

FSM SUPREME COURT APPELLATE DIVISION

HEIRS OF ALLEN MACKWELUNG,) APPEAL CASE NO. K5-2009
)
Appellants,)
)
vs.)
)
HEIRS OF IRVING MACKWELUNG and)
HEIRS OF JACOB TAULUNG,)
)
Appellees.)
_____)

OPINION

Argued: June 16, 2010
Submitted: August 12, 2010[†]
Decided: May 5, 2011

BEFORE:

Hon. Martin G. Yinug, Associate Justice, FSM Supreme Court
Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court

APPEARANCES:

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HEADNOTES

Appellate Review – Briefs, Record, and Oral Argument

Citations to specific documents from the record included in the appellants' appendix must cite to the specific page numbers in those documents. Heirs of Mackwelung v. Heirs of Mackwelung, 17 FSM Intrm. 500, 500 n.† (App. 2011).

Appellate Review – Standard of Review – Civil Cases

Since due process issues are questions of law that are reviewed de novo, and since, if the appellants were to prevail on the due process claims, the appellate court would vacate the decisions

[†] We consider this appeal as submitted to us on August 12, 2010 since it was on that date that, in response to a single justice's show cause order, that the appellants submitted their amended brief that cited not only to specific documents from the record included in their appendix but which added the specific page numbers in those documents, as required by FSM Appellate Rule 28(e).

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below without further considering the merits and remand the matter for new proceedings, the appellate court will analyze the due process issues first. Heirs of Mackwelung v. Heirs of Mackwelung, 17 FSM Intrm. 500, 503 (App. 2011).

Courts – Judges; Courts – Recusal

Kosrae state judges are subject to the 2000 version of the American Bar Association Code of Judicial Conduct as the basis for judicial ethics and disqualification because the State Code adopted by reference and applied to Kosrae judges the 1984 edition of the ABA Code of Judicial Conduct but allowed the Kosrae Chief Justice, by rule, to make the judicial conduct requirements stricter or to establish other standards consistent with the Code of Judicial Conduct, which was done through Kosrae General Court Order 2003-02 adopting the 2000 version of the ABA Code of Judicial Conduct. Heirs of Mackwelung v. Heirs of Mackwelung, 17 FSM Intrm. 500, 503 & n.1 (App. 2011).

Courts – Recusal

The 2000 ABA Code of Judicial Conduct, Canon 3.E requires a judge's disqualification in a proceeding where the judge's impartiality might reasonably be questioned, and one specific basis for disqualification is when the justice has personal knowledge of disputed evidentiary facts concerning the proceeding. Heirs of Mackwelung v. Heirs of Mackwelung, 17 FSM Intrm. 500, 503 (App. 2011).

Constitutional Law – Due Process; Property – Land Court

Due process demands impartiality on the part of the adjudicators, including Kosrae Land Court judges. Heirs of Mackwelung v. Heirs of Mackwelung, 17 FSM Intrm. 500, 503 (App. 2011).

Constitutional Law – Due Process; Courts – Recusal

If a presiding Land Court judge fails to recuse himself when he is required to, it is a due process violation and the matter must be remanded to the Kosrae Land Court with instructions and guidance for re-hearing the matter. Heirs of Mackwelung v. Heirs of Mackwelung, 17 FSM Intrm. 500, 503-04 (App. 2011).

Courts – Recusal

Following the judge's disclosure on the record of any basis for disqualification other than personal bias or prejudice concerning a party, the judge may ask the parties and their lawyers to consider, out of the judge's presence, whether to waive disqualification, and, if the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement must be incorporated in the record of the proceeding. Heirs of Mackwelung v. Heirs of Mackwelung, 17 FSM Intrm. 500, 504 (App. 2011).

Appellate Review – Briefs, Record, and Oral Argument; Appellate Review – Standard of Review – Civil Cases

Usually, when the record is not in a form that fairly and accurately provides the appellate court with an account of what happened in the lower court because it has not been translated into English, the appellate court will stop the analysis of the issue there and proceed to the next since the appellants have not met their responsibility to present the court with a record sufficient to permit it to decide the issues raised on appeal and which provides the court with a fair and accurate account of what transpired in the trial court proceedings. Heirs of Mackwelung v. Heirs of Mackwelung, 17 FSM Intrm. 500, 504 n.2 (App. 2011).

Appellate Review – Briefs, Record, and Oral Argument; Appellate Review – Standard of Review – Civil Cases

Since a trial court's findings are presumptively correct, the FSM Supreme Court appellate division

would need a complete translated transcript from the Kosrae Land Court before it could identify any of that court's findings of fact as clearly erroneous or as unsupported by substantial evidence. Heirs of Mackwelung v. Heirs of Mackwelung, 17 FSM Intrm. 500, 505 n.2 (App. 2011).

Courts – Recusal

When the Land Court judge asked the parties and counsel to consider whether to waive his disqualification but there was no recess taken after the judge informed the parties's counsel of his possible disqualification and when it may be inferred that the Land Court judge participated in the waiver process and actively solicited a waiver and that an agreement by all parties and their counsel (assuming that there was one) on waiver was not, as required, made out of the judge's presence and without his participation, the Land Court judge's disqualification was not properly remitted and his decision will be vacated and the matter remanded. Heirs of Mackwelung v. Heirs of Mackwelung, 17 FSM Intrm. 500, 504-05 (App. 2011).

* * * *

COURT'S OPINION

READY E. JOHNNY, Associate Justice:

This appeal arises from the Kosrae State Court's June 9, 2009 partial affirmance of a Land Court decision about the ownership of Parcel No. 075-T-03. We vacate the Kosrae State Court and the Kosrae Land Court decisions. Our reasons follow.

I. BACKGROUND

On July 17, 2005, the Kosrae Land Court determined that the Heirs of Jacob Taulung owned Parcel Nos. 075-T-01, 075-T-02, and 075-T-03 (all known as Meloh). The Heirs of Irving Mackwelung appealed that decision to the Kosrae State Court. On June 21, 2006, the Kosrae State Court ruled that the Land Court decision was not based on substantial evidence and that the Land Court had not conducted a fair hearing since it had relied on wills not admitted into evidence. Heirs of Mackwelung v. Heirs of Taulung, 14 FSM Intrm. 287, 288-89 (Kos. S. Ct. Tr. 2006). The matter was remanded for the Land Court to provide notice, receive evidence, and conduct hearings. *Id.* at 290-91.

On February 17, 2007, the Kosrae Land Court awarded Parcel No. 075-T-03 to the Heirs of Irving Mackwelung. Both the Heirs of Jacob Taulung and the Heirs of Allen Mackwelung appealed that decision to the Kosrae State Court. The Kosrae State Court held that the Kosrae Land Court ruling that the Irving Mackwelung heirs owned Parcel 075-T-03 was supported by substantial evidence and affirmed that decision, but it further held that the Jacob Taulung heirs owned a portion of 075-T-03 and remanded the matter to the Land Court for it to determine which part of 075-T-03 the Jacob Taulung heirs owned and what part the Irving Mackwelung heirs owned. Mem. of Decision at 8-9 (June 9, 2009).

The Heirs of Allen Mackwelung then appealed the Kosrae State Court decision to the FSM Supreme Court appellate division.

II. ISSUES PRESENTED

The Allen Mackwelung heirs contend the Kosrae State Court's partial affirmance of the Kosrae Land Court ruling was in error because the Kosrae Land Court had violated their due process rights when the Kosrae Land Court judge did not recuse himself and because the Land Court judge's February

17, 2009 decision was "predetermined" before the Land Court hearing. They also contend that the decision was not supported by substantial evidence in the Land Court record and was thus clearly erroneous.

III. DUE PROCESS

The Allen Mackwelung heirs contend that their due process rights were violated since the Land Court judge had previously represented one of them (Winfred Allen) in a land dispute over Loal (also spelled Laal) and that therefore this conflict should have required the Land Court judge's recusal. Related to this claim is the claim that as a result of this prior representation, the Land Court judge "predetermined" the Allen Mackwelung heirs' claim when he announced that he knew the Allen Mackwelung heirs owned Loal and not Meloh. The Allen Mackwelung heirs claim that Meloh is part of Loal. (Both the Land Court and the Kosrae State Court decisions state that they are two different, adjacent lands.) They also assert that their due process rights were violated because they were not given notice of the land adjudication until after the case had been remanded to the Land Court and because the Land Court should not have used the parts of the record admitted before they became parties.

A. *Standard of Review*

The due process issues are questions of law, and we review such questions *de novo*. Heirs of Jerry v. Heirs of Abraham, 15 FSM Intrm. 567, 571 (App. 2008); Sigrah v. Kosrae, 12 FSM Intrm. 320, 324 (App. 2004); Kosrae v. Skilling, 11 FSM Intrm. 311, 315 (App. 2003). If the appellants were to prevail on these particular due process claims, we would vacate the decisions below without further considering the merits and remand the matter for new proceedings; we therefore analyze them first. Anton v. Cornelius, 12 FSM Intrm. 280, 284 (App. 2003).

B. *Land Court Judge's Recusal*

The Land Court Act of 2000 required Land Court judges to "follow and adhere to" the ABA Code of Judicial Conduct, Kos. S.C. § 11.608(1), but permitted the Kosrae Chief Justice to set other ethical rules and standards, Kos. S.C. § 11.608(2). The standards for a Land Court judge's disqualification are established by Kosrae General Court Order 2003-02, which adopted the 2000 version of the American Bar Association Code of Judicial Conduct¹ as basis for Kosrae judicial ethics and disqualification. Edmond v. Alik, 13 FSM Intrm. 413, 416 (Kos. S. Ct. Tr. 2005).

The ABA Code of Judicial Conduct, Canon 3.E requires a judge's disqualification in a proceeding where the judge's impartiality might reasonably be questioned. Isaac v. Saimon, 14 FSM Intrm. 33, 35 (Kos. S. Ct. Tr. 2006); Edmond, 13 FSM Intrm. at 416. One specific basis for disqualification is when the justice has personal knowledge of disputed evidentiary facts concerning the proceeding, Isaac, 14 FSM Intrm. at 35; Edmond, 13 FSM Intrm. at 416, since due process demands impartiality on the part of the adjudicators, including Land Court judges, Edmond, 13 FSM Intrm. at 416 (adjudicatory decisions affecting property rights subject to due process requirements). If a presiding Land Court judge fails to recuse himself when he is required to, it is a due process violation, and the

¹ The Kosrae State Code adopted by reference and applied to Kosrae judges the 1984 edition of the ABA Code of Judicial Conduct. Anton v. Cornelius, 12 FSM Intrm. 280, 285-86 (App. 2003). The statute allowed the Kosrae Chief Justice, by rule, to make the judicial conduct requirements stricter or to establish other standards consistent with the Code of Judicial Conduct. Kos. S.C. § 6.1201(1). General Court Order 2003-02 did this by adopting the 2000 version of the ABA Code of Judicial Conduct.

matter must be remanded to the Kosrae Land Court with instructions and guidance for re-hearing the matter. *Isaac*, 14 FSM Intrm. at 36. For example, the *Isaac* court determined that the judge should have disqualified himself since when he served in governmental employment as a Kosrae State Land Commissioner and affirmed the land registration team adjudication and determination of the parcel's boundaries, the presiding judge (as a Land Commissioner) had expressed an opinion concerning the merits of the parties' boundary claims. *Id.* And, in *Edmond v. Alik*, 13 FSM Intrm. 413, 416-17 (Kos. S. Ct. Tr. 2005) a similar determination was made on similar facts.

The Kosrae State Court decision states that the Land Court judge disclosed to the parties at the start of the Land Court hearing his prior representation of Winfred Allen on the adjacent parcel and that the parties "acknowledged this and stated that he could continue to hear the case." Mem. of Decision at 7 (June 9, 2010). The Allen Mackwelung heirs do not directly challenge as incorrect this Kosrae State Court characterization of the Land Court events.

The ABA Code of Judicial Conduct, Canon 3.F (Remittal of Disqualification) provides the specific method by which a judge's disqualification may be waived (remitted):

A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

The official commentary to that Canon explains:

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties sign the remittal agreement.

It is undisputed that the Land Court judge made the required disclosure on the record and that he asked the parties' counsel whether they would waive his disqualification. The Land Court transcript is in Kosraean and has not been translated into English. We are therefore unable to determine exactly how the remittal process was conducted in the Land Court.² However, it does appear that the judge

² Usually, when the record is not in a form that fairly and accurately provides us with an account of what happened in the lower court because it has not been translated into English, we would stop the analysis of the issue there and proceed to the next since the appellants have not met their responsibility. Appellants must present the court with "a record sufficient to permit it to decide the issues raised on appeal, and one which provides the court with a fair and accurate account of what transpired in the trial court proceedings." *Damarlane v. United States*, 7 FSM Intrm. 510, 513 (App. 1996). However, in this case, we can determine, even without a translation, that no recess occurred between the judge's disclosure and the parties' waiver and that is enough. But without a translation we would remain unsure exactly what the Land Court judge said to

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asked the parties and counsel to consider whether to waive disqualification. And, we can determine from the transcript that there was no recess taken after the judge informed the parties's counsel of the judge's possible disqualification. From that we may infer that the Land Court judge participated in the waiver process and may have actively solicited a waiver and that an agreement by all parties and their counsel (assuming that there was one) on waiver was not, as required, made out of the judge's presence and without his participation. The Land Court judge's disqualification was therefore not properly remitted.

III. CONCLUSION

Accordingly, the February 17, 2007 Kosrae Land Court award of Parcel No. 075-T-03 to the Heirs of Irving Mackwelung and the June 9, 2009 Kosrae State Court review of that award are vacated and the matter is remanded to the Kosrae State Court with directions that it remand the matter to the Kosrae Land Court for the Kosrae Land Court to conduct further proceedings in compliance with the Kosrae State Court's previous instructions set forth in Heirs of Mackwelung v. Heirs of Taulung, 14 FSM Intrm. 287, 290-91 (Kos. S. Ct. Tr. 2006). The Allen Mackwelung heirs will, in the Land Court proceedings, have the right to challenge or rebut any evidence admitted before they became parties to the proceedings after the Kosrae State Court's 2006 remand. If the same Land Court judge is presiding, he shall deem his disqualification waived only if all of the parties and their counsel agree to the remittal of his disqualification outside of his presence and without his participation.

* * * *

the parties about Laal and Meloh. And, since a trial court's findings are presumptively correct, *George v. George*, 17 FSM Intrm. 8, 10 (App. 2010), we would need a complete translated transcript from the trial court [Land Court] before we could identify any of that court's findings of fact as clearly erroneous or as unsupported by substantial evidence, *Ponape Island Transp. Co. v. Fonoton Municipality*, 13 FSM Intrm. 510, 514 (App. 2005) (appellant's burden is to provide an adequate record).