

(Haw. 1999); Farms v. Carlsbad Riverside Apartments, Inc., 690 P.2d 1044, 1046 (N.M. Ct. App. 1984). The issue of the trial court's jurisdiction is being appealed on various constitutional grounds, but there is no determination at this stage that the trial court lacks jurisdiction. The extraordinary writ of prohibition is not to serve as a substitute for an appeal.

The court finds no basis for it to depart from the procedures established for a stay to be put in place pending an appeal in this matter. The Petitioner seeking this extraordinary writ has not met its burden to show that its right to the writ is clear and indisputable. Senda v. Trial Division, 6 FSM Intrm. 336, 338 (App. 1994); Nikichiw v. Petewon, 15 FSM Intrm. 33, 37 (Chk. S. Ct. App. 2007). There are other adequate remedies for the Petitioner to obtain what he seeks. FSM Civ. R. 62.

III. CONCLUSION

For the reasons set forth above, we find that the trial court is not acting without authority or jurisdiction, that the necessary requirements for the granting of an extraordinary writ of prohibition are not present, and we conclude that the writ clearly should not be granted. We therefore HEREBY DENY the petition.

\* \* \* \*

FSM SUPREME COURT APPELLATE DIVISION

HEIRS OF FRITZ WEILBACHER,	)	APPEAL CASE NO. K1-2012
	)	KSC Civil Acton No. 99-10
Appellants,	)	
	)	
vs.	)	
	)	
HEIRS OF ALIK LUKE,	)	
	)	
Appellees.	)	
	)	

ORDER OF DISMISSAL

Decided: October 1, 2013

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: Marstella E. Jack, Esq.  
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\* \* \* \*

## HEADNOTES

Appellate Review – Decisions Reviewable

An appellate court is obligated to examine the basis of its appellate jurisdiction, *sua sponte*, if necessary. Heirs of Weilbacher v. Heirs of Luke, 19 FSM R. 178, 180 (App. 2013).

Appellate Review – Decisions Reviewable; Appellate Review – Notice of Appeal

The FSM Supreme Court appellate division has jurisdiction over an appeal only if the notice of appeal is timely filed because the time limit set by Rule 4(a)(1) is jurisdictional, and if that time is not extended by a timely motion to extend that time period under Rule 4(a)(5), the appellate division is deprived of jurisdiction to hear the case. Heirs of Weilbacher v. Heirs of Luke, 19 FSM R. 178, 180 (App. 2013).

Appellate Review – Dismissal; Appellate Review – Notice of Appeal

Because the requirement that an appeal be timely filed is mandatory and jurisdictional, an untimely filed appeal must be dismissed. Heirs of Weilbacher v. Heirs of Luke, 19 FSM R. 178, 180 (App. 2013).

Appellate Review – Notice of Appeal

In civil cases, appeals may be taken from all final decisions of the Kosrae State Court by the filing of a notice of appeal within forty-two days after the date of the entry of the judgment or order appealed. Heirs of Weilbacher v. Heirs of Luke, 19 FSM R. 178, 180 (App. 2013).

Appellate Review – Notice of Appeal – Extension of Time

There are two requirements for a valid timely motion to extend the time to appeal. The motion must be filed in the court appealed from and it must be filed within 30 days of the expiration of the 42-day appeal period. Heirs of Weilbacher v. Heirs of Luke, 19 FSM R. 178, 180 (App. 2013).

Appellate Review – Notice of Appeal – Extension of Time

The FSM Supreme Court appellate division has no authority to waive or extend Rule 4(a)'s time requirements or to grant a motion to extend time to file a notice of appeal. Heirs of Weilbacher v. Heirs of Luke, 19 FSM R. 178, 180 (App. 2013).

Appellate Review – Notice of Appeal – Extension of Time

Rule 4(a)(5)'s central purpose is to make clear that a motion for extension of time to file a notice of appeal must be made not later than 30 days after the expiration of the initial appeal time prescribed by Rule 4(a). Heirs of Weilbacher v. Heirs of Luke, 19 FSM R. 178, 180 (App. 2013).

Appellate Review – Decisions Reviewable; Appellate Review – Notice of Appeal – Extension of Time

No matter how excusable their neglect or how good the appellants' cause, a motion to extend time to appeal will be denied when it was not filed in the court appealed from and it was not filed within 72 days of the decision appealed because the failure to file an extension motion in the court appealed from within the 30-day extension period is fatal to the appellants' attempt to appeal. The FSM Supreme Court appellate division lacks jurisdiction and has no power or authority to do anything in the appeal case other than to dismiss it. Heirs of Weilbacher v. Heirs of Luke, 19 FSM R. 178, 181 (App. 2013).

COURT'S OPINION

PER CURIAM:

On April 17, 2012, the Heirs of Fritz Weilbacher sent to the court by facsimile transmission, their Motion to File by Facsimile, their Notice of Appeal, and their counsel's Notice of Appearance, all dated and signed by their attorney on that day. They asked that they be permitted to file their notice of appeal by facsimile on April 17, 2012, (the clerk filed it on May 18, 2012) because it would take too long for the documents to reach the court by mail. Their notice of appeal states that they were appealing a Decision and Order (and all preceding orders) entered on February 28, 2012, by the Kosrae State Court in Civil Action No. 99-10.

We are obligated to examine the basis of our appellate jurisdiction, *sua sponte*, if necessary. Kosrae v. George, 17 FSM Intrm. 5, 7 (App. 2010). Therefore, since, if the Heirs of Weilbacher were permitted to file by facsimile, the notice of appeal would be filed forty-nine days after the decision appealed from, the Heirs of Weilbacher were ordered to file a memorandum on whether their notice of appeal is or would be timely filed if the motion were granted and on whether we have jurisdiction over this appeal when the notice of appeal was not filed within forty-two days of the decision appealed.

On September 20, 2013, the Heirs of Weilbacher filed a Brief and Motion for an Enlargement of Time. They apologize to the court for neglecting to accompany the notice of appeal with a motion to extend time to appeal and ask that in the interest of justice that we allow the current motion to extend as if it had been filed after the 42 days had expired but before the 30-day extension period ended because of their genuine error in where to file their notice of appeal.

We have jurisdiction over an appeal only if the notice of appeal is timely filed. "'The time limit set by Rule 4(a)(1) is jurisdictional, and if that time is not extended by a timely motion to extend that time period under Rule 4(a)(5), the appellate division is deprived of jurisdiction to hear the case.'" Bualuay v. Rano, 11 FSM Intrm. 139, 145 (App. 2002) (quoting Hartman v. Bank of Guam, 10 FSM Intrm. 89, 95 (App. 2001)). "Because the requirement that an appeal be timely filed is mandatory and jurisdictional, an untimely filed appeal must be dismissed." *Id.* (citation omitted).

FSM Appellate Rule 4(a)(1)(A) provides that in civil cases, appeals may be taken from all final decisions of the Kosrae State Court by the filing of a notice of appeal within forty-two days after the date of the entry of the judgment or order appealed. FSM Appellate Rule 4(a)(5) allows the time to appeal to be extended under certain conditions. It provides that: "The court appealed from, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by Rule 4(a). . . ." FSM App. R. 4(a)(5). There are thus two requirements for a valid timely motion to extend the time to appeal. The motion must be filed in the court appealed from and it must be filed within 30 days of the expiration of the 42-day appeal period. The Heirs of Weilbacher's motion meets neither requirement.

"'The FSM Supreme Court appellate division has no authority to waive or extend Rule 4(a)'s time requirements or to grant a motion to extend time to appeal.'" Ruben v. Chuuk, 18 FSM Intrm. 604, 607 (App. 2013) (quoting Bualuay v. Rano, 11 FSM Intrm. 139, 146 (App. 2002)); *see also* FSM App. R. 26(b). Thus, even if a motion to extend time to appeal had accompanied the April 17, 2012 notice of appeal facsimile transmission, it would not have been granted because, like the current motion, it was not filed in the court appealed from.

"Rule 4(a)(5)'s central purpose 'is to make clear that a motion for extension of time must be made not later than 30 days after the expiration of the initial appeal time prescribed by Rule 4(a).'"

Heirs of Weilbacher v. Heirs of Luke  
19 FSM R. 178 (App. 2013)

Ruben v. Chuuk, 18 FSM Intrm. 637, 639 (Chk. 2013) (quoting 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 142-43 (3d ed. 1999) (discussing identical provision in U.S. Federal Rules of Appellate Procedure)). The Heirs of Weilbacher's current motion is filed too late no matter what court it is filed in.

The current motion fails to meet any of the Rule 4(a)(5) requirements. It was not filed in the Kosrae State Court and it was not filed within 72 days of February 28, 2012. Thus, no matter how excusable their neglect or how good their cause, Heirs of Weilbacher's failure to file an extension motion in the Kosrae State Court within the 30-day extension period is fatal to their attempt to appeal. We lack jurisdiction. We have no power or authority to do anything in this appeal case other than to dismiss it.

Accordingly, this appeal case is dismissed.

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FSM SUPREME COURT APPELLATE DIVISION

KERSIN TILFAS, MAXWELL SALIK,	)	APPEAL CASE NO. K8-2013
and ESTHER EUVER,	)	(KSC Civil Action No. 84-11)
	)	
Petitioners,	)	
	)	
vs.	)	
	)	
CHIEF JUSTICE ALIKSA B. ALIKSA,	)	
Kosrae State Court,	)	
	)	
Respondent,	)	
	)	
HEIRS OF KILAFWAKUN LONNO,	)	
	)	
Real Parties in Interest.	)	
_____	)	

ORDER DENYING PETITION FOR A WRIT OF PROHIBITION

Decided: October 1, 2013

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

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