filed on 30th August 2017 with costs.

Court Orders

1. Paragraph 1 of the First Respondent's objection to competency is upheld.
2. The entire Petition filed on 30 August 2017 is dismissed forthwith for being incompetent.
3. The Petitioner is to pay the First and Second Respondent's costs on a party-party basis to be taxed if not agreed.
4. The security deposit of K5, 000.00 held by the Registrar of the National Court shall be paid to the Respondents in equal portions.
5. Time for entry of the Order be abridged to the time of settlement by the Registrar which shall take place forthwith.

Judgment & Orders accordingly,

Solwai Lawyers	: <i>Lawyers for the Petitioner</i>
Young & Williams	: <i>Lawyers for the First Respondent</i>
Kawat Lawyers	: <i>Lawyers for the Second Respondent</i>