FSM SUPREME COURT APPELLATE DIVISION

HEIRS OF ISAIAH BENJAMIN and TIMOTHY GEORGE, Appellants, vs. HEIRS OF CLINTON BENJAMIN, HEIRS OF TOLENNA JOSEPH, CHANG B. WILLIAM, and HEIRS OF KONLULU GEORGE, Appellees.	)	APPEAL CASE NO. K1-2010

OPINION

Argued: July 28, 2011
Decided: August 26, 2011

BEFORE:

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

APPEARANCE:

For the Appellants: Sasaki L. George, Esq.
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P.O. Box 38
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* * * *

HEADNOTES

Appellate Review – Standard of Review – Civil Cases – Abuse of Discretion

A lower court's denial of an extension of time is reviewed under the abuse of discretion standard. A court abuses its discretion when its decision is clearly unreasonable, arbitrary, or fanciful; or is based on an erroneous conclusion of law; or the record contains no evidence upon which the court could rationally have based its decision, and such abuses must be unusual and exceptional. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 626 (App. 2011).

Appellate Review – Motions; Civil Procedure – Motions

Motions for enlargement of time to file briefs are timely because they are filed before the briefs are due when they are filed on the same day the briefs were due. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 626 (App. 2011).

Appellate Review – Motions; Civil Procedure – Motions

An early enlargement motion can be useful in showing good faith, and a motion two or three days beforehand may be most helpful if it can provide an accurate estimate of the time needed. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 626 (App. 2011).

Appellate Review – Motions; Civil Procedure – Motions

"Good cause" is a legally sufficient reason. It is the burden placed on the litigant, usually by court rule or order, to show why a request should be granted. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 627 (App. 2011).

Appellate Review – Motions; Civil Procedure – Motions

While merely being a busy lawyer does not constitute excusable neglect justifying an enlargement of time (although when other factors are also present, the neglect may be excusable), the "good cause" standard is a broader and more liberal standard than "excusable neglect." Since the "good cause" standard frees courts from some of the restraints imposed by the excusable neglect requirement, there thus would be times when being a busy lawyer would satisfy the good cause standard where it obviously could not satisfy the higher excusable neglect standard. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 627 (App. 2011).

Appellate Review – Motions; Civil Procedure – Motions

The court's discretion lies in determining whether the busy lawyer (since all lawyers claim to be busy) was busy enough to be considered good cause. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 627 (App. 2011).

Appellate Review – Motions

Even if counsel were unaware of an unpublished decision announcing that in the future enlargements would not be granted without good cause, Kosrae Appellate Rule 9(b) is clear on its face that enlargement is not automatic and will granted only for good cause shown. Thus, he cannot claim ignorance of the appellate rule and of its requirement to show good cause. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 627 (App. 2011).

Appellate Review – Standard of Review – Civil Cases – Abuse of Discretion

In determining if a lower court abused its discretion, the appellate court cannot substitute its own judgment for that of the lower court. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 627-28 (App. 2011).

Appellate Review – Motions; Appellate Review – Standard of Review – Civil Cases – Abuse of Discretion

When the Kosrae State Court was arbitrary in denying the enlargement, and it based its ruling, in part, on an erroneous conclusion of law that the excusable neglect standard was the same as the good cause standard or that it could apply the excusable neglect standard to the appellants' enlargement motion because Kosrae Appellate Rule 9(b) mandates that the good cause standard be used, not the higher excusable neglect standard and when record so large that it cost over $1,500 and four appellate briefs and appendixes, in two separate cases, had to be prepared from it between December 21, 2009 and February 1, 2010, and during that time, counsel also conducted a trial plus the usual press of business, a twelve-day enlargement to complete two of the four appellate briefs would be reasonable, especially when the State Court did not cite any prejudice to the opposing party, the State Court should thus have granted their enlargement motion. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 628 (App. 2011).

Appellate Review – Standard of Review – Civil Cases – Abuse of Discretion

The Kosrae State Court, under Kosrae Appellate Rule 9(b), does not have such unbridled

discretion as to deny an enlargement motion when if good cause is shown because if it did, its actions would only be arbitrary or capricious and thus an abuse of discretion. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 628 (App. 2011).

Statutes – Construction

In construing statutes, the word "may" as opposed to "shall" is indicative of discretion or a choice between two or more alternatives, but the context in which the word appears must be the controlling factor. When, from the consideration of the whole statute, and its nature and object, it appears that the legislature's intent was to impose a positive duty rather than a discretionary power, the word "may" will be held to be mandatory. A mandatory construction will usually be given to the word "may" when public interests are concerned, and the public or third persons have a claim de jure that the power conferred should be exercised, or whenever something is directed to be done for the sake of justice or for the public good; but never for the purpose of creating a right. Accordingly, in a proper case the word "may" will be construed as "must" or "shall." Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 628 (App. 2011).

Appellate Review

Rules are construed in a manner similar to the manner in which statutes are construed. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 628 (App. 2011).

Appellate Review – Motions; Appellate Review – Standard of Review – Civil Cases – Abuse of Discretion

The Kosrae State Court's discretion lies in determining whether the reasons given, taking all the surrounding circumstances into account, constitute good cause. Once it has determined that there is good cause for an enlargement, then the State Court should grant the motion unless some countervailing reason, such as demonstrable prejudice to the opposing party if the enlargement is granted, would militate against it. In such instances, the State Court may have some discretion to deny it. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 628 (App. 2011).

Appellate Review – Dismissal; Appellate Review – Standard of Review – Civil Cases – Abuse of Discretion

When the Kosrae State Court abused its discretion by not granting an enlargement of the date to file the appellants' opening briefs and that denial is reversed, then it follows that the dismissal must also be vacated. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 629 (App. 2011).

Constitutional Law – Due Process – Notice and Hearing

A court hears before it condemns, and that while a court that has announced a decision without notice and an opportunity to be heard can always be asked to recall its decision and listen to argument this opportunity, as every lawyer knows, is a poor substitute for the right to be heard before the decision is announced. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 629 (App. 2011).

Appellate Review – Dismissal; Civil Procedure – Dismissal

While a vacated sua sponte dismissal without notice may mean that a later dismissal after notice is more likely to be a further abuse of discretion than a dismissal made on the court's own motion but only after notice, it does not automatically follow that every dismissal after a vacated sua sponte dismissal must also be an abuse of discretion. Nevertheless, courts should tread carefully here because, to an impartial observer, the process may by then seem tainted. Heirs of Benjamin v. Heirs of Benjamin, 17 FSM Intrm. 621, 629 (App. 2011).

* * * *

COURT'S OPINION

READY E. JOHNNY, Associate Justice:

This appeal arises from the Kosrae State Court's April 14, 2010 order that dismissed an appeal from a Kosrae Land Court decision determining title to land known as Yemelil because the State Court denied Timothy George and the Heirs of Isaiah Benjamin an extension of time to file their opening briefs. We reverse that order. Our reasons follow.

I. BACKGROUND

On November 4, 2008, the Kosrae Land Court ruled that within the land in Utwe known as Yemelil the Heirs of Clinton Benjamin owned Parcels No. 33-U-11 and 33-U-12; the Heirs of Tolenna Joseph owned Parcels No. 33-U-09 and 33-U-10; Chang B. William owned Parcel No. 33-U-08; the Heirs of Isaiah Benjamin owned Parcels No. 33-U-05 and 33-U-06; and the Heirs of Konlulu George owned Parcel No. 33-U-03. On February 3, 2009, the Heirs of Clinton Benjamin appealed the award of Parcels No. 33-U-05 and 33-U-06 to the Heirs of Isaiah Benjamin and the award of Parcel No. 33-U-03 to the Heirs of Konlulu George. Their appeal was docketed as Civil Action No. 6-09. On February 5, 2009, Timothy George and the Heirs of Isaiah Benjamin filed their own appeal, which was docketed as Civil Action No. 8-09. Timothy George claimed that he, and not the Heirs of Konlulu George, should have been awarded Parcel No. 33-U-03, and the Heirs of Isaiah Benjamin claimed that they had title over the Heirs of Tolenna Joseph and the Heirs of Clinton Benjamin.

On October 13, 2009, the Kosrae State Court held a status conference to discuss possible consolidation of the Civil Action No. 8-09 and No. 6-09 appeals and other matters related to the cases. On October 15, 2009, the State Court issued its Notice of Record Ready; Order Setting Briefing Schedule for No. 8-09. That order also "removed" Timothy George as an appellant in No. 8-09.

Timothy George moved to be reinstated as an appellant since he had been dismissed without notice and an opportunity to be heard and since, in his view, the Land Court had erred because he, not the Heirs of Konlulu George, was the true owner of Parcel No. 33-U-03. Timothy George asserted that, although Konlulu George (who had died in the 1960s) had had several children of which he was the oldest son, only he had filed a claim to Parcel No. 33-U-03 and he had made that claim as an individual and not as a representative of Konlulu George's heirs. A further hearing on matters related to both appeals was held on November 17, 2009. In a November 19, 2009 order, the State Court reinstated Timothy George as an appellant and ruled that he would not be part of the Heirs of Konlulu George. The State Court also set December 28, 2009, as the due date for opening appellate briefs in both Civil Action No. 8-09 and No. 6-09 although the two appeals were never consolidated.

The appellants had, on October 28, 2009, received from the Land Court a $1,533.50 invoice for the transcript and records costs of the Land Court proceedings. Because their clients (the appellants) could not afford this sum, the Micronesian Legal Services Corporation ("MLSC") Kosrae office had to seek funds from its Saipan central office. Payment came through on December 21, 2009, and the Land Court record was paid for and picked up that day. On December 28, 2009, the briefs' due date, the appellants moved for an enlargement of time until February 1, 2010, to file their opening briefs. Although the Clinton Benjamin heirs opposed the motion, the State Court, on January 13, 2010, granted the enlargement but also warned that no further continuances would be granted unless good cause was shown.

On December 12, 2009, the Clinton Benjamin heirs filed their opening brief and appendix in No. 6-09. On February 3, 2010, attorney Sasaki George filed, in No. 6-09, an answering brief and appendix

on Timothy George's behalf and an answering brief and appendix on the Isaiah Benjamin heirs' behalf.

On February 1, 2010, the due date for their briefs, appellants Timothy George and the Heirs of Isaiah Benjamin filed a motion for enlargement of time, asserting good cause and asking that they be given until February 12, 2010, to file opening briefs in No. 8-09. On February 3, 2010, the State Court dismissed No. 8-09 for their failure to file opening briefs. The appellants moved that the State Court reconsider because the dismissal had been done without notice and an opportunity to be heard. On February 22, 2010, the State Court vacated the February 3, 2010 dismissal order and set a hearing for the No. 8-09 appellants to show cause why their appeal should not be dismissed and to discuss possible ethical violations by attorney Sasaki George. The hearing was continued to allow the Clinton Benjamin heirs an opportunity to oppose the enlargement. Their opposition was filed on March 10, 2010, and the hearing was held March 12, 2010.

On April 14, 2010, the State Court, reasoning that an enlargement of time should be an unusual, not a routine request, denied the motion for enlargement of time because counsel's evidence did not show good cause since it did not show any unforeseen circumstances but only a busy work load. Order Denying Appellants' Motion for Enlargement of Time; Order of Dismissal at 4-6 (Kos. S. Ct. Tr. Civ. No. 8-09, Apr. 14, 2010) (hereinafter "Order"). The State Court indicated that the appellants should have filed their motion as soon as they knew they would not make the deadline and should not have waited until the last day. *Id.* at 5. It also stated that in the past it had been far too generous in granting enlargement motions and that enlargements would no longer be routinely granted without good cause shown. *Id.* at 6. It concluded that it was more likely to be lenient if it was a party's first enlargement motion, if the motion was unopposed, if the motion was filed ahead of the deadline, and if the grounds were stated with particularity with an affidavit. *Id.* The State Court denied the February 1, 2010 enlargement motion because it was the appellants' third enlargement motion, a party opposed it, it was filed the day the brief was due, and the only reasons offered were that counsel was busy and the record was large. *Id.* The State Court then dismissed the appeal because no briefs had been filed and no good cause had been shown why the appeal should not be dismissed.[1] *Id.* at 7-10. The Heirs of Isaiah Benjamin and Timothy George then appealed to the FSM Supreme Court.

II. Issues Presented

The appellants assert that the Kosrae State Court erred: 1) because its findings of fact were clearly erroneous; 2) by not acting consistently with law or rule when it denied the February 1, 2010 motion for enlargement of time; and 3) by not acting consistently with law or rule when it dismissed their appeal.

III. Analysis

A. *Findings of Fact Claimed Clearly Erroneous*

The appellants contend that the State Court clearly erred when it found that the appellants' February 1, 2010 motion to enlarge was their third such motion. The appellants only filed two motions to enlarge, December 28, 2009, and February 1, 2010. The third (or first chronologically) enlargement motion was one made orally at the November 17, 2009 hearing, and was first requested by counsel for the Clinton Benjamin heirs (appellants in No. 6-09, the other appeal from the November 4, 2008

[1] The order then went on to discuss whether the appellants' counsel, Sasaki George, could ethically represent Timothy George or the Heirs of Konlulu George. That discussion is the subject of a separate appeal – App. No. K2-2010 [*In re* Sanction of George, 17 FSM Intrm. 613 (App. 2011)].

Land Court Yemelil title decision) for their opening brief in No. 6-09. The appellants also contend that the State Court did not consider or address the other factors that contributed to the February 1, 2010 enlargement motion.

One reason the State Court mentioned for denying the enlargement was that the appellants' February 1, 2010 enlargement motion was their third. Order at 6 (Apr. 14, 2010). But it may not have been the deciding factor. It does not seem certain that the State Court would have granted the enlargement motion if it had thought that it was only their second enlargement motion. If error, this then might be a harmless error. At any rate, this and the appellants' contention that the State Court did not address all of the factors that contributed to the February 1, 2010 enlargement motion are best considered when analyzing whether the State Court erred by denying the February 1, 2010 motion to enlarge.

B. *Denial of Enlargement of Time*

1. *State Court Order and Standard of Review*

The State Court's January 13, 2010 order stated that unless good cause was shown, no further continuances would be granted. The appellants contend that they showed good cause. They assert that the time from December 21, 2009, when they picked up the Land Court record, to February 1, 2010, was inadequate because they had two other appellate briefs with appendixes to prepare in the related No. 6-09 appeal; trial in another case; the press of office matters; that there was no bad faith on their part; and that, if the Land Court had provided earlier notice, they would have started earlier in getting the records together. The appellants also object to the State Court's reliance on an earlier unpublished decision that held that enlargement motions should now be unusual and not routine requests since that case was unpublished, the case was not mentioned during the hearing, and they had no notice of the case or opportunity to be heard on it. The appellants agree that the State Court had been generous in the past in granting enlargements but assert that the shift in policy should have been announced before it was applied to them in the dismissal order.

A lower court's denial of an extension of time is reviewed under the abuse of discretion standard. *See* Bualuay v. Rano, 11 FSM Intrm. 139, 146 (App. 2002). A court abuses its discretion when its decision is clearly unreasonable, arbitrary, or fanciful; or is based on an erroneous conclusion of law; or the record contains no evidence upon which the court could rationally have based its decision, and such abuses must be unusual and exceptional. *E.g.*, Narruhn v. Chuuk, 17 FSM Intrm. 289, 293 (App. 2010); M/V Kyowa Violet v. People of Rull ex rel. Mafel, 16 FSM Intrm. 49, 64 (App. 2008); FSM Dev. Bank v. Adams, 14 FSM Intrm. 234, 246 (App. 2006); Kosrae Island Credit Union v. Palik, 10 FSM Intrm. 134, 138 (App. 2001); Jano v. King, 5 FSM Intrm. 326, 330 (App. 1992).

The two enlargement motions could have been filed earlier. But they were timely because they were filed before the briefs were due since they were filed on the same day the briefs were due. The State Court's statement that it is more likely to grant an enlargement motion when "it is filed ahead of the deadline," Order at 6 (Apr. 14, 2010), is understandable but problematic because the nearer someone is to the deadline the more accurately that person can estimate the time needed to complete the brief and thus the size of the enlargement that should be requested. But an early enlargement motion can be useful in showing good faith, and a motion two or three days beforehand may be most helpful if it can provide an accurate estimate of the time needed.

2. *Good Cause Shown Standard*

The Kosrae Appellate Rules provide that:

> The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time . . . . Enlargement is not automatic. If no enlargement is granted by the Court when the time prescribed by these rules has expired, then the Court may not accept late performance.

Kos. App. R. 9(b). "Good cause" is defined as "[a] legally sufficient reason." BLACK'S LAW DICTIONARY 251 (9th ed. 2009). It is "the burden placed on the litigant (usu. by court rule or order) to show why a request should be granted . . . ." *Id.*

The State Court stated that it had previously ruled that a heavy workload did not constitute good cause. Order at 6 (Apr. 14, 2010) (citing Heirs of Killin v. Taulung, Kos. S. Ct. Tr. Civ. No. 144-07 (Apr. 2, 2008)). In support, the State Court quoted Bualuay v. Rano, 11 FSM Intrm. 139, 147 (App. 2002) that held "[m]erely being a busy lawyer does not constitute excusable neglect justifying an enlargement of time." Bualuay, however, was decided on the excusable neglect standard. In relying on Bualuay, the State Court either confused good cause with excusable neglect or made the erroneous conclusion of law that they were the same standard. While merely being a busy lawyer does not constitute excusable neglect justifying an enlargement of time (although when other factors are also present, the neglect may be excusable), the "good cause" standard is a broader and more liberal standard than "excusable neglect." Bualuay, 11 FSM Intrm. at 147 (when excusable neglect existed to extend time to appeal, it would have been an abuse of discretion to deny the motion requesting it). The broader and more liberal "good cause" standard frees courts from some of the restraints imposed by the excusable neglect requirement. *See* FSM Dev. Bank v. Gouland, 9 FSM Intrm. 375, 378 (Chk. 2000); *see also* FSM Dev. Bank v. Neth, 17 FSM Intrm. 131, 134 (Pon. 2010). There thus would be times when being a busy lawyer would satisfy the good cause standard where it obviously could not satisfy the higher excusable neglect standard. We think the court's discretion lies in determining whether the busy lawyer (since all lawyers claim to be busy) was busy enough to be considered good cause. The appellants may thus have met that burden.

3. *Good Cause Was Shown*

The State Court states that "the only reason offered was that counsel was busy and the record is large." Order at 6 (Apr. 14, 2010). The February 3, 2010 order of dismissal also mentioned that appellants' counsel claimed that he had to first complete work on other cases with earlier due dates. Order of Dismissal at 1 (Feb. 3, 2010). (The State Court seemed irritated that the same counsel got the answering briefs timely filed in No. 6-09, the Clinton Benjamin heirs' appeal, but the No. 8-09 appeal brief was not filed.) The State Court added that counsel's MLSC daily time sheets do not show good cause because they "do not indicate clearly what case counsel was working on, if it was this case or the companion case with the same parties . . . ." Order at 6 (Apr. 14, 2010). We must discount this statement because the two appeals, No. 6-09 and No. 8-09, were both from the same large Land Court record, so any work on the record could easily be useful for and work on both of these appeals.

The appellants assert other factors, such as the delay in getting the Land Court record, that, by their timing, may apply more to the December 2009 enlargement motion although it could still have a residual effect. But we think the appellants' objection to the State Court's reliance on an unpublished opinion stating that the court would no longer be generous in granting enlargements without good cause is misplaced. Appellate Rule 9(b) is clear on its face. Enlargement is not automatic and will granted only for good cause shown. Thus, even if counsel were unaware of the unpublished decision, he cannot claim ignorance of the appellate rule and of its requirement to show good cause.

In determining if a lower court abused its discretion, we cannot substitute our own judgment for

that of the lower court. Narruhn, 17 FSM Intrm. at 293; M/V Kyowa Violet, 16 FSM Intrm. at 64; Adams, 14 FSM Intrm. at 246. Under that standard, this is a close case. The appellants had good cause for the twelve days' enlargement they were seeking. For a record so large that it cost over $1,500 and four appellate briefs and appendixes, in two separate cases, had to be prepared from it between December 21, 2009 and February 1, 2010, and during that time, counsel also conducted a trial plus the usual press of business, a twelve-day enlargement to complete two of the four appellate briefs would be reasonable, especially when the State Court did not cite any prejudice to the opposing party. The State Court should thus have granted their enlargement motion. (It had already improperly dismissed the case once and appellant Timothy George twice). It was arbitrary in denying the enlargement, and it based its ruling, in part, on an erroneous conclusion of law that the excusable neglect standard was the same as the good cause standard or that it could apply the excusable neglect standard to the appellants' enlargement motion. Kosrae Appellate Rule 9(b) mandates that the good cause standard be used, not the higher excusable neglect standard.

4. *State Court Discretion*

The State Court also ruled that, under Appellate Rule 9(b), it has the discretion to deny an enlargement motion even if good cause is shown. Order at 3 (Apr. 14, 2010) ("The rule does not state that when good cause is shown, the Court must or shall grant the motion to enlarge.") We do not think that the State Court has such unbridled discretion. If it did, its actions would only be arbitrary or capricious and thus an abuse of discretion.

The State Court's reasoning that it has such discretion was based on the presence of the word "may" instead of "must" or "shall" in the rule. *Id.* In construing statutes, the word "may" as opposed to "shall" is indicative of discretion or a choice between two or more alternatives, but the context in which the word appears must be the controlling factor. Pohnpei v. AHPW, Inc., 14 FSM Intrm. 1, 20-21 (App. 2006); Kama v. Chuuk, 10 FSM Intrm. 593, 599 (Chk. S. Ct. App. 2002). In AHPW, Inc. v. Pohnpei, 14 FSM Intrm. 188, 191 (Pon. 2006), the FSM Supreme Court held that in construing the meaning of "may" in a statute that

> Where, from the consideration of the whole statute, and its nature and object, it appears that the intent of the legislature was to impose a positive duty rather than a discretionary power, the word "may" will be held to be mandatory. A mandatory construction will usually be given to the word "may" where public interests are concerned, and the public or third persons have a claim de jure that the power conferred should be exercised, or whenever something is directed to be done for the sake of justice or for the public good; but never for the purpose of creating a right. Accordingly, in a proper case the word "may" will be construed as "must" or "shall."

Id. (quoting 82 C.J.S. *Statutes* § 380, at 880-81 (1953) (footnotes omitted)). Rules are construed in a manner similar to the manner in which statutes are construed. *Cf.* Adams v. Island Homes Constr., Inc., 12 FSM Intrm. 348, 353 (Pon. 2004) (both are interpreted so as to avoid questioning the statute's, or the rule's, constitutionality); Kama, 10 FSM Intrm. at 599 (construing the words "may" and "shall" in statutes and rules similarly).

The State Court's discretion lies in determining whether the reasons given, taking all the surrounding circumstances into account, constitute good cause. Once it has determined that there is good cause for an enlargement, then the State Court should grant the motion unless some countervailing reason, such as demonstrable prejudice to the opposing party if the enlargement is granted, would militate against it. In such instances, the State Court may have some discretion to deny it. That is not this case.

In this case, the State Court did not mention any prejudice to the appellees. Nor can we see how the appellees could possibly be prejudiced by an enlargement of twelve days for the appellants to file their opening brief. The appellants' position is further bolstered by the State Court's January 13, 2010 order which can only be read to mean that the State Court would grant a further continuance (enlargement) if, and only if, the appellants showed good cause. The appellants complied with that order by showing good cause.

C. *Dismissal of Appeal*

The appellants contend that the dismissal of their appeal was inconsistent with constitutional due process or with Kosrae statute. They first assert that the State Court's February 3, 2010 dismissal, since it was based on a sua sponte motion made without notice or an opportunity to be heard, is void. They also assert that even if the State Court's denial of their enlargement motion were valid, the State Court still cannot dismiss a Land Court appeal for failure to file a brief because, under Kosrae State Code § 11.614(5)(c) and Kosrae Appellate Rule 9(b), it must still hold a hearing and render a decision on the merits.

Since the State Court abused its discretion by not granting an enlargement of the February 1, 2010 date to file the appellants' opening briefs and that denial is reversed, then it follows that the dismissal must also be vacated. Nevertheless, we note that the appellants are correct that the State Court's October 15, 2009 sua sponte dismissal of Timothy George and its February 3, 2010 sua sponte dismissals of the Heirs of Isaiah Benjamin and of Timothy George were abuses of the State Court's discretion and violations of their due process rights and of Kosrae Appellate Rule 20(b) and thus void. As correctly noted by the appellants:

> a court "hears before it condemns," and that while a court that has announced a decision without notice and an opportunity to be heard can always be asked "to recall its decision and listen to argument . . . this opportunity, as every lawyer knows, is a poor substitute for the right to be heard before the decision is announced."

In re Sanction of Woodruff, 10 FSM Intrm. 79, 89 (App. 2001); *see also* Wainit v. Weno, 10 FSM Intrm. 601, 606 (Chk. S. Ct. App. 2002). The State Court, however, correctly vacated that February 3, 2010 dismissal. It then set a hearing on the appellants' enlargement motion and the court's own motion to dismiss. While a vacated sua sponte dismissal without notice may mean that a later dismissal after notice is more likely to be a further abuse of discretion than a dismissal made on the court's own motion but only after notice, it does not automatically follow that every dismissal after a vacated sua sponte dismissal must also be an abuse of discretion. Nevertheless, courts should tread carefully here because, to an impartial observer, the process may by then seem tainted.

We do not reach the appellants' contention that the Kosrae statutory provision, Kos. S.C. § 11.614(5), would require the State Court to decide the No. 8-09 appeal on its merits without the benefit of the appellants' briefs or their participation in oral argument.

IV. Conclusion

Although a close case, the Kosrae State Court abused its discretion in denying the appellants an enlargement of time to file their opening briefs because the State Court made an erroneous conclusion of law to apply the excusable neglect, instead of the applicable good cause, standard and because its decision was arbitrary since good cause was shown. We accordingly reverse the denial of an enlargement to file opening briefs and vacate the resulting dismissal. The appellants shall have twelve days from the date of our mandate to the Kosrae State Court, within which to file and serve their

opening briefs in Civil Action No. 8-09.

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FSM SUPREME COURT TRIAL DIVISION

EMANUEL "MANNY" MORI, Plaintiff, vs. MYRON HASIGUCHI, ELSA LAGRADILLA, and TRUK TRANSPORTATION CO., INC., Defendants,	CIVIL ACTION NO. 2008-1111
TRUK TRANSPORTATION CO., INC., Counterclaimant, vs. EMANUEL "MANNY" MORI, Counter-Defendant,	
TRUK TRANSPORTATION CO., INC., Third-Party Plaintiff, vs. BARNEY OLTER, MARION OLTER, ROSELT POBUK, LISA OLTER, and DWIGHT OLTER, Third-Party Defendants.	

ORDER DISPOSING OF PENDING MOTIONS

Ready E. Johnny
Associate Justice

Decided: August 17, 2011
Corrected: August 29, 2011