FSM SUPREME COURT APPELLATE DIVISION

MARGRINA T. WAGUK, SALOME J. JOSEPH, and ROSINA E. JOSEPH, Appellants, vs. WILTON M. WAGUK, HEIRS OF MORRIS T. WAGUK, KOSRAE LAND COURT, and the KOSRAE STATE GOVERNMENT, Appellees.	APPEAL CASE NO. K2-2015 (Kosrae Civil Action No. 02-15)

MEMORANDUM OF DECISION AND ORDER OF REMAND

Argued: July 13, 2016
Decided: December 28, 2016

BEFORE:

Hon. Dennis K. Yamase, Chief Justice, FSM Supreme Court
Hon. Cyprian J. Manmaw, Temporary Justice*
Hon. Mayceleen J.D. Anson, Temporary Justice**

*Chief Justice, State Court of Yap, Colonia, Yap
**Associate Justice, Pohnpei Supreme Court, Kolonia, Pohnpei

APPEARANCES:

For the Appellant: Yoslyn G. Sigrah, Esq.
P.O. Box 2018
Kolonia, Pohnpei FM 96941

For the Appellee: Canney Palsis, Esq.
Micronesian Legal Services Corporation
P.O. Box 38
Tofol, Kosrae FM 96944

For the Appellees: Jeffrey Tilfas
Assistant Attorney General
Office of the Kosrae Attorney General
P.O. Box 870
Tofol, Kosrae FM 96944

* * * *

HEADNOTES

Appellate Review – Standard – Civil Cases – Abuse of Discretion

A Rule 41(b) dismissal is generally reviewed for abuse of discretion. A trial court abuses its discretion when its decision is clearly unreasonable, arbitrary, or fanciful; or it is based on an erroneous conclusion of law; or the record contains no evidence upon which the court could rationally have based its decision. Waguk v. Waguk, 21 FSM R. 60, 65-66 (App. 2016).

Appellate Review – Standard – Civil Cases – Abuse of Discretion

The complaining party has the burden of showing that the trial court abused its discretion. Such abuse will not be presumed. It will be presumed that the discretion was proper. Waguk v. Waguk, 21 FSM R. 60, 66 (App. 2016).

Appellate Review – Standard – Civil Cases – De Novo

Issues of law are reviewed de novo on appeal. Waguk v. Waguk, 21 FSM R. 60, 66 (App. 2016).

Civil Procedure – Dismissal; Civil Procedure – Dismissal – Lack of Prosecution

Under Kosrae Civil Rule 41(b), the court may dismiss a claim for the plaintiff's failure to prosecute or to comply with the court's rules or with any court order. Waguk v. Waguk, 21 FSM R. 60, 66 (App. 2016).

Civil Procedure – Dismissal; Civil Procedure – Motions – Sua Sponte; Civil Procedure – Res Judicata

Generally, a court may not raise the res judicata defense on its own motion. But, in the interest of judicial economy, a court may properly raise the issue when both actions have been brought in the same court. Waguk v. Waguk, 21 FSM R. 60, 67 (App. 2016).

Civil Procedure – Res Judicata; Equity – Laches

In the Kosrae State Court, both res judicata and laches are affirmative defenses that must be asserted in responsive pleadings, and, if affirmative defenses are not raised in the answer or other responsive pleading, the defenses are waived. Waguk v. Waguk, 21 FSM R. 60, 67 (App. 2016).

Civil Procedure – Motions – Sua Sponte; Civil Procedure – Res Judicata

Under certain circumstances, res judicata can be raised sua sponte. Waguk v. Waguk, 21 FSM R. 60, 67 (App. 2016).

Civil Procedure – Dismissal; Civil Procedure – Motions – Sua Sponte; Civil Procedure – Res Judicata

Judicial initiative is appropriate in special circumstances. Most notably, if a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised. This is fully consistent with the policies underlying res judicata: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste. Waguk v. Waguk, 21 FSM R. 60, 68 (App. 2016).

Civil Procedure – Collateral Estoppel; Civil Procedure – Res Judicata

Res judicata and its offspring, collateral estoppel, are not statutory defenses; they are equitable defenses adopted by the courts in furtherance of prompt and efficient administration of the business that comes before them. They are grounded on the theory that one litigant cannot unduly consume the court's time at the other litigants' expense, and that, once the court has finally decided an issue, a litigant cannot demand that it be decided again. Waguk v. Waguk, 21 FSM R. 60, 68 (App. 2016).

Civil Procedure – Res Judicata; Constitutional Law – Due Process – Notice and Hearing

When raising res judicata *sua sponte*, due process requires that the court give the opposing party notice and an opportunity to respond. Waguk v. Waguk, 21 FSM R. 60, 68 (App. 2016).

Civil Procedure – Res Judicata

Res judicata is defined as an issue that has been definitively settled by judicial decision. It is also more narrowly defined as an affirmative defense barring a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. Waguk v. Waguk, 21 FSM R. 60, 68-69 (App. 2016).

Civil Procedure – Collateral Estoppel

Collateral estoppel is a judgment's binding effect as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based. Waguk v. Waguk, 21 FSM R. 60, 69 (App. 2016).

Civil Procedure – Collateral Estoppel; Civil Procedure – Res Judicata

Res judicata actually comprises two doctrines concerning a prior adjudication's preclusive effect. The first is claim preclusion, or true res judicata, which treats a judgment once rendered as the full measure of relief to be accorded between the same parties on the same claim or cause of action. The second, collateral estoppel or issue preclusion, recognizes that suits addressed to particular claims may present issues relevant to suits on other claims. Waguk v. Waguk, 21 FSM R. 60, 69 (App. 2016).

Civil Procedure – Res Judicata; Judgments

When the plaintiff obtains a judgment in his favor, his claim "merges" in that judgment; he may seek no further relief on that claim in a separate action. Waguk v. Waguk, 21 FSM R. 60, 69 (App. 2016).

Civil Procedure – Res Judicata; Judgments

When a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment acts as a "bar." Waguk v. Waguk, 21 FSM R. 60, 69 (App. 2016).

Civil Procedure – Collateral Estoppel

In order to effectuate the public policy in favor of minimizing redundant litigation, issue preclusion bars the litigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties. Waguk v. Waguk, 21 FSM R. 60, 69 (App. 2016).

Civil Procedure – Collateral Estoppel

The collateral estoppel doctrine provides that a right, question, or fact which is distinctly put in issue and directly determined as a ground of recovery by a court of competent jurisdiction cannot be disputed in a subsequent action between the same parties, even if the subsequent action is on a different cause of action. Waguk v. Waguk, 21 FSM R. 60, 69 (App. 2016).

Civil Procedure – Res Judicata

Under the res judicata doctrine, a judgment entered in a cause of action conclusively settles that cause of action as to all matters that were or might have been litigated and adjudged therein. Waguk v. Waguk, 21 FSM R. 60, 69 (App. 2016).

Civil Procedure – Collateral Estoppel; Civil Procedure – Res Judicata

Simply put, res judicata applies to claims and collateral estoppel applies to issues. Waguk v. Waguk, 21 FSM R. 60, 69-70 (App. 2016).

Civil Procedure – Collateral Estoppel; Civil Procedure – Res Judicata

Preclusion can rest only on a judgment that is valid, final, and on the merits. Waguk v. Waguk, 21 FSM R. 60, 70 (App. 2016).

Civil Procedure – Res Judicata

Res judicata is a final judgment on the merits of an action that precludes the parties or their privies from relitigating issues that were or could have been raised in that action. Implicitly, this presumes that the underlying judgment was made without fraud or collusion by a court or tribunal of competent jurisdiction. Waguk v. Waguk, 21 FSM R. 60, 70 (App. 2016).

Civil Procedure – Res Judicata

As with practically all broad principles of the law, the common law principle of res judicata admits of some exceptions. There are rare circumstances in which judgments will not be protected against attack. Ordinarily, a judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. Waguk v. Waguk, 21 FSM R. 60, 70 (App. 2016).

Civil Procedure – Res Judicata

Three exceptions to res judicata are: 1) when a fundamental change in the applicable law after the first decision was rendered made application of estoppel in the second action inappropriate, 2) when there is corruption contrary to public policy, and 3) when, through deficient notice, there was a total lack of opportunity of petitioner to participate in first action affecting his legal interests. Ultimately, this is a non-exclusive list and for any equitable reason courts may refuse to apply the res judicata doctrine to avoid manifest injustice. Waguk v. Waguk, 21 FSM R. 60, 71 (App. 2016).

Civil Procedure – Res Judicata; Judgments – Void; Jurisdiction

A manifest abuse of authority, a judgment obtained unfairly or working a serious injustice, fraud or collusion by a court, fraud, and lack of jurisdiction have been considered grounds to ignore a judgment's validity. Validity fundamentally includes the court's competence to adjudicate the matter with regard to subject-matter jurisdiction, territorial jurisdiction, and notice. Waguk v. Waguk, 21 FSM R. 60, 71 (App. 2016).

Courts; Jurisdiction

A court of competent jurisdiction is a court that has the power and authority to do a particular act; one recognized by law as possessing the right to adjudicate a controversy. Waguk v. Waguk, 21 FSM R. 60, 71 n.14 (App. 2016).

Civil Procedure – Res Judicata; Judgments – Finality of

There is a sharp conflict about whether a judgment from which an appeal is pending has the finality requisite for the application of the res judicata doctrine. Waguk v. Waguk, 21 FSM R. 60, 71 (App. 2016).

Civil Procedure – Res Judicata

The res judicata doctrine bars the relitigation by parties or their privies of all matters that were or could have been raised in a prior action that was concluded by a final judgment on the merits, and which has been affirmed on appeal or for which time for appeal has expired. Waguk v. Waguk, 21 FSM R. 60, 71 (App. 2016).

Civil Procedure – Res Judicata; Judgments – Final Judgment

When an appeal is pending, the underlying decision is generally not considered final for the purposes of claim preclusion. Waguk v. Waguk, 21 FSM R. 60, 71 (App. 2016).

Civil Procedure – Res Judicata

Substantial difficulties result from a rule that a final trial court judgment operates as res judicata while an appeal is pending. These difficulties suggest that ordinarily it is better to avoid the res judicata question by dismissing the second action or staying trial and perhaps pretrial proceedings pending the resolution of the first action's appeal, but sidestepping the issue through a dismissal without prejudice or a stay pending appeal is not always wise and the court should consider the underlying circumstances of each case before making such a determination. Waguk v. Waguk, 21 FSM R. 60, 71-72 (App. 2016).

Civil Procedure – Res Judicata

The general rule is that a final decision on the merits of a claim bars a subsequent action on that same claim or any part thereof, including issues that were not but could have been raised as part of the claim. The modern trend is to insist, first, that a plaintiff raise his entire claim in one proceeding, and second, to define claim to cover all the claimant's rights against the particular defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose. Waguk v. Waguk, 21 FSM R. 60, 72 (App. 2016).

Civil Procedure – Default and Default Judgments; Civil Procedure – Res Judicata; Judgments – Stipulated

Preclusive effect is given to many decisions that have not actually been litigated on the merits – for example if it is the subject of a stipulation between the parties, or a judgment entered by confession, or consent, or default, where none of the issues is actually litigated. Waguk v. Waguk, 21 FSM R. 60, 72 (App. 2016).

Civil Procedure – Dismissal – Lack of Jurisdiction; Civil Procedure – Res Judicata; Civil Procedure – Venue

A dismissal for lack of jurisdiction, for improper venue, or for failure to join a party is not an adjudication upon the merits. Waguk v. Waguk, 21 FSM R. 60, 73 (App. 2016).

Civil Procedure – Dismissal – Lack of Jurisdiction; Civil Procedure – Res Judicata; Jurisdiction – Subject-Matter

A dismissal for lack of subject-matter jurisdiction does not preclude a second action on the same claim. Waguk v. Waguk, 21 FSM R. 60, 73 (App. 2016).

Courts; Jurisdiction – Subject-Matter; Property – Land Court or Land Commission

While limited, the Kosrae Land Court's subject-matter jurisdiction is broad enough to encompass factual determinations of fraud and misrepresentation to the extent that they affect the validity of titles or conveyances of land. Indeed, that is the Land Court's very purpose. Waguk v. Waguk, 21 FSM R. 60, 73 (App. 2016).

Courts; Jurisdiction – Subject-Matter; Property – Land Court or Land Commission

When the Kosrae Land Court itself is implicated in the allegations of fraud, that court is not competent to adjudicate the subject matter. Waguk v. Waguk, 21 FSM R. 60, 74 (App. 2016).

Civil Procedure – Res Judicata

Claim preclusion cannot be invoked to bar a claim when the dismissal was for lack of subject-matter jurisdiction. Waguk v. Waguk, 21 FSM R. 60, 74 (App. 2016).

Civil Procedure – Collateral Estoppel

When an issue of fact or law is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment, the determination is conclusive in a subsequent

action between the parties, whether on the same or a different claim. Waguk v. Waguk, 21 FSM R. 60, 74 (App. 2016).

Civil Procedure – Collateral Estoppel

When the judgment on which issue preclusion was said to rest was neither valid, final, nor on the merits, and the factual issues were never actually litigated or determined, issue preclusion cannot be invoked to bar the issue's litigation. Waguk v. Waguk, 21 FSM R. 60, 74 (App. 2016).

Appellate Review – Standard – Civil Cases – Abuse of Discretion; Civil Procedure – Collateral Estoppel; Civil Procedure – Res Judicata

Although res judicata and collateral estoppel can be raised *sua sponte*, it is an abuse of discretion to apply those doctrines when the judgment on which it rests was neither valid, final, nor on the merits. Waguk v. Waguk, 21 FSM R. 60, 74 (App. 2016).

Courts; Jurisdiction

A court has no more right to decline the exercise of jurisdiction which is given, than it does to usurp that which is not given. Waguk v. Waguk, 21 FSM R. 60, 74 (App. 2016).

* * * *

DENNIS K. YAMASE, Chief Justice:

I. Procedural Posture

On April 7, 2014, the plaintiffs filed a Complaint with the Kosrae Land Court, Case No. 05-14. On April 14, 2014, the Kosrae Land Court dismissed the complaint. On April 29, 2014, the plaintiffs filed a timely appeal with the Kosrae State Court, Appeal No.: 35-14, and that appeal is still pending. On January 22, 2015, plaintiffs[1] filed a collateral action in the Kosrae State Court, Civil Action No. 02-15, alleging:(1) violations of due process; (2) fraud; and (3) negligence. The plaintiffs sought declaratory and injunctive relief to vitiate a certificate of land title and eject the defendants from the land. On April 9, 2015, the Kosrae State Court dismissed the action without prejudice, pending the Kosrae Land Court appeal, based on *res judicata* and collateral estoppel. This appeal arises from that Order of Dismissal of Action, signed by then Chief Justice Aliksa Aliksa on April 9, 2015.

II. Issues

The two main issues raised on appeal are whether the court can dismiss *sua sponte* based on *res judicata* and whether that exercise of discretion was proper. This is a question of first impression for the Kosrae State Court, and upon review, we find that the decision was an abuse of discretion. Accordingly, we reverse the Kosrae State Court trial division based on the following conclusions of fact and law.

III. Standard of Review

"A dismissal pursuant to Rule 41(b) is generally reviewed for abuse of discretion." Kosrae Island Credit Union v. Palik, 10 FSM R. 134, 135 (App. 2001); *See* Damarlane v. United States, 8 FSM R. 45, 59 (App. 1997). "An abuse of discretion by the trial court occurs when its decision is clearly

---

[1] At this time the plaintiff added two previously unnamed parties who have an interest in the case, and two previously unnamed defendants including the Kosrae Land Court and the Kosrae State Government.

unreasonable, arbitrary, or fanciful; or it is based on an erroneous conclusion of law; or the record contains no evidence upon which the court could rationally have based its decision." Goya v. Ramp, 13 FSM R. 100, 109 (App. 2005); *see* Jano v. King, 5 FSM R. 326, 330 (App. 1992).[2] Notably, "[t]he complaining party has the burden of showing that the trial court abused its discretion; such abuse will not be presumed, but it will be presumed that the discretion was proper." 5A C.J.S. § 1584, at 38 (1958). "Issues of law, on the other hand, are reviewed de novo on appeal." Tulensru v. Wakuk, 10 FSM R. 128, 132 (App. 2001); *see* Department of Treasury v. FSM Telecomm. Corp., 9 FSM R. 575, 579 (App. 2000); Nanpei v. Kihara, 7 FSM R. 319, 323-24 (App. 1995); Sigrah v. Kosrae, 6 FSM R. 168, 169 (App. 1993).

IV. BACKGROUND

Tulensru Wakuk (Tulensru) died leaving the land situated in Yelum, Utwe Municipality, State of Kosrae, to his two sons Morris Wakuk (Morris) and Tulenkun Tulensru (Tulenkun).[3] Subsequently, Morris died leaving his land parcel to his son Wilton Wakuk (Wilton) and Tulenkun died leaving his land parcel to his three daughters: Magrina Wakuk (Magrina), Salome Joseph (Salome) and Rosina Joseph (Rosina). For many years it appears that all parties, continued to live on, work, and cultivate the land, but the exact contours of this relationship are not clear to the court. The official dispute emerged in 2014 when Wilton applied to the Kosrae Land Court for a relocation of the boundaries between parcels 014U03 and 014U04. The three sisters, who are the plaintiff-appellants, represent that for the first time they were notified that the original plat had been legally subdivided nearly 20 years before. Prior to that time the sisters had been operating under the impression that the entire undivided parcel had been gifted to Tulenkun, and by extension to them as his heirs. They believed that the Wilton family line was being given permission to live on and work the land in a small corner of the property, but did not own it. After this discovery, the sisters contend that the title was fraudulently conveyed to Morris based on misrepresentations made while he worked at the Kosrae Land Commission, which is now the Kosrae Land Court. Thus, the sisters seek to invalidate the title to parcel 014U03 that is currently in Wilton's name, thereby acquiring the entire undivided parcel. It is not contested by either party that the grandfather Tulensru owned the entire original parcel in Yelum.

V. SUA SPONTE DISMISSAL

Pursuant to Kosrae Civil Rule 41(b), the court may dismiss a claim "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."[4] Petitioner contends that the language of this Rule, by

---

[2] *See* Jano v. King, 5 FSM R. 326, 330 (App. 1992) ("[a]n abuse of discretion occurs when (1) the court's decision is 'clearly unreasonable, arbitrary, or fanciful'; (2) the decision is based on an erroneous conclusion of law; (3) the court's findings are clearly erroneous; or (4) the record contains no evidence on which the ... court rationally could have based its decision").

[3] This original parcel is shown as Cadastral Plat Number 014U00, which appears to have been subdivided into two parcels, 014U03 and 014U04, on February 28, 1998. One certificate of title was registered to each son, Morris and Tulenkun, respectively. *See* Certificate of Title for Parcel 014U03, and 014U04. It was represented that this division was made inter vivos.

[4] Kosrae Civil Rule 41(b) in full states,

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his

negative implication, prohibits involuntary dismissals except upon motion by the defendant.[5]

Although the Kosrae State Court has not previously ruled on this issue, the FSM Supreme Court has, stating "[g]enerally, a court may not raise the defense of res judicata on its own motion . . . . However, in the interest of judicial economy, a court may properly raise the issue of res judicata when both actions have been brought in the same court." Kishida v. Aizawa, 13 FSM R. 281, 284 (Chk. 2005) (citing Boone v. Kurtz, 617 F.2d 435, 436 (5th Cir. 1980)). Ordinarily, affirmative defenses should be raised pursuant to Kosrae Civil Rule 8(c),[6] which explicitly list "res judicata" and "estoppel" among them. The Kosrae State Court itself has announced that rule stating "[b]oth res judicata and laches are affirmative defenses and must be asserted in responsive pleadings. If affirmative defenses are not raised in the answer or other responsive pleading, the defenses are waived." Sigrah v. Kosrae State Land Comm'n, 9 FSM R. 89, 94 (Kos. S. Ct. Tr. 1999) (citation omitted).[7] This basic rule, however, is discretionary and under certain circumstances,"[r]es Judicata, like all affirmative defenses, can be raised sua sponte." 5 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1270, at 574 n.28 (2d ed. 1995).

> right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

[5] In interpreting this rule, the U.S. Supreme Court has held,

> [w]e do not read Rule 41(b) as implying any such restriction. Neither the permissive language of the rule, which merely authorizes a motion by the defendant, nor its policy requires us to conclude that it was the purpose of the Rule to abrogate the power of the courts, acting on their own initiative, to clear their calendars of cases."

Link v. Wabash Railroad Co., 370 U.S. 626, 630, 82 S. Ct. 1386, 1388-89, 8 L. Ed. 2d 734, 738 (1962).

[6]

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Kos. Civ. R. 8(c).

[7] "[M]any cases reaffirm the basic rule that both claim preclusion and issue preclusion are affirmative defenses that must be pleaded, and that are waived if omitted." 18 Charles A. Wright et al., FEDERAL PRACTICE AND PROCEDURE § 4405, at 34-5 (1981).

VI. SPECIAL CIRCUMSTANCES

Two U.S. Supreme Court cases have explained this position and we adopt their reasoning here. In Arizona v. California, the U.S. Supreme Court held that a "[j]udicial initiative of this sort might be appropriate in special circumstances. Most notably, 'if a court is on notice that it has previously decided the issue presented, the court may dismiss the action *sua sponte*, even though the defense has not been raised.'" 530 U.S. 392, 412, 120 S. Ct. 2304, 2318, 147 L. Ed. 2d 374, 394 (2000) (citation omitted). "This result is fully consistent with the policies underlying res judicata: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit, but is also based on the avoidance of unnecessary judicial waste." *Id.* In United States v. Sioux Nation of Indians, the U.S. Supreme Court held that "[w]hile res judicata is a defense which can be waived, see Fed. Rule Civ. Proc. 8(c), if a court is on notice that it has previously decided the issue presented, the court may dismiss the action sua sponte, even though the defense has not been raised." 448 U.S. 371, 432, 100 S. Ct. 2716, 2749, 65 L. Ed. 2d 844, 886 (1980).

> It is well to remember that res judicata and its offspring, collateral estoppel, are not statutory defenses; they are [equitable] defenses adopted by the courts in furtherance of prompt and efficient administration of the business that comes before them. They are grounded on the theory that one litigant cannot unduly consume the time of the court at the expense of other litigants, and that, once the court has finally decided an issue, a litigant cannot demand that it be decided again.

Id. at 433, 100 S. Ct. at 2750, 65 L. Ed. 2d at 887 (citation omitted).

VII. DUE PROCESS

Finally, when raising *res judicata sua sponte*, due process requires that the court give the opposing party "notice" and an "opportunity" to respond. Kishida, 13 FSM R. at 284; *See* Heirs of Benjamin v. Heirs of Benjamin, 17 FSM R. 621, 629 (App. 2011) ("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'") (citing In re Sanction of Woodruff, 10 FSM R. 79, 80 (App. 2001).

In this case, the Kosrae State Court was on judicial notice of both filings and therefore special circumstances were present. Thus in the interest of judicial economy the Kosrae State Court could properly raise the issue of *res judicata sua sponte*. We note, however, that the Court dismissed without notice to the parties, and without a hearing or an opportunity to brief the matter. Due process requires otherwise.

VIII. *RES JUDICATA* AND COLLATERAL ESTOPPEL

Res Judicata is generally defined as "[a]n issue that has been definitively settled by judicial decision." BLACK'S LAW DICTIONARY 1336 (8th ed. 1979).[8] It is also more narrowly defined as "an affirmative defense barring a second lawsuit on the same claim, or any other claim arising from the

---

[8] "This principle is traditionally referred to in common law jurisdictions by the Latin phrase 'res judicata,' which, literally translated, means, 'a thing judicially decided, or adjudged.'" Ittu v. Charley, 3 FSM R. 188, 190 n. 3 (Kos. S. Ct. Tr. 1987). The term res judicata literally means "a matter adjudged" or "settled by judgment." 46 AM. JUR. 2D *Judgments* § 394, at 558-59 (1969).

same transaction or series of transactions and that could have been – but was not – raised in the first suit." *Id.* at 1337. Collateral estoppel is "[t]he binding effect of a judgment as to matters actually litigated and determined in one action on later controversies between the parties involving a different claim from that on which the original judgment was based." *Id.* at 279.

> The rules of *res judicata*, as the term is sometimes sweepingly used, actually comprise two doctrines concerning the preclusive effect of a prior adjudication. The first such doctrine is "claim preclusion," or true *res judicata*. It treats a judgment once rendered as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." . . . When the plaintiff obtains a judgment in his favor, his claim "merges"[9] in that judgment; he may seek no further relief on that claim in a separate action. Conversely, when a judgment is rendered for a defendant, the plaintiff's claim is extinguished; the judgment acts as a "bar."[10] . . . [T]he effect of a judgment extends to the litigation of all issues relevant to the same claim between the parties, whether or not raised at trial. . . .
>
> The second doctrine, collateral estoppel or "issue preclusion," recognizes that suits addressed to particular claims may present issues relevant to suits on other claims. In order to effectuate the public policy in favor of minimizing redundant litigation, issue preclusion bars the litigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties. . . . It is insufficient for the invocation of the issue preclusion that some question of fact or law in the later suit was relevant to a prior adjudication between the parties; the contested issue must have been litigated and necessary to the judgment earlier rendered.

18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4402, at 7 (1981) (quoting Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 535 (5th Cir. 1978)) (footnotes added). The distinction was used in Berman v. FSM Supreme Court (II), when the FSM Supreme Court appellate division held

> [t]he doctrine of collateral estoppel provides that a right, question, or fact which is distinctly put in issue and directly determined as a ground of recovery by a court of competent jurisdiction cannot be disputed in a subsequent action between the same parties, even if the subsequent action is on a different cause of action. The prior judgment is not, however, conclusive as to matters which might have been, but were not, litigated and determined in the prior action. . . .
>
> But it is barred by the doctrine of res judicata. Under that doctrine a judgment entered in a cause of action conclusively settles that cause of action as to all matters that were or might have been litigated and adjudged therein.

7 FSM R. 11, 16 (App. 1995). Simply put, *res judicata* applies to claims and collateral estoppel applies

---

[9] The General Rule of Merger is "[w]hen a valid and final personal judgment is rendered in favor of the plaintiff . . . the plaintiff cannot thereafter maintain an action on the original claim or any part thereof." RESTATEMENT (SECOND) OF JUDGMENTS § 18, 151 (1982).

[10] The General Rule of Bar is "[a] valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim." RESTATEMENT (SECOND) OF JUDGMENTS § 19, at 161 (1982).

to issues.

A. *Res Judicata*

"It is commonly said that preclusion can rest only on a judgment that is valid, final, and on the merits." 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4435, at 329 (1981).[11] "The doctrine of res judicata should and does apply in Kosrae." Ittu, 3 FSM R. at 190. In Ittu, the Court stated *res judicata* is "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." 3 FSM R. at 191; Heirs of Livaie v. Palik, 14 FSM R. 512, 515 (Kos. S. Ct. Tr. 2006); Heirs of Tulenkun v. George, 14 FSM R. 560, 562 (Kos. S. Ct. Tr. 2007). Implicitly, this articulation of the doctrine presumes that the underlying judgment was made "without fraud or collusion by a court or tribunal of competent jurisdiction." Heirs of Henry v. Heirs Akinaga, 19 FSM R. 296, 302 (App. 2014); Nakamura v. Chuuk, 15 FSM R. 146, 149 (Chk. S. Ct. App. 2007); Ungeni v. Fredrick, 6 FSM R. 529, 531 (Chk. S. Ct. App. 1994).[12] In other words, the underlying judgment must also be valid. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 19, at 161 (1982).

In adopting the *res judicata* the Court in Ittu explained,"[t]here are several reasons why courts see this interest in preserving the final effect of judgments as important. First, the final resolution of a legal conflict should be useful in ending festering and troublesome disputes and restoring order between the disputants and those around them. Second, the final determination of rights frees the prevailing party to exercise the rights which were at issue and allows any contested resource to be used efficiently. Third, finality is intended to prevent both the parties and governmental institutions from devoting still more resources to the dispute itself." 3 FSM R. at 191; United Church of Christ v. Hamo, 4 FSM R. 95, 107 (App. 1989); Jonas v. Mobil Oil Micronesia, Inc., 2 FSM R. 164, 166 (App. 1986). "After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined there is no reason to expect the second decision will be more satisfactory than the first." Hamo, 4 FSM R. at 108. In short, "the underlying purpose is to achieve finality of litigation, a goal which this Court has recognized as desirable." *Id.* at 106.[13]

B. *Validity*

"As with practically all broad principles of the law . . . the common law principle of res judicata admits of some exceptions. There are rare circumstances in which judgments will not be protected against attack." Hamo, 4 FSM at 107. Ordinarily, "[t]he judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment." *Id.* Three other exceptions were articulated by

---

[11] *See generally* RESTATEMENT (SECOND) OF JUDGMENTS § 1, at 16 (1982) (Requisites of a Valid Judgment); RESTATEMENT (SECOND) OF JUDGMENTS § 13, at 132 (1982) ("Requirement of Finality"); RESTATEMENT (SECOND) OF JUDGMENTS § 19, at 161 cmt. a (1982) ("on the merits").

[12] In Ittu, the Court indirectly referred to this requirement by citation stating "[t]he judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment." 3 FSM R. at 191.

[13] "We have earlier stated the doctrine of res judicata is recognized in the FSM and set forth the primary reason for its value - repose." Maruwa Shokai Guam, Inc. v. Pyung Hwa 31, 6 FSM R. 238, 241 (Pon. 1993) (citing Hamo, 4 FSM R. at 107).

this Court in Nahnken of Nett v. United States (III): First, "a fundamental change in applicable law after the first decision was rendered made application of estoppel in the second action inappropriate," second, corruption "contrary to public policy;" and third, a "total lack of opportunity of petitioner to participate in first action affecting his legal interests through deficient notice." 6 FSM R. 508, 519 (Pon. 1994). Ultimately, this is a non-exclusive list and for any equitable reason "courts may refuse to apply the doctrine of *res judicata* to avoid manifest injustice." *Id.* at 517. "A manifest abuse of authority, a judgment obtained unfairly or working a serious injustice, or fraud or collusion by a court, in addition to fraud and lack of jurisdiction have been considered grounds to ignore" the validity of a judgment. Heirs of Tulenkun v. Heirs of Seymour, 15 FSM R. 342, 347 (Kos. S. Ct. Tr. 2007). It is important to note that validity fundamentally includes the competence of the court to adjudicate the matter with regard to subject matter jurisdiction, territorial jurisdiction, and notice. *See generally* RESTATEMENT (SECOND) OF JUDGMENTS §§ 1-12 (1982).[14]

In this case, we cannot be confident that the underlying decision made in the Kosrae Land Court was valid, as the plaintiff alleges fraud and misrepresentation by an employee of the court itself. If the validity of a claim is uncertain it is a manifest injustice to give it preclusive effect. Moreover, the Kosrae Land Court cannot be said to be competent to adjudicate the issues raised by that claim and any decision rendered by the Kosrae Land Court prior to an adjudication before an impartial tribunal would not likely qualify for preclusive effect. Logically, the Kosrae State Court must address the claims raised in the second complaint before the Kosrae Land Court can render a valid decision in the first complaint. To do otherwise is folly.

C. *Finality*

"There is a sharp conflict as to whether a judgment from which an appeal is pending has the finality requisite for the application of the res judicata doctrine." 50 C.J.S. *Judgment* § 725 at 265 (1997).[15] On appeal, the FSM Supreme Court has on numerous occasions held that the doctrine of *res judicata* "bars the relitigation by parties or their privies of all matters that were or could have been raised in a prior action that was concluded by a final judgment on the merits, which has been affirmed on appeal or for which time for appeal has expired." Iriarte v. Etscheit, 8 FSM R. 231, 237 (App. 1989); Damarlane v. FSM, 8 FSM R. 119, 120 (Pon. 1997); Kishida, 13 FSM R. at 283; *See* Nahnken of Nett v. United States, 7 FSM R. 581, 586-87 (App. 1996); Berman v. FSM Supreme Court (II), 7 FSM R. 11, 16 (App. 1995); *See* Hamo, 4 FSM R. 95, 106 ("[a] fundamental principle of the common law is that once a judgment has been issued and the appeal period has expired, or the decision is affirmed on appeal, the parties are precluded from challenging that judgment"). Furthermore, the Chuuk State Court has directly determined this issue holding that a decision is not a final judgment for the purposes of *res judicata* until after the appeal "has been determined." Ungeni, 6 FSM R. at 531. We join our sister state court in adopting the rule that when an appeal is pending, the underlying decision is generally not considered final for the purposes of claim preclusion.

"Substantial difficulties result from the rule that a final trial court judgment operates as res judicata while an appeal is pending. The major problem is that a second judgment based upon the preclusive effects of the first judgment should not stand if the first judgment is reversed." 18 CHARLES

---

[14] A court of competent jurisdiction is "[a] court that has the power and authority to do a particular act; one recognized by law as possessing the right to adjudicate a controversy." BLACK'S LAW DICTIONARY 380 (8th ed. 1979).

[15] RESTATEMENT (SECOND) OF JUDGMENTS § 17, at 148 (1982) ("[a] valid final personal judgment is conclusive between the parties, except on appeal or other direct review").

A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4433, at 311 (1981). "These difficulties suggest that ordinarily it is better to avoid the res judicata question by dismissing the second action or staying trial and perhaps pretrial proceedings pending the resolution of the appeal in the first action." *Id.* at 313. However, it is not always wise to dismiss or stay the second action." *Id.* "If the ordinary opportunities to appeal are thwarted by circumstances of a particular case... preclusion may prove unwise." *Id.* at 316. In fact "[i]t is settled that preclusion should be defeated by the inability to secure appellate review." *Id.* Ultimately, "the availability of preclusion should not turn on the absence of appeal alone, but should depend as well on the nature of the first tribunal and any special factors that may explain the lack of appellate review." *Id.* at 321.

As noted *supra*, the validity of the decision in the Kosrae Land Court has been challenged and this challenge is currently pending before the Kosrae State Court on appeal. Pending this review, the underlying decision is generally not sufficiently final to preclude collateral actions. We furthermore emphasize that sidestepping the issue through a dismissal without prejudice or a stay pending appeal is not always wise and the court should consider the underlying circumstances of each case before making such a determination. Had the court done so, they might have realized that the adjudication of fraud and misrepresentation against the court itself is outside of the subject matter jurisdiction of the Land Court, and therefore no adjudication therein would be possible.[16]

D. *On the Merits*

"The general rule is, of course, that a final decision on the 'merits' of a claim bars a subsequent action on that same claim or any part thereof, including issues which were not but could have been raised as part of the claim." Maruwa Shokai Guam, Inc. v. Pyung Hwa 31, 6 FSM R. 238, 214 (Pon. 1993). "The modern trend with respect to the defense of former adjudication is to insist, first, that a plaintiff raise his entire 'claim' in one proceeding, and second, to define 'claim' to cover all the claimant's rights against the particular defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." *Id.*; *see* FSM v. Yue Yuan Yu No. 346, 7 FSM R. 162, 164 (Chk. 1995) ("[t]he dismissal of the related criminal case was without prejudice, and there was no judgment on the merits"); Union Indus. Co. v. Santos, 7 FSM R. 242, 244 (Pon. 1995) ("[a] judgment on the merits in any action has res judicata effect"). We note that the restatement intentionally omitted the terminology on the merits from the general rule because of the "possibly misleading connotations." RESTATEMENT (SECOND) OF JUDGMENTS § 19, at 161 (1982).[17] This is because preclusive effect is given to many decisions that have not actually been litigated on the merits, for example "if it is the subject of a stipulation between the parties." Mid-Pacific Constr. Co. v. Semes (III), 6 FSM R. 180, 185 n.3 (Pon. 1993). Additionally,"[i]n the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated." *Id.* *See* Ittu, 3 FSM R. at 191 ("even if obtained upon a default"); Narruhn v. Chuuk, 17 FSM R. 289, 298 (App. 2010) ("[a] default judgment is not a judgment obtained on the merits. In fact, it makes no claim as to the merits of the case at all"); Mori v. Hasiguchi, 17 FSM R. 630, 644 (Chk. 2011) ("[w]hile a default judgment is not an adjudication on the merits of a claim... it is a final judgment with res judicata and claim preclusion effect").In other words, a decision that is not on the merits may still have preclusive effect; and this rule cannot be applied without discernment. Particularly, we note that the modern definition

---

[16] RESTATEMENT (SECOND) OF JUDGMENTS § 12(1), at 115 (1982) ("[t]he subject matter of the action was so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority").

[17] "The only virtue that redeems this phrase from oblivion is its service as a shorthand reminder that the extent of preclusion is measured by factors beyond validity and finality." 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4435, at 330 (1981).

of a claim includes those causes of action not necessarily adjudicated on the merits, but nevertheless arising from the same transaction. This definition has been in use in the FSM Supreme Court, but has not previously been adopted by the Kosrae State Court. We do so now.

Expressly Kosrae Civil Rule 41(b) states that "a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party . . . [is not] an adjudication upon the merits." "The basic rule that dismissal for lack of subject matter jurisdiction does not preclude a second action on the same claim is well settled."[18] 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4435, at 339 (1981). The restatement echoes the language of Rule 41, and the exception to the general rule of bars states that a second action by the plaintiff is not precluded when the first judgment "is one of dismissal for lack of jurisdiction, for improper venue, or for nonjoinder or misjoinder of parties." RESTATEMENT (SECOND) OF JUDGMENTS § 20(1)(a), at 170(1981).

In this case, the underlying matter in the Kosrae Land Court was dismissed for lack of subject matter jurisdiction. Pursuant to Kos. S.C. § 11.604, the Kosrae Land Court is a court of limited jurisdiction which includes "all matters concerning the title of land and any interests therein." The powers of the court include:

> (a) Issue service of process;
> (b) Make orders for the attendance of witnesses and the production of documents;
> (c) Make orders for the disposition of exhibits and evidence;
> (d) Make orders and decisions regarding the determination of interests and registration of land, including the subdivision of any interest or rights in land;
> (e) Make orders and decisions which determine any claim of heirship to a deceased person's title or interest in lands;
> (f) Issue certificates of Title setting forth the names of all persons or entities holding interest in parcels of land;
> (g) Engage in additional actions, not inconsistent with law, rule or general court order of the Kosrae State Court, required to carry out its functions.

Kos. S.C. § 11.605. Thus, while limited, the subject matter jurisdiction is broad enough to encompass factual determinations of fraud and misrepresentation to the extent that they affect the validity of titles or conveyances of land. Indeed, that is the very purpose of the Land Court. *See* Sigrah v. Heirs of Nena, 13 FSM R. 192, 198 (Kos. S. Ct. Tr. 2005) ("it is primarily the task of the Land Court to assess the credibility of the witnesses, the admissibility of evidence and to resolve factual disputes"); Anton v. Heirs of Shrew, 10 FSM R. 162, 164 (Kos. S. Ct. Tr. 2001) ("[i]t is the primarily the task of the Land Commission, not the reviewing court, to assess the credibility of the witnesses and resolve factual disputes, since it is the Land Commission, and not the Court, who is present during the testimony"). Pursuant to Kos. S.C. § 11.614(5)(b), no land court decision can be made absent "substantial evidence" and therefore requires reasonable assessment of the facts and evidence.[19] *See* Anton, 10 FSM R. at 164 ("[w]ith respect to review of factual findings, this Court, in reviewing the Land Commission's

---

[18] Those dismissals have preclusive effect only "to the precise issues resolved and the dismissal operates as an adjudication on the merits to that extent." 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4435, at 334 (2d ed. 1995). "Thus the judgment remains effective to preclude the relitigation of the precise issue of jurisdiction or venue that lead to the initial dismissal." 18 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4436, at 338 (1981).

[19] Substantial Evidence is "evidence that a reasonable mind would accept as adequate to support a conclusion." BLACK'S LAW DICTIONARY 380 (8th ed. 1979).

procedure and decision, normally should merely consider whether the Land Commission has reasonably assessed the evidence presented"). However, when the court itself is implicated in the allegations of fraud, it is not competent to adjudicate the subject matter. *See* Benjamin v. Youngstrom, 13 FSM R. 542, 546 (Kos. S. Ct. Tr. 2005) ("[t]he Defendants are not employed by the Kosrae Land Court, therefore they had no role or involvement in the issuance of the Certificates of Title issued by the Kosrae Land Court. The Kosrae Land Court is not a party to this action: it was dismissed with prejudice from this action pursuant to Order entered on December 20, 2004. Therefore, Plaintiffs' cause of action based upon their claim of defective Certificate of Title, must fail as the issuing entity, the Kosrae Land Court, is not a party to this action").

In short, the plaintiff attempted to address the claim of fraud and misrepresentation in the Kosrae Land Court, but was not permitted to do so. Although the Kosrae Land Court has not finalized its decision on appeal, the claim was not determined on the merits, nor could it have been. Thus, the general rule applies and claim preclusion cannot be invoked to bar a claim when the dismissal was for lack of subject matter jurisdiction.

E. *Collateral Estoppel*

"When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." RESTATEMENT (SECOND) OF JUDGMENTS § 27, at 250 (1982); FSM v. Muty, 19 FSM R. 453, 458 (Chk. 2014); FSM v. Cheida, 7 FSM R. 633, 637 (Chk 1996); Mid-Pacific Constr. Co. v. Semes (II), 6 FSM R. 180, 185 (Pon. 1993). Although Kosrae State has never before expressly adopted the restatement, some of its sister states have, and we find this articulation of the rule appropriate.

As stated *supra*, the judgment on which issue preclusion was said to rest was neither valid, final, nor on the merits. The factual issues were never actually litigated or determined. The record makes clear that no hearings were held and no evidence was submitted to the Kosrae Land Court. Thus issue preclusion cannot be invoked to bar the litigation of this issue.

IX. CONCLUSION

We conclude that although the Kosrae State Court could have raised *res judicata* and collateral estoppel *sua sponte*, it should not have. It was an abuse of discretion to apply those doctrines when the judgment on which it rests was neither valid, final, nor on the merits. "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." Eperiam v. FSM, 20 FSM R. 351, 356 n.5 (Pon. 2016) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404, 5 L. Ed. 257, 291 (1821)).

ACCORDINGLY, this matter is REVERSED and REMANDED to the Kosrae State Court to take action consistent with this Memorandum of Decision.

* * * *