

FSM SUPREME COURT APPELLATE DIVISION

SEPE S. ESAU,)	APPEAL CASE NO. K3-2015
)	(Civil Action No. 27-15)
Appellant/Plaintiff,)	
)	
vs.)	
)	
DONNA M. PENROSE, KOSRAE LAND COURT,)	
and KOSRAE STATE GOVERNMENT,)	
)	
Appellees/Defendants.)	
_____)	

OPINION

Argued: July 14, 2016
Decided: December 28, 2016

BEFORE:

Hon. Dennis K. Yamase, Chief Justice, FSM Supreme Court
Hon. Cyprian J. Manmaw, Specially Assigned Justice, FSM Supreme Court*
Hon. Maycleen JD Anson, Specially Assigned Justice, FSM Supreme Court**

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

APPEARANCES:

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For the Appellee: Snyder H. Simon, Esq.
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Tofol, Kosrae FM 96944

For the Appellee: Jeffrey S. Tilfas
(Land Court & State Kosrae Attorney General
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HEADNOTES

Appellate Review – Standard – Civil Cases – De Novo

Issues of law are reviewed de novo on appeal. Esau v. Penrose, 21 FSM R. 75, 77 (App. 2016).

Appellate Review – Decisions Reviewable

The well-established general rule is that only final decisions may be appealed. Esau v. Penrose, 21 FSM R. 75, 78 (App. 2016).

Appellate Review – Decisions Reviewable – Final Decision Defined

A final decision generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. Final orders and judgments are final decisions. Esau v. Penrose, 21 FSM R. 75, 78 (App. 2016).

Appellate Review – Notice of Appeal

There are two filing requirements for a notice of appeal from the Kosrae Land Court: first at the Kosrae State Court and second at the Kosrae Land Court. The first filing requirement actually docket the appeal, as Kosrae State Court is the appellate court for Kosrae Land Court decisions. The second filing requirement does not docket the appeal, but it serves the purpose of commencing the Land Court's preparation of the transcript and record. Thus, an appeal from Kosrae Land Court is timely filed (and the Kosrae State Court has subject matter jurisdiction to hear the appeal) when the notice of appeal is filed with the Kosrae State Court within sixty days of the written decision service upon the appellants even though there was a two-day delay in filing the notice of appeal with the Land Court. Esau v. Penrose, 21 FSM R. 75, 79 (App. 2016).

Appellate Review – Decisions Reviewable

The Kosrae State Court has the authority to hear appeals from Land Court, but it cannot act until the Land Court has adjudicated the matter and an appeal has been filed. Esau v. Penrose, 21 FSM R. 75, 79 (App. 2016).

Appellate Review – Decisions Reviewable – Final Decision Defined

Dismissal of an action for lack of subject-matter jurisdiction is a final judgment for purposes of appeal. Esau v. Penrose, 21 FSM R. 75, 79 (App. 2016).

Appellate Review – Decisions Reviewable

The Kosrae State Court trial division has jurisdiction to review all decisions of inferior courts, including decisions by the Kosrae Land Court. Esau v. Penrose, 21 FSM R. 75, 79 (App. 2016).

Civil Procedure – Service; Property – Land Court or Land Commission

The Kosrae Land Court's written decision must be served on all claimants who appeared at the hearing, pursuant to the State Court rules prescribing service requirements. Esau v. Penrose, 21 FSM R. 75, 80 (App. 2016).

Appellate Review – Decisions Reviewable; Civil Procedure – Service; Constitutional Law – Due Process – Notice and Hearing

When service of the Land Court decision was made on someone who did not reside with the appellant, that service was insufficient, and the fact that the appellant became aware of the Land Court's decision later is not equivalent to being properly served to safeguard her due process rights. If a party was not served notice and was then denied the right to appeal, his or her due process rights are violated. Esau v. Penrose, 21 FSM R. 75, 80-81 (App. 2016).

Appellate Review – Decisions Reviewable; Statutes of Limitations – Tolling

The statutory sixty-day period to appeal a Kosrae Land Court decision is tolled until proper service is made. Serving notice of a Land Court adjudication or decision, is required in order to give the party a chance to appeal, and if a party is not properly served the Land Court's written determination of ownership, the statutory sixty-day appeals period does not run against that party.

Esau v. Penrose, 21 FSM R. 75, 81 (App. 2016).

Appellate Review – Decisions Reviewable

When a Kosrae Land Court decision was never properly served on the appellant, the Land Court will be instructed to properly serve its decision on the appellant, and the Kosrae State Court will then allow the appellant sixty days to file an appeal after the Land Court's decision has been properly served. Esau v. Penrose, 21 FSM R. 75, 81 (App. 2016).

* * * *

COURT'S OPINION

DENNIS K. YAMASE, Chief Justice:

I. BACKGROUND

This appeal arises from the Kosrae State Court's Order of Dismissal of Appellant/Plaintiff's Complaint, entered on May 1, 2015, in favor of Appellees/Defendants Donna M. Penrose, Kosrae State Land Court and Kosrae State Government and against Appellant/Plaintiff Sepe S. Esau.

A Complaint was filed in the Kosrae State Court (herein "State Court") by Sepe S. Esau (herein "Esau"), on April 9, 2015 and docketed as Civil Action No. 27-15. The Complaint alleges violation of due process and misrepresentation against the Kosrae Land Court and Kosrae State Government, and sought to invalidate two (2) Certificates of Title issued to Appellee Donna M. Penrose (herein "Penrose") by the Kosrae Land Court (herein "Land Court") through a Memorandum of Decision entered on July 19, 2014.

On April 27, 2015, the Land Court and Kosrae State Government filed their Answer. Penrose's Answer was filed on April 29, 2015. On May 1, 2015, an Order of Dismissal was entered by the Kosrae State Court dismissing the Complaint.

Esau filed a Notice of Appeal on May 15, 2015 in the FSM Supreme Court's Appellate Division. The Appellant's Opening Brief was filed on September 25, 2015, Penrose's brief was filed on November 25, 2015, and the Kosrae Land Court and Kosrae State Government's brief was filed on December 3, 2015.

II. ISSUES PRESENTED

The appellant, Sepe S. Esau presents two (2) issues on appeal for the appellate court's consideration:

(1) Was the Kosrae State Court Order of Dismissal entered on May 1, 2015, erroneous and contrary to law?

(2) Was the Kosrae State Court Order of Dismissal entered on May 1, 2015, based on substantial evidence?

III. STANDARD OF REVIEW

Issues of law are reviewed *de novo* on appeal. Pohnpei v. AHPW, Inc., 14 FSM Intrm. 1, 14 (App. 2006); George v. Nena, 12 FSM Intrm. 310, 313 (App. 2004); Tulensru v. Wakuk, 10 FSM

Intrm. 128, 132 (App. 2001); Nanpei v. Kihara, 7 FSM Intrm. 319, 323-24 (App. 1995); Rosokow v. Bob, 11 FSM Intrm. 210, 214 (Chk. S. Ct. App. 2002); Phillip v. Moses, 10 FSM Intrm. 540, 543 (Chk. S. Ct. App. 2002).

IV. ANALYSIS

1. *Jurisdiction of the FSM Supreme Court Appellate Division*

Our jurisdiction over the present matter is raised by both Appellees during oral arguments and in the filings. Appellee's Br. (Penrose) at 7; Appellee's Br. (Kosrae Land Court and Kosrae State Government) at 5. Both arguments are parallel in claiming that because the State Court's Order that is the subject of this appeal does not constitute a "final decision," this Court lacks jurisdiction to hear this matter.

The jurisdiction of the FSM Supreme Court Appellate Division over cases on appeal from the Kosrae State Court is governed by FSM Appellate Rule 4(a)(1)(A), which states, in part, that appeals may be taken from "all final decisions of the trial divisions of the Federated States of Micronesia Supreme Court and the Kosrae State Court"

Further, 4 F.S.M.C. 201(2), allows for the appellate division to hear matters from State Court's if the appeal is permitted by the State's constitution.¹ The Kosrae State Constitution, under art. VI, § 6, provides that decisions of the highest division of the State Court are appealable to the FSM Supreme Court Appellate Division.²

The well-established general rule is that only final decisions may be appealed. A final decision generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment. Final orders and judgments are final decisions. Heirs of George v. Heirs of Tosie, 15 FSM Intrm. 560, 562 (App. 2008); Chuuk v. Davis, 9 FSM Intrm. 471, 473 (App. 2000); In re Extradition of Jano, 6 FSM Intrm. 23, 24 (App. 1993).

Here, we will review the Order of Dismissal rendered by the State Court to determine this issue of jurisdiction. A relevant section of the Order states

this matter should have been filed as an appeal to the Kosrae Land Court decision in Case No. 03-13. Plaintiffs are directed to re-file this complaint as an appeal. The relevant Land Court records should then be produced for the court to proceed with this matter.

¹ 4 F.S.M.C. 201(2): The Appellate Division of the Supreme Court may review other cases appealed to it from a State court if the appeal is permitted by State constitution or District charter.

² Kos. Const. art. VI, § 6:

The State Court has original jurisdiction in all cases, except cases within the exclusive and original jurisdiction of inferior courts. The State Court has jurisdiction to review all decisions of inferior courts. Decisions of the Trial Division of the State Court may be appealed to the appellate division of the State Court, as shall be prescribed by law. *Decisions of the highest division of the State Court may be appealed to the appellate division of the Supreme Court of the Federated States of Micronesia.* The courts of the State constitute a unified judicial system for operation and administration.

(Amended by 1995 Kos. Con. Con.) (emphasis added)

This case is dismissed without prejudice at this time. Plaintiffs are directed to properly file this case as an appeal to the land court decision in this matter.

Order of Dismissal of Action at 2.

There are two filing requirements for a notice of appeal from the Kosrae Land Court: first at the Kosrae State Court and second at the Kosrae Land Court. The first filing requirement actually docket the appeal, as Kosrae State Court serves as the appellate court for Kosrae Land Court decisions. The second filing requirement does not docket the appeal. It serves the purpose of commencing the preparation of the transcript and record by the Land Court. Thus, an appeal from Kosrae Land Court is timely filed (and the Kosrae State Court has subject matter jurisdiction to hear the appeal) when the notice of appeal is filed with the Kosrae State Court within sixty days of service of the written decision upon the appellants even though there was a two-day delay in filing the notice of appeal with the Land Court. Heirs of Palik v. Heirs of Henry, 12 FSM Intrm. 415, 422 (Kos. S. Ct. Tr. 2004).

The Kosrae State Court has the authority to hear appeals from Land Court under Kos. S.C. § 11.614; but it cannot act until the Land Court has adjudicated the matter and an appeal has been filed. Alonso v. Pridgen, 14 FSM Intrm. 479, 483 (Kos. S. Ct. Tr. 2006).

In the present matter, the language of the Order may be construed as not being a final order because the State Court instructs the plaintiff to refile the matter as an appeal, and the court dismissed the case without prejudice. Although it is not expressly stated in the Order, the State Court is dismissing the matter for lack of subject matter jurisdiction because the State Court cannot act on the appeal, i.e. doesn't have jurisdiction, until the Land Court decision is filed as an appeal with the State Court, and the record is produced, as required under the two (2) step process in Heirs of Palik. The Order does in fact state that the record needs to be produced by the Land Court before the State Court can proceed, thus, the court lacks subject matter jurisdiction until the appeal is filed and the record is submitted.

Dismissal of an action for lack of subject matter jurisdiction is a final judgment for purposes of appeal. Rogers v. United States, 902 F.2d 1268, 1269 (7th Cir. 1990) (citing 28 U.S.C.A. § 1291). Therefore, we have jurisdiction to hear this matter because the Order of Dismissal by the State Court is a final order for the purposes of appellate review.

2. *Appeal of Land Court decisions to State Court*

When a dispute is heard before the Kosrae Land Court, a determination is made, and the findings of the Land Court are appealable to the Kosrae State Court pursuant to 6 Kos. S. C. § 11.614(1) and (2).³ The Kosrae State Court trial division has jurisdiction to review all decisions of inferior courts, including decisions entered by the Kosrae Land Court. Heirs of Palik, 12 FSM Intrm. at 421.

³ Kos. S. C. § 11.614(1):

An appeal from an adjudicated matter by the Land Court shall be made within sixty (60) days of service of the written decision of the Land Court Justice upon the party appealing the decision. Service of the written decision shall be made upon all claimants who appeared at the hearing, pursuant to the rules prescribing service requirements for the Kosrae State Court.

Kos. S.C. § 11.614(2): "An appeal shall be made by filing a notice of appeal with the Kosrae State Court and filing a certified copy of the notice of appeal with the Land Court within the time limits set forth in this section."

In the matter before the Court, a Memorandum of Decision was entered by the Land Court on July 19, 2014 in Kosrae Land Court Case No. 03-13. The decision found ownership in favor of Penrose on parcels No. 031-K-07 and 031-K-12 located in Insiat-Pukusrik, Lelu municipality.

Instead of filing an appeal with the State Court within the sixty (60) day period as required under 6 Kos. S. C. 11.614(2), Esau filed a Complaint on April 9, 2015 in the State Court, docketed as Civil Action No. 27-15. The Complaint was filed approximately nine (9) months after the decision of the Land Court was rendered. The sufficiency of service of the Land Court's decision on Esau must be considered before the Court can determine the effect of filing a Complaint instead of an appeal in this matter.

3. *Insufficient service of process*

Esau argues that the Land Court's judgment was issued on July 9, 2014, but she did not know of the decision or that the two (2) Certificate of Title were issued on the disputed parcels to Penrose until February 2015. Appellant's Br. at 4. A Certificate of Service indicates that the decision of the Kosrae Land Court was served on Bert Esau, son of Sepe Esau, on October 14, 2014, by Officer Paul Jerry. Appellee's (Penrose) Br. at 6.⁴

Kos. S.C. §11.614(1) requires that service of the written decision of the Land Court be served on "all claimants who appeared at the hearing, pursuant to the rules prescribing service requirements for the Kosrae State Court."⁵ Kosrae Civil Rule 5(b) allows service at the person's dwelling through a person of suitable age who resides therein.⁶

Here, during the hearing, the appellees argued that service on Bert Esau on behalf of Sepe Esau was sufficient. However, counsel for appellant confirmed that Bert Esau did not reside with Sepe Esau, making service of the Land Court's decision on October 14, 2014 insufficient, pursuant to Kos. S.C.

⁴ The Certificate of Service shows that Officer Paul Jerry served Burt Esau on October 14, 2014, at Tenwak, Lelu.

⁵ Kos. S. C. § 11.614(1):
An appeal from an adjudicated matter by the Land Court shall be made within sixty (60) days of service of the written decision of the Land Court Justice upon the party appealing the decision. *Service of the written decision shall be made upon all claimants who appeared at the hearing, pursuant to the rules prescribing service requirements for the Kosrae State Court.*
(emphasis added).

⁶ Kos. Civ. R. 5(b):
Same: How Made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney or trial counselor the service shall be made upon the attorney or trial counselor unless service upon the party himself is ordered by the court. Service upon the attorney or trial counselor or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney, to trial counselor or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, *leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.* Service by mail is completed upon mailing.
(emphasis added).

§ 11.614(1) and Kos. Civ. R. 5(b). No evidence was produced in the filings or during the hearing by the appellees that service of the Land Court's decision was ever made on Sepe Esau at any time.

The fact that Esau became aware of the Land Court's decision in February 2015 is not equivalent to being properly served to safeguard Esau's due process rights. If a party was not served notice and was then denied the right to appeal, his due process rights are violated. Heirs of Tara v. Heirs of Kurr, 14 FSM Intrm. 521, 525 (Kos. S. Ct. Tr. 2007).

Because Esau was never properly served, the statutory sixty (60) day period to appeal the decision of the Land Court is tolled until proper service is made. Serving notice of an adjudication, or decision, is required in order to give the party a chance to appeal. If a party is not properly served notice of a determination of ownership, the statutory appeals period that an appeal shall be made within sixty days of the written decision's service upon the party, does not run. *Id.*

Accordingly, this Court finds service of the Memorandum of Decision entered by the Land Court to be ineffective. This Court will allow the Land Court to properly effectuate its service of process on the appellant. Because the initial service of the decision is ineffective in this matter, the remaining issues as raised by the parties will not be considered by this Court.

V. CONCLUSION

The Kosrae Land Court is instructed to properly serve the Memorandum of Decision on the Appellant within thirty (30) days of the entry of this Order. The Kosrae State Court shall then allow the appellant sixty (60) days to file an appeal after the Land Court's Memorandum of Decision has been properly served. This matter is HEREBY REMANDED to the Kosrae Land Court and Kosrae State Court for further proceedings consistent with this Opinion.

* * * *

FSM SUPREME COURT APPELLATE DIVISION

LIPTON W. TILFAS,)	APPEAL CASE NO. K7-2015
)	(Civil Action No. 22-15)
Appellant,)	
)	
vs.)	
)	
KOSRAE STATE GOVERNMENT and WILLIAM)	
PALIK, in his official capacity as Administrator)	
of Personnel and Employment Services, Kosrae,)	
)	
Appellees.)	
)	

MEMORANDUM OF DECISION; ORDER OF REMAND

Argued: July 11, 2016
Decided: December 29, 2016