

IN THE HIGH COURT
REPUBLIC OF THE MARSHALL ISLANDS

Mudge Samuel) High Court Civil
Plaintiff) Action 2016-121
)
Vs)
)
Robson Yasiwo Almen, et al.)
Defendant.)
_____)

TRANSCRIPT OF PROCEEDINGS

Before the Honorable Colin Winchester, Associate Justice,
High Court, Republic of the Marshall Islands
November 7, 2017
Uliga, Majuro, Marshall Islands

APPEARANCES:

For Plaintiff: Mr. Roy Chikamoto
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For Defendant(s): Mr. Filimon Manoni
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COURT: Good afternoon gentlemen. It is November 7. I believe it's 2 o'clock in the afternoon. We are here in case number 2016-121, Mudge Samuel versus Robson Yasuo Almen, and Ladie Jack. We have a motion for summary judgment on - filed by Mr. Chikamoto and a motion for stay and for dismissal filed by the attorney general. Let me just make a brief record as to the absence of Alanso Elbon. We had a scheduling conference in this matter on October 9. Mr. Elbon was present at that time. We did talk about scheduling the hearing today and specifically mentioned because there was some concern that counsel might not be available today, that I would consider continuing or rescheduling these arguments if counsel were unavailable due to conflicting travel plans or conflicting court obligations. I am aware that Mr. Elbon is on Mejit Island involved in a TRC case but he has not filed a motion to continue. I checked with counsel just prior to beginning of hearing. He has not asked either of them to state his positions for him. His client is not present. I agree with the discussion I had with counsel. Mr. Elbon's position in these matters should not be different from those that I expect to hear from the attorney general so I have elected to proceed in his absence and that will just have to be the order of the court. Counsel, I do have two hours and thirty minutes set aside for this. I've got another hearing at 4:30 this afternoon. Take as much of that time as you feel like taking. And I assume we are safe in foregoing Marshallese

translation. Am I correct about that?

MR. CHIKAMOTO: Yes. Yes, Your Honor ...

MR. MANONI: ... That's fine.

COURT: That should speed things up a little bit.

MR. MANONI: Yes.

COURT: Mr. Chikamoto likes to talk in long paragraphs.

MR. CHIKAMOTO: (Laughter).

COURT: Anyway, we will proceed with the motion for summary judgment.

MR. CHIKAMOTO: Yes, Your Honor. To give you some background, Your Honor, and, you know, I'd just like to correct the statement of facts that were presented by the defendants, RMI Government and Almen. I just want to make clear at the outset that the instant motion is on the issue as to whether or not the defendant Ladie Jack can remain in the Office of Mayor for MALGOV, Majuro Atoll Local Government, while the election has been under a recount petition since January - I'm sorry, December 15th, 2015. And because cases were filed on the 18th of December of 2015, all the way until the present, our position has been and continues to be that under the Election and Referenda Act of 1980 that you cannot have a declaration of the final results because, as I stated, in the Roudebush case, each segment of a - an election is - constitutes when you look at the whole still the election itself. And when there is a challenge, either an election challenge and or recount petition, you're

supposed to stop any further proceed - declaration of the final results. You cannot have a final result under those situations, Your Honor. And in fact, that's exactly what the Election and Referenda Act says. So, it's our position at the outset of this presentation that there should not have ever been a declaration of the final results because the defendant Almen, and therefore the Marshall Islands Government, knew that there was a petition for recount. And of course, with the filing of the two cases, civil actions 2015-233 and 234, that the case - there should never have been this declaration of final results which came on the 19th of December. So, you have the 15th, is when we filed our petition, and it was hand delivered to the Defendant Almen. On the 18th we filed two cases challenging the election. On the 19th the Chief Electoral Officer, Defendant Almen, declares the final results. On the 22nd, Ladie Jack is sworn in as the new mayor for MALGOV.

COURT: I don't think there is any dispute about all of the facts.

MR. CHIKAMOTO: No. There is not. It's all public knowledge ...

COURT: ...(Indiscernible) agree. Those are the correct dates as far as I can tell. Question for you Mr. Chikamoto.

MR. CHIKAMOTO: Yes, Sir?

COURT: Does this case just deal with Ladie Jack's holding of the office and your client's not holding of the office and

until the other case is resolved or is - so this case is interim and beyond?

MR. CHIKAMOTO: Yes. But, you know, the theoretical basis on which the - I call - I will call it the recount case because it involves the recount provisions of the electoral - Elections and Referenda Act of 1980. The Chief Justice has indicated that he's only interested in the numbers. And I have a dispute with that but never the less we threw in the Constitutional provisions which affected the numbers which the Chief Justice is only focusing on. So, we're saying that you cannot look at the numbers, only the numbers. You have to say - look at the reasons how you arrived at those numbers. The same respect, that is the recount case and what we've been saying is that there is this very very close relationship between the constitutional rights that could have been violated as a result of the chief executive - chief electoral officer's actions during the election and the constitutional issues that were involved there. Then you have the seating of Mayor Ladie Jack and the constitutional provisions that affect my client's constitutional rights, in particular his property rights to have sat in that office because the office could never have been filled under my previous analysis. Therefore, he should have been seated - should have - the Defendant Ladie Jack should never have been seated as mayor. And therefore, by leaving him there, either through an abatement of the action which is

proposed by the Defendants RMI and Almen. Any further abatement and its been coming on to two years now since the election of November of 2015, and the petition filing on December 15th, 2015, so it is a violation - continuing violation of his property rights which are protected because he's got property rights under the Marshall - I mean - sorry, the Majuro Atoll Local Government Constitution. As I read it Your Honor, you cannot have anyone taking the seat until he has been certified. What does certified mean? Well, that presumes that it's a valid certification otherwise ...

COURT: ... There has been a certification but you're saying it's not valid?

MR. CHIKAMOTO: It's not valid because there's been this election protest since December 15, 2015. There could not have been final results and certification. He could not take office. It's all very logical and its supported by the case law that we had supplied to the court.

COURT: Are you asking me in this law suit or for purposes of the summary judgment today to make that decision that the certification that occurred on the 19th of December is invalid or are you just asking me to put Mudge Samuel into office until Judge Ingram makes that decision?

MR. CHIKAMOTO: Well, we're asking the court to put back Mudge Samuel into the position that he's supposed to be occupying right now because of the current litigation. There

cannot be a declaration of the final results. It's - the election is still ongoing until today, until a judgment comes down and an appeal is final as to what those - whether that decision is correct, so, this could span years.

COURT: Just look at another couple of years easy.

MR. CHIKAMOTO: Right, so in that - under that scenario, Your Honor, what we're saying is under Loudebush - I'm sorry not Loudebush but Loudermill, I believe it is, and Goldberg versus Kelly and so forth, it is the property right that is at stake now in this case. Thus, it was deprived without any due process, the election occurred, he was told to leave, the new - mayor came in, and two years later he's without his job which is set forth in the Marshall - Majuro Atoll Local Government Constitution. He has a right to be there. He should have been there. He should still be there now until all of the litigation is completed. But we are asking for the court for partial summary judgment throw him back into the office, have Mayor Jack vacate that office until all of the litigation is completed. Now, as I told the court before, what we did was we filed constitutional issues and violations in the recount case. We also filed similar constitutional issues in addition to the property right, the provision, that occurred because of the seating of the Defendant Ladie Jack when they - he should never have been placed in there to begin with. So, while the state is saying - national government is saying that they're two very

similar cases and we should have an abatement ...

COURT: ... Similar - but they're different.

MR. CHIKAMOTO: They're very different.

COURT: I'll say they're very different. I'll - you can see they are different.

MR. CHIKAMOTO: Yeah, I believe they are very different. We're asking for different kinds of relief here. Ultimately of course is the election. Was it run properly? Which constitutional violations were violated in one case versus the other case?

COURT: Well who is going to make that decision? It seems to me that's the decision before in the case of Chief Justice. Am I correct or am I wrong?

MR. CHIKAMOTO: No. There are - and this is a I think a misconception that the government has. There's something called a recount case and then there's something called an election challenge case. They're two separate types of actions. So, we filed one under the recount provisions also involving violation of constitutional rights. And then you have the general election challenge case which also includes allegations of violation of constitutional rights. So, they're two actually separate types of actions.

COURT: There had been four actions. One was dismissed. One was I assume correct was resolved when things remanded to the chief electoral officer which leaves two. Am I right?

MR. CHIKAMOTO: Yes.

COURT: Okay. Alright. Go ahead.

MR. CHIKAMOTO: And it is - and which is - we are getting to the - now, the factual part of this case is, you are right to say that we originally had four - two cases. One was challenging the rights of an individual from the mainland who was saying that she never got the ballots and therefore she could not have forwarded - that case was dismissed because we did not prosecute. 2015-233, though, survived.

COURT: Yes.

MR. CHIKAMOTO: That's the case that was remanded. And because the clerk gets - had advised me that I had to file a separate action because I initially filed it under 233. They created a new case 2017-

COURT: 37.

MR. CHIKAMOTO: 37 and that's where we are today. But 2016-121 which is the election challenge case still moves on and that's what we're after today. So, they're two actually quite different proceedings, Your Honor. We are asking here that Mudge Samuel be reinstated as the mayor because he has every right to be there. And I had learned early on as - by coincidence. When I was in my first year of law school, we have research and writing, and the case that came up was the entitlement issue under the constitution, US Constitution, whether you have a property right for your job. And on the eve

of moot court hearing our case came up, Goldberg versus Kelly came down from the US Supreme Court and that was basically - we had to - there's no way to get around it. A Supreme Court decision had come down. So, I had learned early on that you don't stop your legal research but you go and research all the way up until the date of the hearing because who knows what you might find. That's exactly what I did. So, I'd like to present to the court a number of cases that I had found just prior to today's hearing. The first one is Valencio Seldon versus the Federated States of Micronesia. It is an FSM case but it is written by, if I can approach the bench, it is written by Chief Justice Edward King who if you understand the way the court system in the FSM works, they have a national court and they have state courts. But in state court actions you have - they're like district courts. And, of course, a justice from the national court will sit and determine that case. So, in the case of Seldon it is Chief Justice Edward King who presided over this and issued this decision. This decision is important because it goes through the constitutional analysis of what is a property right and why is it that this police officer was terminated without due process. There was no due process hearing. And that is important in our case because what I'm saying is there was an election but it was not run correctly. And my client's constitutional rights which are property right, and if you go through this in my analysis in the memoranda that

we filed with the court, he has a property right under the MALGOV Constitution. He was required to have a due process hearing and therefore any suggestion that there should be an abatement and this thing continue on for another two years, he's already been punished for two years. And this case has ...

COURT: Ultimately if he wins he could not have been in office. He will not have been calling the shots for Majuro but he will be entitled to that table, not?

MR. CHIKAMOTO: Okay, then we have another case. I'm full of these. Your Honor, I just ...

COURT: ... Alright ...

MR. CHIKAMOTO: ... Like I said, I just go on and on ...

COURT: ... (Indiscernible) ...

MR. CHIKAMOTO: ... We're trying to find the truth and that's - this is an appellate division case of the Trust Territory High Court. But you will notice the date is 1981. The Republic was formed in 1979. So, the jurisdiction of the TT High Court and the appellate division of that court still was issuing opinions, one of which is the Chutaro case. This case is important because it's very similar to the situation that we have. There was a senatorial race between a gentleman called Alee Alik, who has since passed, and Chuji Chutaro. And I just spoke to Chuji just a little while ago. Unfortunately, I can't get his affidavit but it pretty much sets out what had happened and what is recited in the High Court opinion. But it's important

because during that race, there was an allegation by Chuji Chutaro that unregistered voters were listed and voted. So, these are illegal basically. The trial division of the High Court said well we can't discuss this issue. Brought up on appeal, the appellate division said no we will discuss it because we have to go and see how you arrived at the figures. That's exactly what we've said. And I will tell the court that there's another case. It's a (Indiscernible) variety, it is the Kenya Supreme Court case in Kenyetta. In that case, you know, bless their hearts, despite what I think was tremendous amount of political pressure that court had the spine the resolve to say another election has to be held because we can't verify the results ...

COURT: ... Wasn't that a few weeks ago?

MR. CHIKAMOTO: It was in August the Supreme Court heard the case and they came down with a decision nullifying the election, calling for a new election, and the new election just finished last month, just October. Just to tell you how rough and tumble it is in Kenya, one of the justice's body guards I think or driver was killed following their decision. One of them felt so threatened that they fled to the United States. And so, when it came down to hearing to determine whether or not there should be a delay of the second election, just the chief justice showed up for that hearing so there was no delay. It went on as ordered, originally. But - I digress here but the

point is, Your Honor, is that court, Kenyetta court in Kenya, said for the very first time we don't look at just the numbers. But we have to find out what occurred to get to those numbers. And the example that that court says is in mathematics we have an answer, but you have proof. You go through certain proofs to arrive at the same answer. If you can't - if your proofs are wrong you will not get the right answer. So, the court ...

COURT: ... So, based on what you've told me, I don't have the (Indiscernible) case, right? Because obviously if - I don't have the (Indiscernible) case. That's the Chief Justice's case.

MR. CHIKAMOTO: Yeah. But, but ...

COURT: ... And I've indicated that he's not going to do that. So how do I arrive at - for a decision that he chooses intentionally not to pursue.

MR. CHIKAMOTO: Well, we do have other claims that arise. And in fact, it is addressed by the government's opposition, Your Honor, to our motion for summary judgment. And they're bringing in and dredging up all of these constitutional arguments. So, like I said, Your Honor, from the very beginning, there is the recount case. Closely intertwined with that recount are constitutional issues. Then we have the holdover - what I call the holdover case as to whether or not there could have been a declaration - final declaration, the certification, and those constitutional issues behind those - that claim. So, they're kind of related but they really aren't

because, like I said, they're two different types of remedies. So, getting back then to Chuji Chutaro's case, the court there held that we have to have a new election. We have to go beyond this and look at the - what had happened in this case. And they found out that the chief electoral officer in that case did include voters who were not registered. Therefore, they nullified the election and what happened was, and what is interesting in this case is, the appellate division in the last - the foot - not footnote but headnote here says this is what happened, we remand this matter to the trial court with direction that it enters ruling holding this 1979 election on Mili Atoll invalid and to order a new election for Mili to be held immediately until, this is the key point, until such election Defendant Alik, who was declared the - illegally declared the winner in that case, will not be entitled to remain in his seat on the Nitijela. However, defendant has served on the Nitijela for the prior two years since election and can be considered a de facto member of the Nitijela, therefore entitling him to retain any salary paid to him as a member. We agree with the concept that he has no right to stay there for the two years. And this is very similar ...

COURT: ... I thought you were going to disagree with the salary ...

MR. CHIKAMOTO: ... But what we - right, we disagree with the salary portion. And the cases that I think I've cited to the

court in my prime memoranda say that, you know, that de jure officer has a right to get those monies back. The question is how does he do it? And in this case, they're saying Nitijela should pay - I mean Chuji Chutaro should not get it from Nitijela. But it doesn't say that he can't sue Alee Alik to get that money back. So, there is a remedy. And that's what those cases I think say. But of course, we're saying that this particular case should not bind the court as to that particular issue. But with respect to - but with respect to

COURT: ... I appreciate your good lawyering ...

MR. CHIKAMOTO: ... (Laughs) Thank you, Your Honor. I'm trying to be zealous about my representation, Your Honor. The third case that we did not include is Langijota versus Alex. And this is a Supreme Court decision for the RMI. And this court is important because it deals with the issue that was raised by the Government on the matter of laches. And so, this case refers to a discussion on what is laches and what the person who is asserting the defense has to claim in order to prevail. If I can just - for the court's edification, our position is that Rule 8 of the Rules of Civil Procedure state that you must state your affirmative defenses in your responsive pleading. That was not done here. Therefore, you've waived that right. Then - what they're trying to do they're trying to bring this up at this point and say laches is a defense. In support of that, they cite the Perry case out of Virginia. This

case is an election case, a presidential election case, Rick Perry from

COURT: ... Texas.

MR. CHIKAMOTO: Texas. Newt Gregor - Gingrich from Georgia I believe, Huntsman from I don't know where he's - Alabama or something.

COURT: Utah.

MR. CHIKAMOTO: Utah, your state. And then Rick ...

COURT: ... (Indiscernible).

MR. CHIKAMOTO: ... Rick Santorum from Pennsylvania I believe. And the distinguishing thing about the Perry case, and this is what they cite about laches, that case was specifically for injunctive relief. They came in, and talk about last minute, they came in at the last minute because under the Virginia statute, you are required to sign - get ten thousand petitions if you want to get on the presidential ballot. And this is like, you know, I think it was 27th of December and they're supposed to print the ballots on - sometime early January. So, you're talking about two weeks. And the court in that case said you're too late. These guys at the state of Virginia are already beginning to print out the ballots and you're asking them to change everything. You should have done this much earlier. This is not the case - that's something very - very urgent, right? They're asking for some relief at the very last minute. We're not asking for relief at the very last

minute. What we are asking for is the court to look at the statute and say is it right or wrong to have seated Defendant Ladie Jack when the petition had been filed, when cases had been filed, the court knew about it at least constructively that cases were filed challenging the election. The chief electoral officer certainly knew that the petition had been filed. It was hand delivered and he's never disputed that. And, of course, the Defendant Ladie Jack understood all of that because he was the one who was rushing in to try and get seated in that office as soon as possible, which he did on the 22nd of December. So, all of this - what we're saying is this is - this is totally illegal. There is no basis for this. And a year and a half later, Your Honor, Chief Justice Ingram says, you know, I don't see any rejection of the petition. So, I'm remanding this and, you know, chief electoral officer why don't you do your job? All of this is - if you're talking about equitable principles like laches, what you should be saying is well why didn't he file the rejection when he should have as required by the statute? There is no time limit, I'll give you that. But not a year and a half later. And the mayor or de facto mayor has been sitting there for a year and a half collecting salary while my client is sitting at home without a job, without any income, without any hearing for due processes to whether or not he should have - to take his job away was even justified under the circumstances. The government knew that there was a petition.

The government knew that cases were filed. So, how can they now come into court and say, you know, he's waited too long. The court may have delayed it by a year and a half. But as soon as that decision came down, immediately thereafter the Chief Electoral Officer, Almen, did reject it.

COURT: Two days later.

MR. CHIKAMOTO: And within the period of time, allowed by statute, we timely appealed it. So, we acted very quickly as soon as we could to protect our rights under the recount case.

COURT: Now let me ask you a question.

MR. CHIKAMOTO: Yes.

COURT: Case number 234, the one that was dismissed.

MR. CHIKAMOTO: Yes.

COURT: For failure to prosecute.

MR. CHIKAMOTO: Yes.

COURT: I've been through that file and it appears to me that Chief Justice Ingram declined to issue a TRO to prevent the chief electoral officer from certifying the results of the election. But it looks like that happened two days after he already certified. So, hasn't your client had due process? Hey I want you to stop, don't let them certify, and Chief Justice says no, I'm not going to give - I'm not going to give you that TRO. He can certify it, which he did. Well, and actually done it two days earlier.

MR. CHIKAMOTO: Well, he did not certify it at the correct time. Timing is everything. He should have done it shortly after the petition was filed, and he never did until a year and a half later. Now, during the interim, we start to file these cases and we're challenging the election, we're challenging the recount, and then the government is saying well you delayed the case. We didn't delay the case. We're not the one that's supposed to certify. The chief electoral officer is supposed to certify. It took him a year and a half and an order of the court before he issued his rejection. We can speculate as to whether or not he would have ever filed his rejection, in which case, this could have gone on for years without a rejection.

COURT: I'm guessing, it's pure speculation, he thought he had done everything he needed to do.

MR. CHIKAMOTO: That's right. And it is brought up by the government that what had happened of course was that he in essence had rejected our petition. Well, that can't be. And, the record shows that on the 26th of November, 2015 we filed what's called an informal petition for recount, a request ...

COURT: ... (Indiscernible).

MR. CHIKAMOTO: No, he did.

COURT: Yes.

MR. CHIKAMOTO: He did ...

COURT: ...(Indiscernible).

MR. CHIKAMOTO: Which was never delivered to us until the 15th of December. But the reason why we asked for that recount, an informal recount, was because in Rita, after an informal recount on request - by request of one of the councilman candidates, successful candidate and councilman Charles Kelen, my client actually ended up with 31 net votes, Your Honor. And on that basis, if you multiply that by 13 wards, you come up with 300 and some odd votes, mathematically and theoretically. So, weren't - there was sufficient justification in our minds to request a recount. Now, what they're trying to say is well you gave the - this informal petition in - on November 26 and he denied it in - on June - December 15th, so therefore it was an effective denial because your petition is basically the same thing. Well, that - what that means is we're not going to follow the ...

COURT: ... That's water under the bridge because Chief Justice says no that denial is not right.

MR. CHIKAMOTO: ... Right ...

COURT: ... (Indiscernible) and it can't be right.

MR. CHIKAMOTO: Right.

COURT: That's resolved.

MR. CHIKAMOTO: Thank you, Your Honor. So, what we have then is we have these cases that I've just presented to the court because of my research, all the way up to the - today's hearing. And they basically support our position. One, Seldon

says that there is a constitutional right and the US Supreme Court cases verify that you do have a property right which is protectable so long as the constitution or the statute under which you are claiming he has a right gives him some kind of entitlement to that job.

COURT: Let me ask you an obvious question.

MR. CHIKAMOTO: Yes.

COURT: (Indiscernible) obviously. You said - I think you said it was a police officer.

MR. CHIKAMOTO: Yes.

COURT: Does an elected official have the property right as opposed to an employee?

MR. CHIKAMOTO: We believe so, Your Honor, because the constitution says until you have that certification, right, you lose your position under the MALGOV Constitution when there is a certification of the election. Up until that point, you still have a right to sit as the mayor and that's what we're saying. So, he has a constitutionally protected property right. And that's why Seldon is important, because it describes what property right is. Lauderhill also delves into that and says there is a property right that is protectable. So, that being the case, there had to have been due process. There was no due process because the election occurred, he was booted out. Still, until today, we can't do - we're trying to do something but we can't. And that's what we're here for today, is to seek

relief from the court, getting my client to go back to the job that's he entitled to, under the MALGOV Constitution, and remove the usurper of that position which is the current mayor and the defendant, Ladie Jack. So,

COURT: This is a motion for summary judgment.

MR. CHIKAMOTO: Yes.

COURT: But it kind of sounds like and feels like a motion for preliminary injunction.

MR. CHIKAMOTO: No ...

COURT: ... Where I'm going to make this decision somewhere down the road but do you want me to make it today in case I reach this decision down the road?

MR. CHIKAMOTO: No.

COURT: What's the difference? Because obviously the standards are varied.

MR. CHIKAMOTO: Your Honor, first of all, well primarily, when you talk about injunctive relief you're looking for some kind of immediate irreparable harm. The harm that occurred actually occurred in 2015, December 22nd when Ladie Jack was sworn in by the court despite the fact that we had filed a petition. We had two cases that were filed with the court challenging the election. That, under the Elections and Referenda Act, is illegal. You cannot have the certification at that time. You can't have that. If you can't have the certification, what are we trying to prevent? He's already in

office. What we're asserting is that two years later - and the other thing, there has to be immediate harm. We're not saying that he had to have (Indiscernible). And in fact, Your Honor, what - the reason why we filed those two cases was because we understood or at least counsel had - was under the impression that even though we gave him that petition on the 15th, he's not going to answer that for quite some time, but we didn't know when. So, another thing that I like to do is to file prophylactic actions.

COURT: Oh, really?

MR. CHIKAMOTO: (Laughs)

COURT: I would not have guessed if you hadn't told me.

MR. CHIKAMOTO: That in the even that for some the court believes that, you know, we had - we should have filed something, that's exactly what we did to protect my client's rights even though ...

COURT: ... Mr. Manoni says and you've alluded to this a couple of times, you didn't file this case until June 26. You waited too long to file this case and seek the review that you're seeking in this case. What's your response to that?

MR. CHIKAMOTO: If I'm not mistaken, Your Honor, we may have alluded to that in the original 2015-233. That was remanded and became 2017-

COURT: 37.

MR. CHIKAMOTO: Right. But because of the delay, I mean,

the other thing is the RMI Supreme Court says election cases need to be decided quickly.

COURT: That hasn't happened.

MR. CHIKAMOTO: It has not happened and that's why after six months I decided, my god, I have to do something, again another prophylactic action. I have to do something because if not, then I am going to be accused of having sat on my rights and that is why we filed 2016-121. It has just dragged on so long that I couldn't in good conscience allow this thing to continue now for a year - two years and still nothing. Then I would be accused definitely of having slept on my rights. What I was hoping - this is the very first election case that I'm involved in. But I was hoping that the court would issue a decision very quickly as required by the Supreme Court. I am beginning to find out that the court actually takes its time for whatever reason. And here we are, two years later, and we're not even at the - we're going I guess towards the hearing itself where will finally argue. But it's taken two years to do that, part of which is the delay caused by the chief electoral officer himself by not even responding to our petition that was filed on the 15th of December 2015. So, when you talk about equity, when you talk about laches, it just - if you - maxim I think if you - if you want equity or you have to do equity, you have to come in with clean hands, I would suggest that the government - the government's hands are dirty. They're dirty. (Laughs)

COURT: I may or may not disagree with you about that.

MR. CHIKAMOTO: (Laughs) ...

COURT: ... But that's

MR. CHIKAMOTO: And even the court, because of the delay, Your Honor, is partially responsible for this delay, which is now two years later. So, there's delay on the part of the court. There's delay on the part - definitely on the part of the Defendant Almen and the government. There was a six-minute delay on our part, but I will represent to the court - 6 months, that I will represent to the court that after that I in good conscience could not take this anymore. It should have been decided within thirty or sixty days, at the most, what the election result was. And it's a good thing that I did because one and a half - two years later, here we are. We're finally at a point where we can move for summary judgment based on what has been filed by the parties. And that's what I'm looking for, is relief for my client to get back into office. He should never have been taken out of office without due process hearings.

COURT: So, you're not asking me today to temporarily install Mudge Samuel. You're asking me to install him for good.

MR. CHIKAMOTO: No.

COURT: No?

MR. CHIKAMOTO: No.

COURT: Okay.

MR. CHIKAMOTO: He's entitled to sit in that office

COURT: Until.

MR. CHIKAMOTO: Until a valid certification has been issued and that's under decision of the courts. Two separate cases ...

COURT: ... Got it.

MR. CHIKAMOTO: And even though Judge Ingram has his set of constitutional challenges, we have our set of constitutional challenges in this particular case which kind of overlaps. But, again, they're two separate remedies for an election that has gone awry, and we are asking for slightly different kinds of constitutional relief. We - they are not the same. This is what I'm trying to tell the court. So, we have the Seldon case which refers to the property right and we have the Chutaro case which says - and this is something that the national government and the Defendant Almen says you know there's no such position as a de facto mayor or nor is there a de jure position as mayor. And I'm saying that yeah - that's - while it is true that there is no provision or there is no office, the point is that he was elected in 2011. The election was not challenged. He took office. He remains in office under the MALGOV Constitution until the certification, and we believe that certification means what it says, is a valid certification. Otherwise to say invalid certifications apply, it is an absurd result under constitutional interpretation or statutory interpretation. You cannot give a definition to a word that gives you an absurd result. It's not - if you look at the plain meaning or what it

should mean, what will give you a valid and understandable result, a logical result. They're asking for something (coughs) - excuse me, something that is illogical and absurd saying that he issued his certification. Therefore, he's validly installed. That's an absurd result.

COURT: So, we have a person who by constitution and your statute or article is authorized to determine when and under what circumstances he should issue a certification.

MR. CHIKAMOTO: Yes.

COURT: And now you're asking me a judge to say I appreciate Mr. Almen that you issued certification but it's (Indiscernible) therefore it's invalid.

MR. CHIKAMOTO: Because the statute says he cannot declare the final results if there's a petition that has been filed. It says in the chief - in the electoral - Elections & Referenda Act. It's statutory. And in fact, because he didn't issue his rejection until a year and a half later at the behest of the court - the court had to order him to do that. Even up to that point in time, Your Honor, the election is still in doubt. I'll go back to the United States and Bush versus Gore. I mean, there was no declaration of the final results until the Supreme Court had come down with its decision, indicating which kinds of ballots would be acceptable. So, there was no declaration of final result until that court case had decided this is what it is, and that's exactly what the Elections and Referenda Act

says. If there's a petition, then you can't declare the results.

COURT: So, if it says that - if you're - in fact, it's exactly how it says and you're correct about that. Then I would have the authority, in your position, that I would have the authority to say because you did file a petition you must (Indiscernible) the certification is invalid. You therefore don't have a valid certification, and therefore Mudge Samuel gets to jump back until someone says we do have a valid certification.

MR. CHIKAMOTO: That's exactly right. That's exactly what the MALGOV Constitution says. Unless the court is willing to give an absurd definition and agree that well they did issue a certification even though it was issued without addressing the petition, without addressing the cases that had been filed, and even though then we're a - two year - a year and a half later, he then files his certification or rejection. I mean, there is no certification. There has not been and there cannot be under the Elections and Referenda Act of 1980.

COURT: Well, couldn't I say Elections and Referenda Act says cannot issue a certification while a petition is pending, but he did. The act doesn't say it has to be a valid certification. The act might allow for an invalid certification and therefore it's okay. And I agree that's an absurd result. But, it's a possible result albeit absurd.

MR. CHIKAMOTO: Well, Your Honor, that's why the Chutaro case is very interesting. Because up on appeal to the appellate division of the Trust Territory High Court, which is the predecessor to the courts here, the court held that - they invalidated the election because of the illegal votes. And what they did was they ordered Alee Alik, who was declared to be the winner, to vacate that office immediately, and, they ordered a special election. And in talking to Chuji Chutaro this afternoon just before the hearing, he said there was a special election, I won by four votes. He was then installed as the senator for Mili for the last two years of that term. And I think he may have run for re-election after that. I didn't get into that with him because I was running out of time before coming to this hearing. So, the Chutaro case is interesting in that respect because it does say 1) that Alee Alik was a de facto senator, 2) it says that he had to vacate that office. He can't keep on sitting there. The election was invalid. We're ruling that it's invalid.

COURT: (Indiscernible) there, isn't that the difference? You're asking me to declare that the election is valid - invalid, right?

MR. CHIKAMOTO: No. What I'm saying ...

COURT: ... That's my problem. We've just identified the problem. They said the election is invalid, he can't be in office. You're asking me to say you can't be in office unless

someone (Indiscernible) comes along and says the election is valid. That's not (Indiscernible)...

MR. CHIKAMOTO: ... Well, unless the court says because of the petition that was filed on December 15th, 2015, it's going to work its way through the court system all the way up to the Supreme Court, and at that point, there will be a decision as to whether the certification was correct or wrong, whether we need to have a new election or not.

COURT: And then the Supreme Court can say and by the way Ladie Jack you can't sit in office because today we state that the election was invalid.

MR. CHIKAMOTO: No. The only reason why that the appellate division of the Trust Territory High Court came to that decision is because the trial division of the Trust Territory High Court did not come to that decision. And that's why I refer the case to the Kenyetta case - the Kenya case because that case, the Supreme Court of Kenya said it's not just the numbers that we look at, we look at how did you arrive at those numbers. When you look at how you arrived at those numbers, it's illegal. It's unconstitutional. There's a new election. There has to be a new election.

COURT: Just for your information I've been to Kenya. It's the only country I've ever been to whose chuck holes are bigger than the Marshall Islands.

MR. CHIKAMOTO: Okay. Perhaps you haven't been to Chuuk yet, apparently.

COURT: I have not been to Chuuk.

MR. CHIKAMOTO: (Laughs) But anyway ...

COURT: ... Although, I will say at least Ladie Jack has fixed a lot of potholes.

MR. CHIKAMOTO: (Laughs) I can't speak to that, Your Honor. I don't drive around here as much as maybe as I should. I just drive from the hotel back to here and back and forth. I don't go anywhere beyond that. So, we ask the court to take judicial notice of the cases that were filed by plaintiff. We ask the court to take judicial notice of the fact that it is general public knowledge as to what had occurred and the court said and counsel for the defendant has not agreed - disagreed with the basic premise that there was a filing of the petition, in time. There was a challenge to the election. There was no rejection until later when Chief Justice Ingram remanded the appeal so to speak on the issue of recount back to the Defendant Almen. But thereafter, we moved very quickly and that's the state of the action here. I would like to, again, reiterate to the court that we're not talking about a situation where we're asking the court for some kind of relief that maybe we have to wait until the Supreme Court comes out with its decision. The fact remains, Your Honor, that the statute says what it says. If something is illegal, it has to be corrected and that's what

we're saying. We're not saying, and the court then would have to be saying well what we're going to do is we're going to wait for another three more years before the Supreme Court actually comes out with its decision, and Mudge, you may have a protected property right but what am I supposed to do. And that's what we're coming here to court today. He - we're saying he has a protect property right. He was denied of that property right without due process of law. The CEO, the chief electoral officer, and the government, did not follow the law. They installed Ladie Jack illegally. And therefore, he should be removed now. Chutaro, as I said, was decided because the error of the trial division in not saying that it had no jurisdiction to hear the case. So, if you read that case, that's why it's important, is that it stands for the proposition that if you are in office, and you got into office illegally, you have to vacate that office in favor of the true and de jure office holder, until such time as there is another election. That's what we're saying. So, when you look at the MALGOV Constitution, and these provisions regarding when you take office, when your term ends, you'll see that the logical interpretation is you have to have a valid certification before you can take office. That did not occur in this case.

COURT: And I assume that you are the proponent of valid certification because an invalid certification doesn't make any sense.

MR. CHIKAMOTO: No, it is absurd - it is an absurd result, Your Honor. That would mean that, and this is what we're afraid of that has happened in this case, because if you look at the broader picture, if it comes down to, and we are truly correct that there was this - these series of clandestine meetings, of one of which we caught the CEO with - it destroys the integrity of the whole election process and that's why I asked the questions in our memoranda, could that be a reason why because of the close relationship that he did not have the recount, even though thirty one net votes we're gained by my client in the Rita recount - informal recount. Is that the reason why he looked at the postal ballots in private without the poll of - poll watchers being present? Is that the reason why the confined voter ballot box was driven around until 3am? Now, what they say ...

MR. MANONI: ... But Your Honor, at this time, these are merely allegations and they would probably give in 2017-07 proceeds towards a trial, those would be addressed in that case. If so and so assert ...

COURT: (Indiscernible) by affidavit in this record. Whether these are true or not I don't know. But they are part of the record.

MR. CHIKAMOTO: No, Your Honor, our position is that they've already admitted these facts. If you go through all the pleadings, they do not deny that it was driven. If fact, again,

there's ...

MR. MANONI: ... That's a very broad statement. I don't think it is actually accurate.

MR. CHIKAMOTO: There is a - in fact, we had attached as an exhibit in one of our pleadings a news story by the Journal and it indicates that these ballots were counted in private. And the response of the CEO was there's nothing that stops me or that requires me to count it in front of everybody else. So, we ask the court to take judicial notice of that situation. He also indicated in our petition that well I am - we're trying to get as many votes as possible and we're driving until 3:00 am in the morning. And so, there's this tacit admission that yes we drove it until 3:00 am but our position is that we did it because we're trying to get as many votes as possible. There's no doubt that he denied the petition for the informal recount which we had filed with the chief electoral officer on November 26, 2015. Even though with 31 net votes you would think that it would mean maybe there are some computation and tabulation problems. But despite that he just flat out said no. And the cavalier attitude of the government is well thanks for letting us know what these problems are and we'll remember them the next time we run the election. No case. No case where there are these violations of the election law, and that's why the Kenya case is important because you look at - go beyond the numbers. You go beyond the numbers to look at how you arrived at those

figures. If you don't do that then what you are doing is you are institutionalizing violations of the statute. And all they're saying is well we'll take care of that next time. We may have violated your rights this time but you're just letting us know. And that's why I have a problem with every single election case that has been filed and ruled on by the court because I'm saying the court needs to look at - go beyond the figures because you're not a horse with blinds. You have to open your eyes like the Kenya court did and say wait a minute, we're - let's go through the proof mathematically. And so, when it came down to, and I digress again, but when you get down to 2017-037, the state says, the government says, well this is a result of the unofficial results. And low and behold, the final result is the same. It hasn't changed. That's the record. And I say no, no, no, that's not the record. You haven't given us anything. You haven't given the court anything. How did you arrive at those figures, is the critical point. If you don't get to that questioning don't answer that. Then what you're doing is you are going to institutionalize these kinds of things that have occurred time and again. You go through each one of these election cases and you'll see that there's a pattern. They're not following the statute. And it's because of this attitude that well we'll take care of it next time. It doesn't happen. Well, we'll take care of it next time. It doesn't happen. It has to stop in order to protect the integrity of the election

process because if someone is there, Your Honor, who has the right or and the power, despite what the law says, to count ballots in private, Your Honor, and say we'll correct it next time, no, it destroys integrity of the current election, 2015 election.

COURT: Mr. Chikamoto, you've had 45 minutes. I'm not going to cut you off just yet but I do want to give you about ten minutes, if so more. And then to give the attorney general his hour. So, (Indiscernible) ...

MR. CHIKAMOTO: ... I would like to reserve some time ...

COURT: ... (Indiscernible) I'd like to save twenty minutes ...

MR. CHIKAMOTO: ... Yes, for rebuttal. So, when we look at everything, Your Honor, what we're saying is that these three cases that we've given to the court today support our position. And it's very logical. We follow the statute. This is what the statute says. The chief electoral officer has to follow the law. But instead of doing that, his attitude like its indicated in the Marshall Islands Journal about counting ballots in private even though there's a Supreme Court case that says you have to do it in the public. There's no law that says I have to do this. That's ludicrous. He's violating the very principles of democracy upon which this Republic was established, Your Honor. And that's what the Kenya court is trying to protect. They took that step. And it is - it was a bold step and the whole world was watching and saying what are they going to do.

Are they going to cave in to the politicians and the violence or are they going to stand up for the principles for which they were appointed which is to protect the constitutional rights of the people and have a fair election. That's all we want is a fair election. We can't have a fair election if the electoral officer, the one who is in charge of this is meeting with one of the candidates, clandestine meetings, Your Honor. It throws the whole process into question. And when you start thinking about what if could have been, if you are an attorney who was involved with judicial ethics or legal ethics, attorney's ethics, the appearance of impropriety is so broad. But if you do something that gives the public the impression that something is wrong because of what you're doing, it poisons everything that you're trying to do. And that's what we're trying to prevent. And that's what the constitution says. That's what the legal - the Ethics in Government Act says. We're trying to say my God let's follow the Constitution, and the statute says, not looking at the mechanics of the - which is the recount petition, but there's more than that that's at stake here. It is the very foundation upon which this Republic was established which is democracy. You cannot have a democratic republic if you have an election that has been tainted by people who don't follow the law and the Constitution. So that's what we're asking for, Your Honor, in this case and even in the other case. Don't just look at the - and you're not - and I'm not asking to look at the

numbers. That's the other case.

COURT: I'm not looking at numbers.

MR. CHIKAMOTO: Yeah, look at - don't look at just the numbers but you look at what happened in its totality. Don't be blind - have blinds on your head. You have to look at everything. When you look at everything you begin to see what we think is a pattern of, I wouldn't say fraud, but impropriety that permeates this election. And really, if you think about it, and I've been running these things through my mind, I can even go to the last - see who - when you ask the question who is it that won this election. Now what do the circumstances that these senators won the election you begin to see a pattern that people were coming out of nowhere and winning position. And who are these people? I am told - I'm not - okay, I won't get into that, Your Honor. I won't get into that.

COURT: By the way, I came out of nowhere and I'm a judge here.

MR. CHIKAMOTO: (Laughs) Yes, Your Honor, but you weren't elected into this position, you were appointed, and it's based on your abilities and your

COURT: That's my story.

MR. CHIKAMOTO: Yes.

COURT: And I'm sticking to it.

MR. CHIKAMOTO: Yes. And I'm not saying that you were appointed here out of political favor or whatever it is because,

as I said, you are well qualified and I have no problem with that. But, if you have an individual like the Defendant Ladie Jack who got into office on the basis of an irregular and illegal certification. He has no right to be there. He should be removed immediately pending the final certification and valid certification which then would trigger ...

COURT: ... Which you'll probably never get.

MR. CHIKAMOTO: Come again?

COURT: You might never get another certification. Justice Ingram may say you're not entitled to another certification.

MR. CHIKAMOTO: He might say that but we have to go through the legal proceedings, Your Honor, and we would appeal that decision telling the court - because the way he looks at it now is I just want to look at the numbers. And I'm saying no, no, no. Even the Kenya court is saying we don't look at the numbers. Look at the broader picture. How did you arrive at the numbers? And that's why I am saying, and our position is, every single case has just looked at the numbers. Every single case says thank you for explaining these irregularities. We'll take care of that in the next election. You're not getting to the root of the problem. That's what we're saying, is we have to get to the root of the problem. That's what the Kenya court says, Supreme Court. That's what we're saying in this case. That Kenya case actually supports our position. Don't just look at the numbers but look at what's behind and how you got at

those numbers. And that's what we're doing here today. He has to be thrown out. Mudge to be thrown back in because there was no valid certification. They can't get certification, a legal one, while there's a petition and legal challenges going on to the election. The election is still ongoing. We cited that US Supreme Court case. And each one of these processes is part of the election process until its culminated like Bush versus Gore where the US Supreme court says we're going to count these ballots or you're going to stop doing this. And then you have the result of the final election - the presidential election of 2000. What would be ludicrous, if Gore came up and said well I'm the winner and CNN comes in and ...

COURT: (Indiscernible)...

MR. CHIKAMOTO: ...(Loud laughter).

MR. CHIKAMOTO: Well, you cannot appoint because you cannot have a valid certification unless it's been determined by the court if there's a challenge. And that's exactly what we've done here. We've challenged it two ways, either on the recount or the - what is called an election protest or election challenge. This is an election challenge case and we're also saying because of that Defendant Jack has no right to be where he is, based on the provisions of the Majuro Atoll Local Government Constitution.

COURT: Alright.

MR. CHIKAMOTO: Thank you.

COURT: Thank you. Mr. Attorney General.

MR. MANONI: Thank you. I will look up the Kenyan Constitution and elections laws and provide some addressing point a later time. But, anyways, before I go into my response I just wanted to point out at this time that the court does take judicial notice of the dismissal in Civil Action 2013 - 2015-034. And our argument in that is that because that was dismissed pursuant to Rule 41 B that - and the dismissal didn't say it was a dismissal without prejudice then that serves or operates as an adjudication of those claims under that case. So, what we're basically saying is that because the dismissal serves as a adjudication on the merits of this case and because 2015-233 that has now morphed into 2017-037 and 2015-234 were based exactly upon the same materials that the dismissal of 2015-034 are - bars the plaintiffs case on the basis of res judicata. But I would also venture to point out to the court that yes I agree with the plaintiff's analysis of Chutarro and Alee case, particularly with the second part of the summary. But the first part which talks about remaining in the seat is now no longer the case because the Elections and Referenda Act Section 185-5 allows a - the unofficial winner to be seated while the dispute is being resolved or while the petition has been recount. And in our response to the Motion to - for Summary Judgment, we did allude to the argument that that principle could very well apply also in the case of the mayor

dispute before you. Then, I was a bit confused by the - by counsel's assertions on the challenges to the results in December of 2015 because I was initially of the impression that the 2015-233 was in fact the challenge to the recount and therefore technically an appeal to the decision of the CEO. But of course, we would consider that it is also clear in the pleadings by the plaintiff that we did both concede that the response by - the rejection quote on quote of December 10, 2015 was taken as a rejection and thus the plaintiff filed a - 2013 - 2015-233.

COURT: My understanding and assumption of that is everyone except for Chief Justice Ingram believed that that was (Indiscernible) rejection. And it is not until Chief Justice Ingram came along and said I am done with this rejection.

MR. MANONI: Yes.

COURT: That's how I ...

MR. MANONI: ... Right, yes. But that's moot now because the chief electoral had pursuant to that issued a rejection and then the plaintiff then filed an appeal against that rejection. So when the plaintiff say that the action in 2015-233 was a recount challenge and that these are separate challenges, the recount challenge and the challenge to the election results itself, and so I haven't seen a challenge to the election results are separate from 2015-233. And if that is what the plaintiff alleges had happened, then he should have in December 2015 filed

another challenge to the installation and certification of Jack as the Mayor for Majuro Atoll. In fact, there was only 2015-233 and 2015-234 in December of 2015. 2015-233 was a challenge to the purported rejection of the petition and then 2015-234 on behalf of Samuel and another voter from the US purporting violation of her rights to vote. That has since been dismissed. So to the plaintiff's assertions of due process as the court, correctly noted, that they have come before this court for a TRO or preliminary injunction which was denied by the High Court. And so that was the end of that matter. In regards to the plaintiff's assertions toward property rights, I mean, I like the case

COURT: I'm going to guess you like the last sentence.

MR. MANONI: Yes, I do like that last sentence.

COURT: The one that Mr. Chikamoto does not like.

MR. MANONI: Yes, the one that you don't like, Mr. Chikamoto. But then again, the first part of that is probably no longer relevant now because Section 185 of the Elections and Referenda Act allows a - the unofficial winner to be seated while the dispute is being ...

COURT: ... And, Mr. Attorney General, in your opinion does Section 185 apply to local elections as well as national elections?

MR. MANONI: Well, the text of the section speaks specifically to members of the Nitijela, but, in the broad -

broader sense we would submit that even if this applies only to members of the Nitijela that this is the principle that the court could take into account of because it allows a person to be seated while the dispute is ongoing. And there appears even to be some conflict between the two provisions, but that is now the position under Section 185 of the act. The local government act says that the announcement of the declaration of the winner in the local government election is probably done in the same way under Section 185 of the Act. So, we would ask this court to look at that section, 185, broadly and to arrive at a decision that supports the government's position. So, the government's position is that number one, the motion for summary judgment should not be granted because of a number of reasons. The first reason is that the plaintiff's, although I set aside a different order in my written submissions, the plaintiffs by their own default failed to take a timely action to preserve what they think is their right before the certification has occurred. There is a certification. Whether that is proper or not is the subject of this proceeding. But, there is a certification. So, in December of 2015, December 22 I believe, 2015, the certification was concluded. The mayor was then sworn in into office. We - in the full knowledge of plaintiff and counsel and even plaintiff and counsel congratulated the mayor or spoke to the mayor about matters and affairs of the office at the time. The action 2016-121 was filed approximately six to

seven months following the certification. By that time pursuant to the certification and the swearing in of Jack, Jack had appointed a local government cabinet. He was in the first - almost the first year of his administration as mayorship and we ask the court to take judicial notice of that. I believe there is no dispute that he was - he took up the mayor's position in December after the elections, and currently he's in that office today. So, and - as the wheels of government have begun to turn, that to come in at this very late - belated time of the administration to attempt to remove Jack and to install Samuel would not be only prejudicial to the local government, the Office of the Mayor, because the administration has taken place. And on the basis of the test for laches, there was a delay. The delay was unreasonable. And the delay would cause prejudice to the people of Majuro Atoll. And even if the plaintiff believes he had a legal claim, he failed to act upon it and to preserve his interest within a time, reasonable, so as not to cause prejudice. We also - I also wanted to go back to the arguments by the plaintiff on certain activities which they allege to have occurred are violations of the (Indiscernible) constitutional amendments. The Supreme Court has held, time and time again, that the CEO is presumed to have carried out his duties in accordance with legislation. And unless his actions is a departure from the law of that (Indiscernible) or unlawful, then they will intervene. Otherwise, the CEO knows best, the running

of the elections and they would be loathed - the Supreme Court would be loathed to interfere, unless you can show a grave error in regards to the way the conduct was - the election was conducted.

COURT: I think Mr. Attorney General maybe you could just summarize what you understand. I am very concerned whether or not you're able to (Indiscernible) government. And Mr. Chikamoto makes an ugly statement where a case - we're saying these issues are so grave that the certification of the election with the petition is still pending and we're told is so grave that even a loathed judge like me should (Indiscernible). That's kind of what I'm (Indiscernible).

MR. MANONI: Thank you. I agree with you, your sentiments, Your Honor. And so that is why we believe that the Plaintiff's Motion for Summary Judgment should not be granted. We argued further that because the - this case if you recall as also alluded to by plaintiff Civil Action 2015-233 which have now kind of morphed into 2017-237, that is the writ case. That is the case where the issues raised by counsel this afternoon will be determined and decided. The allegations of unconstitutional actions on the part of the CEO or actions in violation of the Elections and Referenda Act and so forth will be decided. That will be the case. And because that began as 2015-233 prior to 2016-121, we say that this action 2016-121 should be abated or stayed until the resolution of 2017-037. So, in my written

submission to this court 2015-233 should be substituted or slashed and then add 2017-037 for clarity.

COURT: But if I do that, if I chose to abate this case until 2017-037 is resolved Mr. Chikamoto currently points out it will be another two to three years down the road, right?

MR. MANONI: Uh

COURT: I can't see it happening any faster. And what he's saying is because this is going to take so long to resolve that case, and I should act in this case now rather than wait for that case.

MR. MANONI: I think it were to cause a number of issues that we believe would not be - would be prejudicial to the local government as well as even probably to his client because 2017-037 will resolve the whole thing. Assuming for arguments sake that - and by the way, we both have received notice from the other court in 2017-037 for status conference in that case. So, I believe that that case is moving now. All pleadings have been obtained - achieved and so that case is by that order or by that order it would appear that that case would be moving ahead. And so, it would be an awkward position assuming for argument sake that Samuel is thrust back into the office and Ladie Jack is removed, and then in December, the 237 says no Ladie Jack you go back in there, the plaintiff has no case, and then the parties are switched again. And then ...

COURT: Wouldn't that be a - I agree that - I think that is a huge problem. But isn't that a problem caused by the CEO who certified the election results while a petition was pending?

MR. MANONI: That is the problem, Your Honor. We agree that is the problem. And - but we assert that that could have been addressed a lot earlier, much earlier, if that had been brought to the attention of or if the plaintiffs have come forward in their pleadings in 2013 - 2015-233 and 234 in this case. But our argument here aside from that is that because this is - the Supreme Court said in Clanton that it doesn't have to be the same cause of action, provided that it is similarly or that the essence of the case is the same. And Mr. Chikamoto and his client's argument for what he terms a horrible position is based exactly on the material in 2015-233, 2015-234, and now again. So, for purposes of the abatement argument, we need to promote the judicial economy, save the court time because the interest here are addressed in 2017-237. And so, it would be our motion here that this court consider the abatement of 121 until such time or stay 121 until such time that 037 is resolved. I would also take this moment to address the issues which the plaintiff raised on referrals to this court under Section 188 of the Elections and Referenda Act. Section 188 is very clear that referrals as argued by my learned counsel here under Section 188 is related specifically to two issues - or to one issue, that is the right of a person to vote or the

determination of the eligibility of the person's - a voter's right to vote. We argue that Section 188 is not a vehicle for any other claims except for those. And there is authority under Clanton as well that the Supreme Court had come down and said - in fact, that Section 188 was not intended to provide for argument about a class of voters. But, on the interpretation of the section of that provision is to mean an identified voter. In this case, the assurances by plaintiff we argue mere allegations or reference to people not identified, to many people not identified. And also adding in complaints about the conduct of the election and then raising constitutional issues for referral under Section 188. So, we said in our submission that you have - or the CEO rather has no obligation to refer those complaints to the court under Section 188. It is your duty if you feel your interest is at stake because of the conduct of the CEO, you have the opportunity to go to Court and ask the court for relief, either to stop the counting or to enter the name of a voter on the ballot if a voter is to register at a voting booth. But they did not. So, all of those alleged complaints about the conduct of the election that they assert where the conduct of the CEO and purportedly has to be referred to the court under Section 188, there is no obligation on the CEO to do that. They should have taken action then if there were allegations. The election is over. The counting is over. The ballots have been all massed in one box. There is no

way to determine which one would - had been challenged and which one had been counted because they failed to take timely action to prevent that. They could have come here and said to this court that we want an injunction, stopping the counting, so that they can sift through the ballots before the ballots are counted and then deposit that into a single box. And again, Clanton has the authority on that point. And so, our argument on that part is that there is no obligation on the CEO to do that. And if the plaintiff thought his interest or rights were at stake, then he had the opportunity to do so, but instead, he slept on his rights and now he's attempting (coughs) - excuse me - he's attempting to use this vehicle under Section 188 as a referral to have this court address issues which are not properly before or which the CEO has no obligation to refer. And in regards to the holdover claim, as we said in our submission that there is no such position as a holdover position. And even though Majuro Atoll Local Government says that a mayor holds office until a certification of (Indiscernible). So, there has been the certification, of course which is disputed by the plaintiffs. But, our issue with that is that they could have acted much faster or they could have come to the court and said look, you know, this certification is not proper in December 2015. But there is a certification, which of course they dispute. We think that the judgment in the Perry case applies to this case. And even if you had a perfectly legal right and you failed

within a reasonable time, under the test of - under the three-question laches test that you have slept on your rights and then you should not be allowed to complain at this stage. In fact, in the responses or answers to the complaint, the plaintiff - oh sorry, the defendant CEO did in fact raise this argument. And so we believe that we have the opportunity at this stage to remind this court of the failure or the default and the inability of the plaintiff at this stage to come forward to seek his relief under this equitable principle. And then finally, as I raised or alluded to earlier in the beginning of this case that my submissions, that the court take judicial notice of the dismissal of Civil Action 2015-234. That case mirrors exactly the arguments proposed or advanced by the plaintiff in the other companion cases inclusive of 2017-037. And that under the Marshall Islands Rules of Civil Procedures, Rule 41B, that case was dismissed for the failure of plaintiffs to comply with certain court orders. And that full says that - in that event if the order does not say otherwise, that dismissal will operate as the final judgment, as a judgment on the merits of the case. So in other words, all of the claims that the plaintiff had asserted here have in fact been dismissed and have been adjudged by the dismissal of Civil Action 20 - sorry, 2015-234. That is also our argument in counterpart case Civil Action 2017-037. So, on the basis of these points, Your Honor, and I would also volunteer on behalf of ...

COURT: ... (Indiscernible) you do ...

MR. MANONI: ... (laughs) Alanso. He's not here that this court also take note of his written submissions and the arguments he submitted to this court in our joint response to plaintiff's motion for summary judgment. And - oh, and finally, even the stay of the pleadings that we do not believe that the plaintiff has met the standard required of the court to grant a summary judgment. There is factual disputes and so - and allegations that have been denied by the plaintiffs - sorry, by both defendants in their responses on their answers. And so, the test is I think quite higher than that. And so, again, on that basis, the Motion for Summary Judgment must fail. With these arguments, Your Honor, on the basis of submissions, the authorities we provided to this court in both of our submissions and on this basis we submit.

COURT: Thank you. 15:49

MR. MANONI: Just this one point, Your Honor. In the submissions earlier, counsel said that the reason was - the case was delayed so much was because of the defendant and the courts. I disagree with that assessment. I think the court, the other court, I think attempted its best to move this thing along. And I think counsel must accept some degree of responsibility for the delays in moving this case forward. We certainly accept that there were instances, at least before I came over to take over these cases, there was a - little delays in discussions

with counsel and counsel is aware. But I do not - I would not accept that the delays were purely due to the plaintiffs and the courts.

COURT: Understood. And just so you know Mr. Attorney General (Indiscernible) appear for part of a hearing - the big hearing we had downstairs on the Bigej case, the first of those two days. Do you remember the - actually you were still there at the time Mr. Chikamoto got up and he started to walk out the door, and as he got to the door he turned around and said oh just one more thing, Your Honor. So, when counsel does that in my chambers at least now we call that pulling a Chikamoto. And you just pulled a Chikamoto.

MR. CHIKAMOTO: (Laughter)

COURT: Go ahead Mr. Chikamoto.

MR. CHIKAMOTO: Thank you, Your Honor. I'm flattered that I've got this procedure that's been named after me.

COURT: Not sure it's so flattering (Indiscernible) ...

MR. CHIKAMOTO: ...(Laughter). I don't know whether to take that as a compliment or as a cut. But at any rate, Your Honor,
.....

COURT: ... (Indiscernible).

MR. CHIKAMOTO: Thank you, Your Honor. With respect to - I'll do this as quickly as possible. With respect to res judicata, res judicata lies only when you have identical issues, identical parties, and therefore res judicata applies which

prevents you from raising those issues. 233 dash 234 regard - was regarding a postal ballot challenge. And the individual that was involved in that case was Janet Tokjen. That's totally different from the recount case or the - I call it the holdover cases in which we have here today. And that, which is another point, is the Attorney General tries to merge the two as if they're exactly the same. As I was explaining to the court, they're quite different. And if you go through all of the election cases you will see that there are something called recount cases and then there are cases that actually challenge the election. But you do have a line of cases, Your Honor, and the most famous one is Ury, U-R-Y, versus Santy. It is a District Court case I think out of Illinois or Indiana. But in that case the Ury Court held specifically that where the constitutional violations are so blatant the Court really has no choice but to raise the constitutional issues in order to protect the integrity of the election. And that is - and that's basically what we're saying. But, nevertheless, there are these two cases. They are quite different. On December 10th, 2015, that letter was not delivered to us until the 15th of December. And the position that we took, just to clarify with the court, is that we deemed it to be a rejection. That's all we could do at that time. And I'm just projecting because it's a - prophylactic actions that were filed, Your Honor. In order to protect my rights, the question is did he really reject it. And

that's exactly what's going on in this case. Now they're saying rejection occurred on December 10th, delivered to on the 15th. And I'm saying now no, because based on what Judge Ingram has said, and which is moot now as attorney general says, no, you have to do it in writing, and it has to be after I believe the formal petition has been filed, which we did on the 15th.

COURT: I agree. That's what Ingram (Indiscernible).

MR. CHIKAMOTO: So, we could not - we also would like to indicate that the plaintiff could not challenge the seating because of - there was an invalid certification. So, we can't challenge anything until the certification was issued. So, theoretically we had no because there was no written rejection. The thing about this case is there was a certification which we are saying is illegal. Then we have the issue of the rejection which sets in motion the appeal of the decision on the rejection of the petition. That was done after this. So, a lot of this is after the fact. But we're trying to catch up here. But nevertheless, on the 15th of December, he gives his decision with respect to an informal request that was made on the 26th of November. You cannot have - our position is you cannot have a rejection in - on a petition that has been filed on the 26th of November. Your petition has to arise after the declaration of the unofficial results. There's nothing we could do. And with respect to the seating of the Defendant Jack, well, again, the question is where are we in this process? And that - and part

of this is the tremendous amount of delay. Talk about the Bigej case, which is probably the king of all delayed cases. We do have a delay in here and we're trying to catch up. But, nevertheless, what had occurred did occur and we're trying to back track and go forward from there. But as the state of the facts occurs, you know, there was no rejection, official rejection. It's at that point then that we can appeal. Well, technically, you can't - he can't have that, like I said, I told the court, we cannot have certification until there's a final decision. Everything had been appealed already. So with respect to whether we should challenge and could have challenged it earlier, the question is did we have a certification, a valid certification. Did we have sufficient - I guess notice that he had taken this seat and he did it validly, of course he was under color of law, so to speak, that he's taken this seat. But we're saying no, no - but, you know, we have to look at the election. And that's why I'm saying, if you just look at it, you have to look at the entire electoral process and what went on here to find out and determine whether it was legal or not. And the Ury case says when you have this mixture of constitutional issues with the recount case, we have no choice but to uphold the constitutional rights because it destroys the integrity of the election. We have to have a new election. Section 185 is inapplicable to the seating of the mayor because, as the government points out, it deals specifically with seating

the Nitijela - seating in the Nitijela. The Nitijela is actually the body that will approve the results of the election. It's not the CEO. And I read that provision, it say the Nitijela can seat whoever they want. So what had occurred in Chutaro, and another case, I mean a case that we had cited, is he was seated by the Nitijela. It was based on an election which subsequently was found to be invalid by the appellate division of the High Court because the trial division refused to accept jurisdiction, and that was appealed, and we have this reversal of the election. So, what we're suggesting to the court is that 185 does not apply at all. We can't - the two are very different. You can't apply a provision that's specifically related to seating of Nitijela members. And the Constitution of the Republic - of the Majuro Atoll Local Government. With respect to the judges Your Honor's loathsome statement, the court might be loathed to interfere with machinery of the local government at this point because of the two years that has already transpired. But, it's almost as if the court then would be shutting its eyes as to what really happened in this election and say the constitutional provisions of MALGOV I'm not going to look at that, we had a certification. That certification was two years ago. The question is, is it valid? We're saying no. If it's no, then you can't seat that individual. It's under protest. Election hasn't been called yet. It's still in the process of being certified and finally determined. Therefore,

so long as that process is moving on to its natural conclusion, the question is, who is the mayor? And what we're saying is, under the MALGOV Constitution, it can't be the defendant Ladie Jack. It has to be the prior mayor who is a hold over mayor. And you look at the Chutaro case, and it refers sort of like to this delay. And if you look at headnote 4, it deals with this issue. It says under the general equity powers, the court would have the right to look into election irregularities where basic fundamental democratic right has been violated. That's what we're saying in this case, Your Honor. The violation occurred because of this clandestine meeting between the CEO, Chief Electoral Officer, Defendant Almen, and one of the candidates during the election. The election is not - was not over and it's still not over yet, Your honor. The court should not interfere with impunity. However, obviously the immediate case required some judicial determination or, then it goes on, voters will simply have to wait four more years but the court - the Chutaro court says and for the citizens of Mili Atoll to be told to wait for four more years cannot be condoned by this court. We can't do that. We are not going to wait until the next election. We're not going to wait until this final result. Something has to be done now to protect the rights of Mr. Chutaro. And what was their solution, vacate the office of Senator Alik, get him out, hold a special election. In this case, it's moving in the prior mayor because we're looking at

the Constitution of the MALGOV and reinstalling the rightful de jure mayor who was voted by, and it was not challenged, who was voted and was in office and still should be in office until he is unseated by a certified successor. So, we are saying look at - you have to intervene. You might be loathsome to interfere in the machinery of government but that's not our fault. One and a half years has transpired and that can be blamed on the CEO not taking any kind of step to correct what he had done. And he poisoned the whole election.

COURT: He took his step but you're saying he took the wrong step.

MR. CHIKAMOTO: Oh, he took the wrong step, Your Honor. He took the wrong step. He took the wrong step in counting the ballots in private. He took the wrong step in not pulling a recount when my client came 31 net votes. He took the wrong step in delivering and in taking this ballot box until 3:00 A.M. the next morning. And I refer to that and refer to the Elections and Referenda Regulations, and it clearly states, you can only expand the hours of polling time ...

COURT: ... For people standing in line.

MR. CHIKAMOTO: For people standing in line and specifically where the polling hours have to be extended because basically some natural disaster, a tidal wave, or a war or something like that, will have to cancel and then you will continue at that point. None of that occurred in this case.

So, he had no right to drive this thing until - but his response again is, and if you look at his response, and to our claim, I'm trying to get as many voters as I can. That's not what the regulations say and that's not what the law says. So, 185 is not applicable. It applies to members of the Nitijela not to the Mayor's Office. He's trying to stretch that and saying well the principles should apply. That's not - we don't do that in statutory construction. The mayor's race is entirely different. We have a different constitution. Otherwise, why have a MALGOV Constitution. We have to follow what the MALGOV Constitution says because we're talking about the mayor's position. Laches, can only assert the rights of the party. If you look at the Alex case which we had supplied to the court, what he's raising is we need to protect the rights of the people of Majuro. Laches should apply. Well, the people of Majuro are not parties to this case. Mudge Samuel is. And the defendant is not named as the mayor but individually. We are not naming MALGOV. So when you talk about who can assert the rights, first of all as I say, because they never asserted them in the beginning, under Rule 8, they're deemed to be waived. Secondly, under Alex, Langijota versus Alex, you can only assert the rights - your rights in defense. You cannot be asserting the rights of others and saying well these people are being prejudiced because of this, that, and the other thing. And that's what the government is trying to say. And if I'm not mistaken, perhaps that is what

the court's inclination is to do as well, I'm not going to interfere with the machinery of government. The machinery of government has already started. We can't just stop it. And what I'm saying is well you have to stop it because or you should stop it because to do otherwise would just institutionalize what had gone wrong with this election. And I'm submitting to the court that we cannot allow this kind of activity to occur every four years. This is the most egregious situation that I've heard of, but this is the very first case that I've prosecuted or - prosecuted. And there are a legion of cases, election cases, and they all say well, you know, let's see what happens next time. My client's constitutional rights were violated. That's it. He should go back into office. 2015-233 and it was morphed into 2017-013 and this particular case are quite different cases. He's trying to merge the two in saying that the issues are the same, the parties are the same, and they aren't. Ladies Jack is not named in 2017-037. We're not talking about the right to re-install the former mayor, my client, into the position of mayor now. What we're doing is there - and again, stress to the court, there are recount cases and then there election challenges. They're two quite different causes of actions. They may be related because of the issues but they are two different causes of action. With respect to abatement, the argument fails as the actions are not identical. Therefore, they are two different actions, we shouldn't abate

them. And if you again go into the Chutaro case, you're going to then ask us to wait not only two years but maybe five years or six years before this whole thing is resolved. And every day that passes my client is suffering, a deprivation of his constitutional rights, his property rights, are taken away from him and continue to be taken away from him with every passing minute that he is not paid and assumes his constitutional right to be mayor under the hold over doctrine. The CEO is not required to address constitutional issues, I think he is. And that's why I say permeating both actions are these constitutional issues. The Supreme Court has basically said we're not going to listen to any more, if I'm not mistaken, there's a case that I cited, an RMI Supreme Court case that says the run of the Mili election case is - we're kind of getting tired of hearing these cases, but, if they involve constitutional issues, that's a totally different matter. Now what I'm suggesting to the court is we take this approval that if we have constitutional issues you look at what happened in the election, you merge the two like the Ury Court did, that we merge the two and we'll come to a conclusion that something was wrong in this election. It's not numbers but something was wrong in arriving at the numbers. And part of the answer we believe is this clandestine meeting that we just happened to get evidence of that poisons the whole election with respect to the mayor's race. Now the flood gates which was a matter which was

raised by Defendant Jack, flood gates will not open as far as we're concerned. If you wanted to challenge the election laches would apply in that case, but we were in here from the early on pounding away and trying to get some resolution to the issues. So, flood gates is a red herring. Lastly, Your Honor, disputes still need to be resolved and what he - what the attorney general is referring to is all these factual issues. Again, I'm going to get to the beginning of my argument. The Court should be reminded that what we're talking about here today is to get Ladie out and the former mayor back in. We will not cover the - and we're spending a lot of time talking about the election issues because its kind of hard to differentiate between the two. But, to the extent that the procedure for the certification of the mayor was not followed, and that he cannot have a declaration of final results when matters have been challenged, and they we're back on the 15th of December 2015 until today, there is no final result. There has been no certification. Under the Majuro Atoll Constitution Defendant Jack is not entitled to sit in that office. And that's why we're moving for partial summary judgment. The court has to intervene, Your Honor. I'm sorry. I'm so convinced in this case, Your Honor, that if no action is taken at this point, what then are the rights of someone who has been wronged in the process? Because in the future, another mayor's case will pop up and there's going to be some constitutional - and he will be

kicked out. And the court's going to say well I don't want to intervene. Even at this point, I don't want to intervene. Why? Well, it took so long. Why did it take so long? Because the CEO didn't certify anything. A year and a half later - that's why we're looking around going where do we get justice in all of this? If you're talking about equities, my client has been grossly injured. He had a constitutional - protected constitutional right from the outset, Your Honor. He should never have been removed. But, it was because a certification was done. And we're saying it was illegal. It was done by someone who was meeting with the client - the person - the candidate - the person who he's swearing in - the court is swearing in when there was no right to do that. It was under protest already. It was under petition for recount and protest. Two very different actions. He should never have been installed from the beginning. And to that extent, every day that passes, every minute that passes that he's not sitting in that office, his constitutional rights, property rights, have been violated and continue to be violated. If you go back to your - I don't know second year constitutional law case, it continues to be violated because of what has occurred. It - there's state action. If you talk about state action, this court then I would say is the state action that prevents my client from exercise - from getting his justice by resolving his constitutional rights. This court by abating it is going to be the one that is imposing

the con - that the requirement for state action before due process can be found. It's a gross violation and it continues to be violated and that's what we're trying to stop, Your Honor. It has to stop.

COURT: Okay.

MR. CHIKAMOTO: Thank you, Your Honor.

COURT: Thank you. Mr. Manoni, you also have a motion. I'll give you a few minutes if you wish to say any final words about the motion for abatement.

MR. MANONI: Thank you, Your Honor. Yes, that would be our inclination and our motion, Your Honor, to - that this action be abated pending resolution of 037. And may I also just mention something that I missed in my initial arguments that - of course and I understand that it is subject to the court's - this court's discretion that there was an order staying or abating this matter on December 31, 2016, and that we ask the court enforce that order. And in fact, in our submissions, we said that the filing of the motion for summary judgment did not seek the permission of this court nor the modification of that order to allow further filing. And ...

COURT: ... Let me ask you about that.

MR. MANONI: Yes.

COURT: So Chief Justice Ingram said on December 1, 2016, almost an year ago, in this case 2016-121, is abated pending resolution of 233.

MR. MANONI: Yeah.

COURT: So 233 is not resolved (Indiscernible) remand and then that. Perhaps Mr. Chikamoto should have come to court and said 233 is done, I'd like to continue, but he didn't. He just (Indiscernible) file things.

MR. MANONI: Filed a new case. So, yes - so our argument is that 233 in effect morphed into 2 - 037.

COURT: Okay.

MR. MANONI: Without a resolution.

COURT: (Indiscernible) 233 is still pending but just has a new case number ...

MR. MANONI: ... Pending, new case number, yes. And thank you, that would be our motion, Your Honor.

COURT: One more question. In your March 31 Opposition to Plaintiff's Motion for Summary Judgment ...

MR. MANONI: ... Yes ...

COURT: ... Counter Motion for Abatement or Dismissal, we talked about abatement today.

MR. MANONI: Yes.

COURT: Have you given up on your request that the case be dismissed? Are you simply asking me to abate it or you, in the alternative, still ask ...

MR. MANONI: ... The alternative dismissal, Your Honor.

COURT: (Indiscernible) ...

MR. MANONI: ... If - yes ...

COURT: ... Go ahead.

MR. MANONI: Yes, if this court is going to reprimand me for not following the rules of procedures,

COURT: I would have done it already.

MR. MANONI: Yes, thank you, Your Honor. Then an abatement of the case I think would be a very logical arrival at this case.

COURT: The easy thing for me to do would be to say 2017-037 is similar and different to this case, and to consolidate this case into that but I cannot do that because Judge Ingram has recused in this case and not in that case. So I can't give this case back to him. It does for me and I believe a rather awkward position of being asked now to resolve this case before he resolves that case. But as Mr. Chikamoto points out, that's the nature of being a judge (Indiscernible). I am reluctant, maybe even loathsome to interfere with local government relations, but, in the interest of the constitutional right, Mr. Chikamoto makes a good argument that even if I don't want to do it I am obligated to do it if I determine that's the case. So I may not be the most popular man in the world. We'll wait and see what my decision says when I make it. Okay?

(End of Hearing)

HIGH COURT)
REPUBLIC OF THE MARSHALL ISLANDS)
_____)

I, Ingrid K. Kabua, Chief Clerk of the Courts, in the High Court, Republic of the Marshall Islands, hereby certify that:

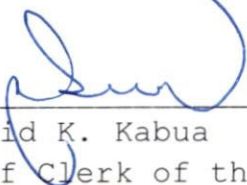
The foregoing 66 page(s) contain a full, true, and correct transcript of proceedings in the High Court of the Republic of the Marshall Islands on November 7, 2017, before the Honorable Colin Winchester, Associate Justice, in High Court Civil Action No. 2016-121, Mudge Samuel (Plaintiff) versus Robson Yasiwo Almen, et al. (Defendants) digitally recorded and transcribed by me to the best of my knowledge and ability.

CD No./ Date: November 7, 2017

Log Nos./Time: 14:12:02 - 16:28:28

Dated this 17th day of April, 2018, at Majuro, Republic of the Marshall Islands.

SIGNED & CERTIFIED TO BY:



Ingrid K. Kabua
Chief Clerk of the Courts
Marshall Islands Judiciary