IV. Conclusion

Accordingly, Mailo's summary judgment motion is denied in its entirety as a matter of law. When a party's summary judgment motion has been denied as a matter of law and it appears the nonmoving party is entitled to judgment as a matter of law, the court may grant summary judgment to the nonmoving party in the absence of a cross motion for summary judgment if the original movant has had an adequate opportunity to show that there is a genuine issue and that his nonmoving opponent is not entitled to judgment as a matter of law. FSM v. GMP Hawaii, Inc., 17 FSM Intrm. 555, 569 (Pon. 2011); Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 110 n.5 (Pon. 2010); Truk Continental Hotel, Inc. v. Chuuk, 6 FSM Intrm. 310, 311 (Chk. 1994).

Mailo has had an adequate opportunity to show that there is a genuine issue. He agrees that there are no factual matters in dispute and that the only disputes are matters of law. Mailo has also had an adequate opportunity to show that the Plan is not entitled to judgment as a matter of law. Since, based on the above analysis, the Plan is entitled to judgment as a matter of law, summary judgment shall be entered in its favor.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

HEIRS OF EDMOND TULENKUN, Petitioners, vs. CHIEF JUSTICE ALIKSA B. ALIKSA, Kosrae State Court, Respondent, HEIRS OF TULENSRU SEYMOUR and HEIRS OF EDMOND NED, Real Parties in Interest	APPEAL CASE NO. K1-2013 KSC Civil Action No. 46-12

ORDER DENYING PETITION FOR A WRIT OF PROHIBITION

Decided: October 17, 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 Petitioners: Yoslyn G. Sigrah, Esq.
P.O. Box 3018
Kolonia, Pohnpei FM 96941

* * * *

HEADNOTES

Mandamus and Prohibition – Procedure

Under Appellate Rule 21, if the appellate division is of the opinion that a writ of prohibition clearly should not be granted, it must deny the petition. Otherwise, it must order that an answer be filed. Heirs of Tulenkun v. Aliksa, 19 FSM R. 191, 194 (App. 2013).

Mandamus and Prohibition – Nature and Scope

Five elements must be present 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. Heirs of Tulenkun v. Aliksa, 19 FSM R. 191, 194 (App. 2013).

Mandamus and Prohibition – Nature and Scope

A writ of 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. Heirs of Tulenkun v. Aliksa, 19 FSM R. 191, 194 (App. 2013).

Mandamus and Prohibition – Nature and Scope

A writ 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, does not suffice to support the issuance of a writ of prohibition. Heirs of Tulenkun v. Aliksa, 19 FSM R. 191, 194 (App. 2013).

Mandamus and Prohibition – Nature and Scope

The single issue presented by a petition for 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 remedy otherwise available. Heirs of Tulenkun v. Aliksa, 19 FSM R. 191, 194 (App. 2013).

Courts; Mandamus and Prohibition – When May Issue

The Kosrae State Court Chief Justice is not acting in excess of his jurisdiction by appointing himself to sit as a temporary judge on a Land Court case when all the Land Court judges are disqualified when the Land Court is an inferior court within a unified state court system and since there is no constitutional impediment to a Kosrae statute authorizing a Kosrae State Court justice to sit as a temporary justice in another (inferior) court within the unified Kosrae state court system. Heirs of Tulenkun v. Aliksa, 19 FSM R. 191, 194-95 (App. 2013).

Courts – Judges; Courts – Recusal

If the Kosrae Chief Justice sits on a case in the Land Court and his decision is later appealed to

the Kosrae State Court, the Chief Justice must then have no involvement in the case in the Kosrae State Court and the Kosrae State Court appeal would necessarily be handled by another justice. Heirs of Tulenkun v. Aliksa, 19 FSM R. 191, 195 (App. 2013).

Courts – Recusal

The general rule is that the disqualifying factors must be from an extrajudicial source, and the normal situation in which a judge's disqualification may be required is when a judge's extrajudicial knowledge, relationship or dealings with a party, or the judge's own personal or financial interests, might be such as to cause a reasonable person to question whether the judge could preside over and decide a particular case impartially. Heirs of Tulenkun v. Aliksa, 19 FSM R. 191, 195 (App. 2013).

Mandamus and Prohibition – When May Issue

When there appears to be no legal grounds, let alone a clear duty that the Kosrae Chief Justice not appoint himself a Land Court temporary judge to preside over a Land Court case, a writ of prohibition clearly should not be granted. Heirs of Tulenkun v. Aliksa, 19 FSM R. 191, 195 (App. 2013).

* * * *

COURT'S OPINION

PER CURIAM:

Although this case was originally filed as an appeal of a Kosrae State Court decision assigning a judge, the filers, the Heirs of Edmond Tulenkun, have now filed a petition for a writ of prohibition under this docket number seeking essentially the same relief. The petition arises from a Kosrae Land Court case and a Kosrae State Court order appointing a special judge in the Land Court case. The petition is denied. Our reasons follow.

I. POSTURE OF CASE

On June 6, 2012, the Land Court Principal Judge recused himself from Heirs of Edmond Tulenkun v. Heirs of Tulensru Seymour, L.C. No. 28-10, a quiet title action. The Heirs of Seymour then filed a petition for a writ of mandamus in the Kosrae State Court (KSC Civil Action No. 46-12), asking that the Land Court be ordered to appoint a judge to preside over L.C. No. 28-10, but they neglected (although due process requires it) to serve the petition on the Heirs of Tulenkun, the real parties in interest. On July 2, 2012, the Land Court Principal Judge filed a request for the appointment of a special judge.

Once the Kosrae State Court Chief Justice was satisfied that both the Land Court Principal Judge and the Land Court Associate Judge were validly disqualified, the Kosrae Chief Justice, in an order in KSC Civil Action No. 46-12, appointed himself to be the special judge presiding over Land Court Case No. 28-10.

The Heirs of Tulenkun, who since they were served the order had just learned of KSC Civil Action No. 46-12, appealed that order. The appeal was docketed as Appeal Case No. K1-2013. The Heirs of Tulenkun have now filed a petition for a writ of prohibition in K1-2013. Their appeal, and now their petition, seeks an order prohibiting the Kosrae Chief Justice from presiding over Land Court Case No. 28-10.

II. Procedure and Standard

Under Appellate Rule 21, if we "are of the opinion that the writ clearly should not be granted, [we must] deny the petition. Otherwise, [we] shall order that an answer be filed." FSM App. R. 21(b). Five elements must be present 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. Etscheit v. Amaraich, 14 FSM Intrm. 597, 600 (App. 2007). A writ of 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. *Id.* A writ 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, does not suffice to support the issuance of a writ of prohibition. *Id.*

The single issue presented by a petition for 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 remedy otherwise available. *Id.* at 497.

III. Analysis

The respondent is a judicial officer, Kosrae State Court Chief Justice Aliksa B. Aliksa. The petitioners contend that the statute under which he appointed himself is unconstitutional under Article VI of the Kosrae Constitution and that therefore the Kosrae State Court Chief Justice acted in excess of his jurisdiction when he appointed himself to preside over Land Court Case No. 28-10.

The statute reads: "In the event that all Land Court justices have a conflict of interest or for other reasons are legally disqualified from hearing a case before the Land Court, a Justice of the Kosrae State Court may hear and adjudicate the matter." Kos. S.C. § 11.603(2)(a). The petitioners contend that this statute violates the constitutional provision that "[t]he State Court is a court of record and the highest court of the State. It consists of a Chief Justice and an Associate Justice. . . ." Kos. Const. art. VI, § 2. They further contend that this constitutional provision means that Kosrae State Court justices cannot sit in the Land Court on a Land Court case and are restricted solely to sit in the Kosrae State Court. The petitioners assert that, since the Kosrae State Court Chief Justice was nominated by the Governor and confirmed by the Kosrae Legislature, they only consented to him sitting in the Kosrae State Court and did not contemplate or consent to his moving back and forth between the Kosrae State Court and the Land Court at will.

The petitioners also contend that the Kosrae State Court Chief Justice should be disqualified from Land Court Case No. 28-10 because he earlier sat on a related case in the Kosrae State Court.

The Kosrae State Court Chief Justice is not acting in excess of his jurisdiction by appointing himself to sit as a temporary judge on a Land Court case when all the Land Court judges are disqualified. When the statute authorizing the appointment of Kosrae State Court justices to sit on Land Court cases was enacted, the Governor and Legislature certainly contemplated that a Kosrae State Court judge might sit on an occasional Land Court case.

The Land Court is an inferior court within a unified state court system. "The courts of the State constitute a unified judicial system for operation and administration." Kos. Const. art. VI, § 6. The statute authorizes the appointment of a Kosrae State Court justice to be a Land Court judge when all Land Court judges are legally disqualified. The statute is not unconstitutional. There is no constitutional impediment to a Kosrae statute authorizing a Kosrae State Court justice to sit as a temporary justice in another (inferior) court within the unified Kosrae state court system. If the Kosrae Chief Justice sits on a case in the Land Court and his decision is later appealed to the Kosrae State Court, the Chief Justice must then have no involvement in the case in the Kosrae State Court and the Kosrae State Court appeal would necessarily be handled by another justice.

That the Kosrae State Court Chief Justice decided a related case is not a ground to issue a writ of prohibition. Anything he learned during that case did not stem from an extrajudicial source. The general rule is that the disqualifying factors must be from an extrajudicial source, and the normal situation in which a judge's disqualification may be required is when a judge's extrajudicial knowledge, relationship or dealings with a party, or the judge's own personal or financial interests, might be such as to cause a reasonable person to question whether the judge could preside over and decide a particular case impartially. Ting Hong Oceanic Enterprises v. Supreme Court, 8 FSM Intrm. 1, 7 (App. 1997); In re Main, 4 FSM Intrm. 255, 260 (App. 1990).

IV. Conclusion

Since there appears to be no legal grounds, let alone a clear duty that the Kosrae Chief Justice not appoint himself a Land Court temporary judge to preside over Land Court Case No. 28-10, we are of the opinion that the writ clearly should not be granted. Accordingly, we deny the petition, FSM App. R. 21(b), and dismiss this case.

* * * *

FSM SUPREME COURT TRIAL DIVISION

ROCKY INEK,	)	CIVIL ACTION NO. 2012-1022
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
CHUUK STATE,	)	
	)	
Defendant.	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Martin G. Yinug
Chief Justice

Trial: August 5, 2013
Decided: October 17, 2013
Corrected: December 6, 2013