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HEADNOTES

Mandamus and Prohibition – Nature and Scope

For the FSM Supreme Court to exercise its discretion to issue a writ of mandamus or prohibition: 1) the respondent must be a judicial or other public officer; 2) the act to be compelled must be non-discretionary or ministerial; 3) the respondent must have a clear legal duty to perform the act; 4) the respondent must have failed or refused to perform the act; and 5) there must be no other adequate legal remedy available, and each of these five elements must be satisfied. A writ of mandamus or prohibition is an extraordinary remedy, the object of which is not to cure a mere legal error or to serve as a substitute for appeal, but to require an official to carry out a clear, non-discretionary duty or prevent a clear abuse of power. Tilfas v. Aliksa, 19 FSM R. 181, 184 (App. 2013).

Mandamus and Prohibition – Nature and Scope

The issuance of writs of mandamus or prohibition must be done with great caution and cannot be used to test or overrule a judge's exercise of discretion, and a mere legal error by a judge, even gross legal error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, will not suffice to support the issuance of a writ of prohibition. Tilfas v. Aliksa, 19 FSM R. 181, 184 (App. 2013).

Mandamus and Prohibition – Nature and Scope

The single issue presented by a writ of prohibition is whether an inferior court or tribunal is without jurisdiction or is about to act in excess of its jurisdiction. The extraordinary writ of prohibition is proper to prevent an inferior tribunal acting without or in excess of jurisdiction which may result in a wrong, damage, and injustice when there is no plain, speedy, and adequate legal remedy otherwise available. Tilfas v. Aliksa, 19 FSM R. 181, 184 (App. 2013).

Attorney and Client – Attorney Discipline and Sanctions; Mandamus and Prohibition – When May Issue

A writ of prohibition cannot be used as a substitute for a pending appeal of attorney sanctions that is currently being briefed, especially when the sanctions have been stayed while that appeal proceeds. That is an adequate legal remedy for the attorney sanctions. Tilfas v. Aliksa, 19 FSM R. 181, 184 (App. 2013).

Mandamus and Prohibition – When May Issue

A petition for a writ of prohibition will be denied when any legal error or even gross legal error in striking the response brief is correctable by a pending or a future appeal. Tilfas v. Aliksa, 19 FSM R. 181, 184 (App. 2013).

Mandamus and Prohibition – When May Issue

When the respondent Kosrae State Court Chief Justice has not acted without jurisdiction or in excess of his jurisdiction, a writ of prohibition clearly should not be granted. Tilfas v. Aliksa, 19 FSM R. 181, 184 (App. 2013).

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COURT'S OPINION

PER CURIAM:

Since we are of the opinion that the writ of prohibition sought here clearly should not be granted,

we deny the petition for a writ of prohibition. FSM App. R. 21(b). Our reasons follow.

I. BACKGROUND

Kersin Tilfas, Maxwell Salik, and Esther Euver prevailed in a boundary dispute in Kosrae Land Court. The Heirs of Kilafwakun Lonno appealed that decision to the Kosrae State Court. The Heirs of Lonno filed their opening brief in that court and counsel for Tilfas, Salik, and Euver filed a response brief. The Heirs of Lonno counsel moved to have the response brief stricken because, although the brief was signed by counsel of record, it had been drafted by a different counsel, the counsel of record's sister. On May 17, 2013, the Kosrae State Court issued an order striking the response brief of Tilfas, Salik, and Euver and sanctioning their counsel by suspending the authoring counsel from practice for one year and by warning the counsel of record.

On May 30, 2013, Tilfas, Salik, and Euver appealed the May 17, 2013 order to the FSM Supreme Court appellate division. The appeal was docketed as K5-2013.

On a motion for reconsideration, the Kosrae State Court issued a July 12, 2013 order setting oral argument without the stricken brief. The Kosrae State Court also denied a motion for a stay pending appeal.

On August 1, 2013, a single justice order granted a stay and noted that the appeal involved two issues: 1) the striking of the response brief of Tilfas, Salik, and Euver because one counsel wrote the brief that another counsel signed and filed and 2) the Kosrae State Court's sanction of the authoring attorney by suspending her from the practice of law in Kosrae for one year and issuing a warning to the other counsel. It further noted that a sanction against an attorney who is not a party to the underlying case is immediately appealable if the sanctioned attorney proceeds under his or her own name and as the real party in interest but that the other relief sought appeared to be an order directing the Kosrae State Court not to strike, or to reinstate the stricken brief, and to proceed from there with oral argument on the merits but without taking any position on the case's merits, that is, Tilfas, Salik, and Euver sought an order prohibiting the lower court from proceeding without considering their brief or permitting them to argue. In other words, they sought a writ of prohibition issued under Appellate Rule 21 and directed to the Kosrae State Court.

The single justice order also required that the appellate filings be amended so that the sanctioned counsel proceed under their own names and as real parties in interest on their appeal of the sanctions against them, and that if, Tilfas, Salik, and Euver intended to petition for a writ of prohibition directed to the Kosrae State Court Chief Justice in Civil Action No. 84-11, they must conform their filings and service to Appellate Rule 21's requirements. On August 30, 2013, Tilfas, Salik, and Euver filed a separate petition for a writ of prohibition. On September 6, 2013, another single justice order directed that the petition for a writ of prohibition be assigned a new docket number separate from the attorney sanctions appeal (K5-2013) and that it proceed separately on the Rule 21 expedited procedure pertinent to that form of relief.

The petitioners allege that the Kosrae State Court's acts were due process violations and seek a writ 1) removing the presiding justice because his actions in striking their brief and sanctioning their counsel have shown that he is biased and predisposed to rule against them; 2) reinstating the stricken brief and appendix before the Kosrae State Court hears oral argument; and 3) lifting the sanctions against their counsel.

II. STANDARD

In order for the FSM Supreme Court to exercise its discretion to issue a writ of mandamus or prohibition: 1) the respondent must be a judicial or other public officer; 2) the act to be compelled must be non-discretionary or ministerial; 3) the respondent must have a clear legal duty to perform the act; 4) the respondent must have failed or refused to perform the act; and 5) there must be no other adequate legal remedy available, and each of these five elements must be satisfied. Etscheit v. Amaraich, 14 FSM Intrm. 597, 600 (App. 2007). A writ of mandamus or prohibition is an extraordinary remedy, the object of which is not to cure a mere legal error or to serve as a substitute for appeal, but to require an official to carry out a clear, non-discretionary duty or prevent a clear abuse of power. *Id.* It cannot be used to test or overrule a judge's exercise of discretion, and mere legal error by a judge, even gross legal error in a particular case, as distinguished from a calculated and repeated disregard of governing rules, will not suffice to support the issuance of a writ of prohibition. *Id.* The issuance of writs of mandamus or prohibition must be done with great caution. *Id.*

The single issue presented by a writ of prohibition is whether or not an inferior court or tribunal is without jurisdiction or is about to act in excess of its jurisdiction. Election Comm'r v. Petewon, 6 FSM Intrm. 491, 496 (Chk. S. Ct. App. 1994). The extraordinary writ of prohibition is proper to prevent an inferior tribunal acting without or in excess of jurisdiction which may result in a wrong, damage, and injustice when there is no plain, speedy, and adequate legal remedy otherwise available. *Id.* at 497.

III. ANALYSIS

While the respondent is a judicial officer, Chief Justice Aliksa B. Aliksa, the other elements do not appear to exist. Even if the striking of the response brief of Tilfas, Salik, and Euver and the sanctioning of the two counsel is legal error or even gross legal error, Chief Justice Aliksa did not have a ministerial, non-discretionary duty not to strike the brief and not to sanction counsel.

The attorney sanctions have already been appealed in Appeal Case No. K5-2013, and are currently being briefed and will be allowed to follow the normal appeal procedure, especially since the sanctions have been stayed while that appeal proceeds. That is an adequate legal remedy for the attorney sanctions. This petition for a writ of prohibition cannot be used as a substitute for that appeal.

Any legal error or even gross legal error in striking the response brief is also correctable by appeal. First, the issue will be addressed in attorney sanction appeal. Second, if Tilfas, Salik, and Euver are still aggrieved after the Kosrae State Court's final decision in Civil Action No. 84-11, – that is, if the Kosrae State Court does not affirm the Land Court decision but rules instead in the Heirs of Lonno's favor – Tilfas, Salik, and Euver can then appeal that decision to this court and assert that the striking of their brief was an error entitling them to relief. It may be that the Kosrae State Court will affirm the Land Court and that any legal error in striking their brief would thus become harmless error.

IV. CONCLUSION

Since respondent Kosrae State Court Chief Justice has not acted without jurisdiction or in excess of his jurisdiction, we are of the opinion that the writ clearly should not be granted. Accordingly, we deny the petition. FSM App. R. 21(b). The stay of oral argument in KSC Civil Action No. 84-11 is lifted. (The stay of the attorney sanctions remains in place.) KSC Civil Action No. 84-11 may proceed to decision.

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