

5. *Statute of Limitations*

It is unnecessary to discuss this issue as the Kosrae State Court decision is affirmed on all relevant grounds and this issue is left for decision in the pending appeal matter in the Kosrae State Court.

V. CONCLUSION

The Kosrae State Court's Order denying reconsideration of its Order of Dismissal was proper given the unresolved status of Appellant's Civil No. 72-14 appeal before the Kosrae State Court of the Land Court decision rendered in L.C. No. 20-13, which involves the same underlying facts and similar parties as those present in the cause of action brought in Civil Action No. 92-14. We find no abuse of discretion in the lower court's denial of reconsideration of its Order of Dismissal.

Accordingly, the decision of the Kosrae State Court, which denied the Motion to Reconsider an Order of Dismissal, is hereby AFFIRMED.

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FSM SUPREME COURT APPELLATE DIVISION

SEPE LONNO,

Appellant,

vs.

HEIRS OF RICHARD PALIK, KOSRAE LAND
COURT, and KOSRAE STATE GOVERNMENT,

Appellees.

APPEAL CASE NO. K6-2015
(Civil Action No. 25-15)

OPINION

Argued: July 13, 2016
Decided: December 29, 2016

BEFORE:

Hon. Dennis K. Yamase, Chief Justice, FSM Supreme Court

Hon. Cyprian J. Manmaw, Specially Assigned Justice, FSM Supreme Court*

Hon. Mayceleen J.D. Anson, Specially Assigned Justice, FSM Supreme Court**

*Chief Justice, Yap State Court, Colonia, Yap

**Associate Justice, Pohnpei Supreme Court, Kolonia, Pohnpei

APPEARANCES:

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For the Appellees: (Heirs of Palik)	Canney Palsis, Esq. Micronesian Legal Services Corporation P.O. Box 38 Tofol, Kosrae FM 96944
For the Appellees: (Kosrae State parties)	Jeffrey S. Tilfas Acting Attorney General P.O. Box 870 Tofol, Kosrae FM 96944

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HEADNOTES

Civil Procedure – Dismissal

The decision to dismiss a case is committed to the trial court's sound discretion. Lonno v. Heirs of Palik, 21 FSM R. 103, 106 (App. 2016).

Appellate Review – Standard – Civil Cases – Abuse of Discretion

A lower court's decision to dismiss a case should be scrutinized, with an eye toward determining whether it is an abuse of discretion on the presiding judge's part. Such abuses must be unusual and exceptional; an appellate court will not merely substitute its judgment for that of the trial court. Lonno v. Heirs of Palik, 21 FSM R. 103, 106 (App. 2016).

Appellate Review – Standard – Civil Cases – Abuse of Discretion

An 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. Lonno v. Heirs of Palik, 21 FSM R. 103, 106 (App. 2016).

Appellate Review – Standard – Civil Cases – De Novo

Issues of law are reviewed de novo on appeal. Lonno v. Heirs of Palik, 21 FSM R. 103, 106 (App. 2016).

Civil Procedure – Dismissal; Civil Procedure – Dismissal – Before Responsive Pleading

At the pleader's option, Rule 12(b) defenses may either be raised in a separate motion before pleading or may be raised in the responsive pleading. Lonno v. Heirs of Palik, 21 FSM R. 103, 107 (App. 2016).

Civil Procedure – Dismissal; Statute of Limitations

When a complaint's allegations are subject to the defense that the statute of limitation has lapsed, a court may choose to dismiss the action, even though it is an affirmative defense. Lonno v. Heirs of Palik, 21 FSM R. 103, 107 (App. 2016).

Appellate Review – Briefs, Record, and Oral Argument

If an appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to such finding or conclusion because it is not the appellate court's responsibility to search the record for errors. The parties' briefs must clearly denote those portions of the record that support their arguments. Lonno v. Heirs of Palik, 21 FSM R. 103, 107 (App. 2016).

Civil Procedure – Pleading

A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, but when a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. Lonno v. Heirs of Palik, 21 FSM R. 103, 108 (App. 2016).

Appellate Review – Standard – Civil Cases – Factual Findings

If, after poring over all the evidence in the record, the appellate court is left with a firm conviction that a mistake has been made, it may then conclude that the finding was erroneous, but it cannot substitute its judgment for that of the trial court. Lonno v. Heirs of Palik, 21 FSM R. 103, 108 (App. 2016).

Constitutional Law – Due Process

When the appellant's designated family representatives acted on her behalf and were her agents for the Land Court proceedings, she cannot aver that she was unaware of the proceeding and her due process deprivation claims are wanting. Lonno v. Heirs of Palik, 21 FSM R. 103, 108 (App. 2016).

Appellate Review – Decisions Reviewable

When the proper forum for the claim would have been a timely appeal from the Land Court, not a complaint filed outside the applicable time to appeal, the Kosrae State Court's dismissal of the action will be affirmed. Lonno v. Heirs of Palik, 21 FSM R. 103, 109 (App. 2016).

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COURT'S OPINION

DENNIS K. YAMASE, Chief Justice:

This appeal arose from an Order of Dismissal issued by the Kosrae State Court on May 22, 2015. The Kosrae State Court found that the statute of limitation had lapsed, with respect to the challenged decision of the Land Court and allegations alleging a due process violation were unsupported.

I. BACKGROUND

This land dispute involves a parcel of land referred to as Inkosro Fwinfokoa, which is located within the Malem Municipality, State of Kosrae. Sepe Lonno's (Lonno) claim to the property in issue was the subject of a hearing conducted by the Land Court on June 8, 2008. Among the participants in that proceeding were designated family representatives on behalf of Lonno: Lydon Cornelius and Remos Livaie (the brother of Lonno). Responsive Brief of HO Palik at 7-8. A Memorandum of Decision (MOD) in favor of Heirs of Richard Palik (HO Palik) was issued by the Land Court on April 3, 2009.

The underlying Land Court decision lay dormant for over six years, when Civil Action 25-15 was filed by Lonno in the Kosrae State Court on April 6, 2015. This Complaint named, not only HO Palik,

but the Kosrae Land Court and Kosrae State Government as party Defendants. Numerous claims were brought against the latter two, predicated upon a purported failure to have provided Lonno notice and an opportunity to be heard, along with alleged negligence on the part of government employees.

On May 22, 2015, the Kosrae State Court issued an Order of Dismissal of Action. In so holding, the lower Court stated *inter alia*:

As Defendant[s] Heirs of Richard Palik properly assert, this Complaint is time-barred. This Complaint relates to a Land Court Decision from 2009, well after the statute of limitation [expired]. In addition, the proper forum would have been a timely appeal to the State Court, which was never filed. Plaintiff's claims that she and her predecessor in interest never received notice are unsupported by evidence and cannot be legally sustained. Accordingly, this claim is dismissed as time-barred under Kosrae State Code, Section 6-2506.

II. ISSUES ON APPEAL

A. Whether the Kosrae State Court Order entered on May 22, 2015, was erroneous and contrary to law?

B. Whether the Kosrae State Court Order entered on May 22, 2015, was based on substantial evidence?

III. STANDARD OF REVIEW

The decision to dismiss a case is committed to the sound discretion of the trial court. As such, the lower court's decision should be scrutinized, with an eye toward determining whether it reflects an abuse of discretion on the part of that presiding Judge. Such abuses must be unusual and exceptional; an appellate court will not merely substitute its judgment for that of the trial court. Simina v. Kimeou, 16 FSM R. 616, 619 (App. 2009).

An 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. Arthur v. FSM Dev. Bank, 16 FSM R. 653, 657-58 (App. 2009). Finally, issues of law are reviewed *de novo* on appeal. Iriarte v. Individual Assurance Co., 18 FSM R. 340, 351 (App. 2012).

IV. ANALYSIS

1. Summary Dismissal of Complaint

Lonno's first assignment of error, challenges the propriety of the Kosrae State Court's decision to summarily dismiss the relevant cause of action, given the absence of a "formal 12(b) motion to dismiss requested by any part[y]." Lonno's Opening Br. at 4. The recitation of the lower court, with regard to Defendant/Appellees' having moved for dismissal,¹ is additionally cited by Lonno, as an

¹ May 22, 2015 Order of Dismissal entered by the Kosrae State Court set forth:

Defendant Heirs of Richard Palik moves to dismiss the complaint as it fails to state a

incorrect reference to the procedural backdrop.

Although an actual 12(b) motion was never lodged by either attorney for Appellees, the sum and substance of the relief sought – dismissal, was set forth in each of their Answers. Within the Answer filed by HO Palik, a request to dismiss was articulated, in light of a failure to state a claim upon which relief could be granted, the applicability of *res judicata* and the statute of limitation having lapsed. Answer of Heirs of Palik (May 6, 2015). Similarly, the prayer for relief filed by the Kosrae State Defendants/Appellees, requested dismissal, given the Complainant's failure to identify the particular portion of land in issue. Answer of the Kosrae State Defs. (May 4, 2015).

Rule 12(b) of the Kosrae Rules of Civil Procedure provides, in pertinent part:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) improper venue; (4) insufficiency of process; (5) insufficiency of service of process; (6) failure to state a claim upon which relief can be granted

The use of the permissive word may connotes that a respective request for dismissal can be set forth within an Answer and need not be made through a separate Rule 12(b) motion. Since Heirs of Paliks' Answer cited dismissal was warranted, pursuant to various affirmative defenses and the Kosrae State Appellees' prayer for relief asked that the Complaint be dismissed based upon a failure to identify the subject land, the Kosrae State Court therefore had requests to dismiss the action before it. Furthermore, because the allegations of Lonno's Complaint are subject to the defense that the statute of limitation has lapsed, a court may choose to dismiss the action, even though it is an affirmative defense. Mobil Oil Micronesia, Inc. v. Pohnpei Port Auth., 13 FSM R. 223, 228 (Pon. 2005).

2. *Failure to State a Claim Upon Which Relief Can be Granted*

The claims within the underlying Complaint, to recover the Inkosro Fwinfokoa land, reference an alleged failure by the Land Court to provide Lonno an opportunity to delineate the specific boundaries of her claim, via a written statement or supportive documentation and neglected to conduct a survey which would generate a preliminary map denoting the sought after portion. Nevertheless, the Complaint failed to attach transcripts from the Land Court proceeding, much less the April 3, 2009 MOD, as exhibits thereto. We note, that these items were similarly absent from Lonno's opening brief and appendix.

The unequivocal language of Rule 10(b)(2) of the FSM Rules of Appellate Procedure provides: "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion."

It is not the Court's responsibility to search the record for errors; briefs of the parties must clearly denote those portions of the record that support their arguments. Nakamura v. Bank of Guam, 6 FSM R. 224, 228 (App. 1993). Since, neither transcripts from the Land Court proceeding, nor the

claim for which relief can be granted, is barred by Res Judicata, and is time barred by statute of limitation and laches. Defendant State of Kosrae also moves for dismissal as the complaint fails to identify the subject land.

MOD which was issued in the wake thereof, were made part of the record, we are not privy to what testimony was adduced at this hearing and what factors were taken into consideration by the Court in rendering its decision.

In Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), the United States Supreme Court held:

[A] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Id. at 678, 129 S. Ct. at 1949, 173 L. Ed. 2d at 864. As such, the misgivings harbored by the lower Court, in terms of the sufficiency of the Complaint, based on the sheer possibility, that the factual affirmations are consistent with what actually transpired at the Land Court proceeding and comport with the decision that was generated, are equally manifest here. If after poring over all the evidence in the record, if the Appellate Court is left with a firm conviction that a mistake has been made, it may then conclude that the finding was erroneous, but it cannot substitute its judgment for that of the trial court. Livaie v. Wellbacher, 13 FSM R. 139, 143 (App. 2005). It was clearly Lonno's duty to affix the aforementioned documentation, in support of the respective arguments made here, yet this was not done.

3. *Due Process*

Lonno maintains that "It was not until a period prior to the filing of Plaintiff's Complaint [in] April of 2015[,] that Plaintiff-Appellant discovered that Notices were never served on her regarding [the] Land Court proceeding in 2008[,] affecting Inkosro Fwinfoko." Lonno's Opening Br. at 8. The penultimate sentence within the Order of Dismissal entered by the Kosrae State Court stated: "Plaintiff's claims that she and her predecessor in interest never received notice are unsupported by evidence and cannot be legally sustained." As previously noted, among the participants at the 2008 Land Court proceeding were designated family representatives of Lonno; namely his brother Remos Livaie, along with Lyndon Cornelius.

By way of analogy, these designated family representatives, acting on behalf of Lonno, can be considered her agents. FSM v. National Offshore Tuna Fisheries Ass'n, 10 FSM R. 169, 174 (Chk. 2001). As such, the fiduciary duty created by such a relationship reflects a manifestation of consent by these designated family representatives/agents to act on Lonno's behalf and subject to Lonno's control. Individual Assurance Co. v. Iriarte, 16 FSM R. 423, 441 (Pon. 2009). Given this relationship and concomitant representation, Lonno's affirmation, regarding not having been privy to the Land Court's 2008 proceeding, was not accepted by the lower court.

In other words, the presence of these agents/proxies, along with their active involvement at the Land Court hearing, belies the averment of Lonno that she was not aware of the proceeding "until a period prior to the filing of [her] Complaint [in] April of 2015." As such, we find, that the Kosrae State Court properly found Lonno's claims sounding in a deprivation of due process to be wanting; thereby warranting the dismissal.

4. *Statute of Limitation*

In its Order of Dismissal, the Kosrae State Court noted: "In addition, the proper forum would

have been a timely appeal to the Land Court, which was never filed. Plaintiff's claims that she and her predecessor in interest never received notice[,] are unsupported by evidence and cannot be legally sustained." The time frame for filing such an appeal is spelled out in § 11.614 of the Kosrae State Code:

(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 of the Kosrae State Court.

(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.

V. CONCLUSION

The underlying Complaint was filed outside the applicable time to appeal a Land Court decision of which the party had notice through her agent-proxy and this constitutes a situation precluding the Kosrae State Court from entertaining the subject cause of action. We find no abuse of discretion by the Kosrae State Court in issuing the Order of Dismissal which was therefore proper and will not be disturbed.

Accordingly, the Kosrae State Court's May 22 Order of Dismissal of Action is hereby AFFIRMED.

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