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THE SUPREME COURT OF
FEDERATED STATES OF MICRONESIA
APPELLATE DIVISION

KERSIN TILFAS, MAXWELL SALIK,)
ESTHER EUVER,)
)
 Petitioners.)
)
 vs.)
)
 CHIEF JUSTICE ALIKSA B. ALIKSA,)
 Kosrae State Court,)
)
 Respondent.)
)
 HEIRS OF KILAFWAKUN LONNO,)
)
 Party in Interest.)
)
)
)

Appeal Case No.: K5-2013
(State Court Case No.: 84-11)

PETITION FOR WRIT OF PROHIBITION;
MEMORANDUM OF POINTS AND
AUTHORITIES; CERTIFICATE OF
SERVICE

COME NOW, Kersin Tilfas, Maxwell Salik, Esther Euver, Petitioners in the above-entitled case, by and through their undersigned counsel, and hereby bring this Writ of Prohibition seeking to prevent Chief Justice of Kosrae from proceeding to oral argument at state appellate level and for other relief as set forth below. This petition is brought pursuant to Rule 21(a) of the FSM Rules of Appellate Procedure, the following Memorandum of Points and Authorities and any other files and records in this case.

A. Factual Background

The real substance of this state case involves “boundary line” disputes. The ownership of these parcels in question is not disputed. The only dispute to these land parcels is the boundary line. Heirs of Kilafwakun Lonno, represented by MLSC Attorney Canny Palsis are disputing their boundary lines against all three adjacent landowners: 1) Kersin Tilfas; 2) Maxwell Salik; 3) Esther Euver. The findings of the Kosrae State Land Court Memorandum in its Decision of

December 7, 2011, were in favor of Euver, Salik, and Tilfas and against Heirs of Kilafwakun Lonno. As the adversely affected landowners, Heirs of Kilafwakun Lonno appealed the Land Court's decision to the Kosrae State Court.

In accordance with a state court-issued Scheduling Order, Heirs of Kilafwakun Lonno filed their Opening Brief and Appendix on February 18, 2013. On March 19, 2013, Euver, Salik and Tilfas filed their Opening Brief and Appendix. On March 26, 2013, Attorney Palsis filed a Motion to Strike Appellees' (Petitioners in this case) Brief and Appendix. On May 17, 2013, the Kosrae State Court Appellate Division, Chief Justice Aliksa B. Aliksa issued an Order Granting Motion to Strike Appellees' Brief and Request for Sanctions. On May 30, 2013, Appellants (Petitioners) filed their Notice of Appeal from the state court's May 17th order with the Appellate Division of the FSM Supreme Court. On same date, Petitioners filed their Motion to Stay Proceeding with the state court. Oral argument on the motion to stay was held in state court on Thursday, July 11, 2013. On the following day, July 12, 2013, the state court issued its written Order Denying Stay and a separate document entitled Appellee's Motion to Stay Proceeding Denied.

On July 16, 2013, the Appellants filed in this court their Motion to Stay Proceeding in State Civil Action No. 84-11 Pending Disposition of Interlocutory Appeal. On August 1, 2013, this court issued an Order Granting Stay.

To allow an essential understanding of the matters set forth in the petition and to minimize duplication costs, the petitioners respectfully request that this court refer to the copies of the state court's May 17th and July 12th orders previously submitted and made parts of the records and files in this case.

MEMORANDUM OF POINTS AND AUTHORITIES

B. Statement of the Issues and Relief Sought

1. The State Court orders of May 17, 2013 and July 12, 2013, issued by Chief Justice Aliksa were erroneous and contrary to law.
2. The Petitioners and their Counsel's Procedural and Substantive Due Process rights under the Kosrae State Constitution and FSM Constitution were violated when landowners were denied their rights to present brief, appendices to support their case, and when counsel was sanctioned, and became victims of discriminatory practices that led to a deprivation of property rights.
3. The Relief sought in this Petition is to request that this court issue a Writ of Prohibition:
 - a. To prevent Chief Justice Aliksa from proceeding to oral argument in this land appeals case without the Petitioners' brief and appendix.
 - b. To set aside the two orders issued on May 17, 2013, and July 12, 2013, by Chief Justice of the Kosrae State Court Aliksa B. Aliksa;
 - c. To reinstate Petitioners Tilfas, Salik and Euver stricken Brief and Appendix;
 - d. To lift the sanction against the undersigned counsel and warning on record against the Trial Counselor in this case.
 - e. To disqualify and remove the Chief Justice from presiding over this case and to appoint a temporary judge to preside over this case.

C. Writ of Prohibition

FSM App. R. 21(a), states in part that “[a] writ of mandamus or prohibition directed to a judge or justice shall be made by filing a petition therefor with the clerk of the Supreme Court appellate division with proof of service on the respondent judge or justice and on all parties to the action in the trial court. The petition shall contain a statements of the facts necessary to an

understanding of the issues presented by the application; a statement of the issues presented and the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition.”

D. Statement of the Reasons Why the Writ Should Issue

The State Court orders of May 17, 2013 and July 12, 2013 were erroneous and contrary to law. Chief Justice Alikxa in his two most recent decisions in this case, ordered the briefs and appendix stricken from the records (and sanctioned attorney and warned counsel of record) on a single ground: ghostwriting.

The main precedent that the state court used in rendering its order striking brief and sanctioning attorney is on the case of Kinere v. Kosrae Land Comm’n, 13 FSM Intrm. 78 (Kos. S. Ct. Tr. 2004). Ghostwriting is defined in Kinere as a counsel's actions in preparing the answer on behalf of a defendant as a pro se litigant. Id. Kinere is a case involving claims of ghostwriting by MLSC attorney for Pro Se Defendant Joab P. Sigrah, one of the four defendants in this case. Pro Se Joab signed documents prepared by MLSC attorney. As a result, the court in Kinere cautioned MLSC attorney that counsel should not be drafting pleadings for pro se Defendant Joab P. Sigrah. Words of caution to pro se defendant Joab and MLSC counsel was the extent of the court in Kinere’s disciplinary attempts. In Kinere, there was no striking of brief and severe sanction against attorney, simply the court’s words of caution. The state court although was guided by Kinere, in an highly unusual move, struck Appellants’ brief, warned counsel of record and issued severe sanction to the attorney who made a later appearance after the filing of the brief, disciplinary measures inconsistent with Kinere.

In direct contradiction to the findings of ghostwriting in Kinere, the signing and filing of Petitioners' brief at state level was not done within the context of *pro se* defendants or parties. There are no *pro se* parties in this case to invoke the issue of ghostwriting. Petitioners Tilfas, Salik, and Euver have been represented by legal counsel at the time of filing of their brief, and given that their legal counsel of record signed off on the Brief, there apparently cannot be any claims of ghost writing for *pro se* parties that are formally represented by legal counsel in this litigation. Appellees' MLSC Attorney Palsis apparently misled the state court when identifying the legal counsel for Appellants/Petitioners Tilfas, Salik and Euver as a *pro se* litigant.

Further, there is no legal or factual basis for the state court to strike a brief that fully complied with all the applicable rules governing appeals process, filing of briefs and appendix in the state court. A motion to strike a brief cannot be used to disregard this type of boundary line dispute appeals case. Land dispute cases and appeals are set by statutes. The statutes do not allow motion to strike to stall or hinder this type of legal process. Title 11, Section 11.614 deals with appeals from Land Court to State Court:

Section 11.614. Appeals.

(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.

(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.

(a) Within 90 (ninety) days of receipt of the certified copy of the notice of appeal, the Land Court shall provide to the State Court the following items from the decision being appealed:

- (i) All original records, pleadings, documents and evidence received;
- (ii) A complete written copy of the transcript of proceedings;
and
- (iii) A written copy of the findings and decision of the Land Court Justice.

(3) The notice of appeal shall state the Land Court decision which is being appealed and the specific legal grounds upon which such appeal is based.

(4) The notice of appeal shall comply with all State Court rules and regulations concerning appeal procedures and substance.

(5) The State Court shall thereafter calendar and hear the matter as hereinafter provided. The matter shall be decided upon briefs submitted by the parties and oral argument concerning legal issues. If a party fails to file a timely brief, as ordered by the State Court, such failure may be considered as consent to the relief sought by the opposing party's brief. The State Court has the discretion to refuse to allow oral argument by a party who fails to file a timely brief.

(a) No evidence or testimony shall be considered at the appeal hearing except those matters which constitute the official record, transcripts, and exhibits received at the Land Court hearing.

(b) The State Court shall decide the matter by applying the "substantial evidence rule" to any decisions rendered by the Land Court.

(c) After review of the entire record and hearing oral arguments from counsel or parties, the State Court shall render a decision on the appeal and issue a written decision within 120 (one hundred twenty) days of the close of argument and hearing.

(d) If the State Court finds the Land Court decision was not based upon substantial evidence or that the Land Court decision was contrary to law, it shall remand the case of the Land Court with instructions and guidance for re-hearing the matter in its entirety or such portions of the case as may be appropriate.

(e) If the State Court affirms the decision of the Land Court, no further appeals to the State Court shall be allowed.

KSC, §11.614(5) provides that a prerequisite to oral argument is the filing of the briefs.

A decision by the reviewing court consistent with §11.614(5) will be based upon briefs and oral argument concerning legal issues.

If the state court is not prevented from pursuing its present course of handling this land appeals case, the potential of a judicial one-sided review of only one party, Heirs of Kilafwakun Lonno' brief and appendix will cause irreparable harm and is in violation of Kosrae State Code, Title 11, Chapter 6 on Determination and Registration of Interests in Land and Kosrae State Rules of Appellate Procedure and other laws.

Further, the 24 set of rules contained in the Kosrae State Rules of Appellate Procedure do not provide for striking of brief, appendices and sanctioning attorney for one year for

ghostwriting. There are no legal grounds justifying striking of briefs, sanctioning and for a state court to proceed on a one-party brief.

Here, the Petitioners filed their Brief and Appendix in state court, in full compliance with the applicable rules of the Kosrae Rules of Appellate Procedure pertaining to the submission of appellate brief and appendix. Petitioners filed their Brief in accordance with the deadlines established in this case by court Order. Pertaining to the requirement on contents of the Brief, Petitioners submitted their Brief in strict adherence to Kos. App. R. Rule 11 (b). Their Appendix was filed in accordance with Kos. App. R. 13(b) pertaining to the Duty of Appellee to Prepare and File Appendix. The Petitioners' Brief was signed by Trial Counselor satisfying Kos. App. R. 14(d) pertaining to signing of Brief.

Striking contents of pleadings has not been favored by court. Motions to strike under Rule 12(f) are viewed with disfavor and are infrequently granted. Medabalmi v. Island Imports Co., 10 FSM Intrm. 32, 35 (Chk. 2001). Courts ordinarily favor resolving cases on their merits rather than on procedural grounds. Id. Since there is no specific rule under the Kosrae Rules of Appellate Procedure that provides for the filing of a Motion to Strike, the Heirs of Kilafwakun Lonno resorted to a filing under Rule 24(b) of the Kosrae Rules of Appellate Procedure which provides for disciplinary power of the court over attorneys and trial counselors.

The allegations made in the motion to strike were not supported by evidence and contrary to law. Attorney Palsis' complaint of ghostwriting was grossly misapplied. The matters did not involve pro se defendants. Petitioners Tilfas, Salik and Euver were represented by a Trial Counsel, certified to practice law in the State of Kosrae. The certified Trial Counselor signed for the Tilfas, Salik and Euver when submitting their Brief and Appendix. Tilfas, Salik and Euver did not sign the brief. The Trial Counselor was not a party to the case, he is the legal counsel.

Attorney Palsis along with the state court mistakenly identified and mislabeled the trial counselor as a pro se litigant in advancing their ghostwriting theory. Therefore, there cannot be any ghostwriting for parties that are formally represented by legal counsel in this proceeding. There are no pro se parties in this case to invoke any ghostwriting theory. All filings in state court including briefs had been signed by legal counsel not pro se litigants.

Further, the Petitioners and their Counsel's Procedural and Substantive Due Process rights under the Kosrae State Constitution and FSM Constitution were violated when they were denied their right to present brief, appendices to support their case, and when counsel was sanctioned for one year resulting in deprivation of property rights.

The Procedural Due Process clause of the Constitution guarantees that a person's life, liberty, property shall not be taken without adequate procedures. This procedural due process right is enshrined in Article II, Sections 1(b) of the Kosrae State Constitution which states that, "a person may not be deprived of life, liberty, or property without due process of law or be denied the equal protection of the laws."

The Constitution affords all individuals the right to due process of law.¹ The scope of the "due process of law" is the utilization of a *fair decision-making process*, wherein an individual is entitled to a fair hearing and right to be heard before he or she is being deprived of life, liberty, or property interest. Here, the state court is not conducting the legal proceeding in this case according to established rules and principles to protect and enforce private rights. Accordingly, Land Claimants/Petitioners Tilfas, Salik and Euver invoke their constitutional right to due process and should be afforded a full hearing and trial on the merits as further protected in the

¹ Due Process has five main elements: 1) The conduct of legal proceedings 2) according to established rules and principles 3) for the protection and enforcement of private rights 4) including notice and the right to a fair hearing 5) before a tribunal with the power to decide a case. (Black's Law Dictionary, 2nd Ed., 2001).

state code under §11.614(5), requiring that a court must review and consider parties' briefs and appendix before any real property interests rightfully claimed are taken.

This Court must consider the fundamental principal of Due Process in assessing the sheer weight of the Land Claimants' rights to their property (over any claims of ghostwriting) – land rights and interests that are procedurally safeguarded under the Constitution, thus, cannot be affected nor cut short by any type of unfair treatment and prejudicial practices by the state court.

E. Removal of Chief Justice Alikxa from presiding over this Case

The ABA Model Code of Judicial Conduct, adopted and codified as Kosrae State Code, Title 6, Section 1201, requires that a judge disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned. (Canon 3.E (1) (2000 ed)).

Petitioners Tilfas, Salik and Euver are entitled to an unbiased judge. Petitioners submit that Chief Justice Alikxa cannot be fair and just in any forthcoming decision in this case evidenced in the decisions he issued, where he completely disregarded §11.614(5) of the Kosrae State Code by ordering oral argument without the petitioner's brief and appendix, where he issued a severe one-year sanction against an attorney for ghostwriting, and other questionable decisions and conducts. Chief Justice Alikxa's rulings in this case thus far clearly show a court already predisposed to ruling in one party's favor. Petitioners submit that if Chief Justice Alikxa is not interested to review their brief and appendix by having them stricken, the presiding judge is already giving out his inclination to which direction he is ready to rule, as if a final judgment on the case has been announced already while awaiting formal oral argument, and for an issuance of a written decision to satisfy appellate rules and KSC, Title 11 as to form and not substance.

The Petitioners' rights to present their case in state court which include right to file appellate briefs, appendices and oral argument secured through state constitution, statutes, and rules of state appellate procedure, had already been adversely effected to an extent of permanent harm. The petitioners' request for a new presiding judge will at least afford them some flickers of hope that these set of parties may be afforded equal protection of the law as provided under FSM Const. art. IV, sec. 3.

Finally, Petitioners submit that Chief Justice Aliksa cannot be fair and impartial on a case represented by Attorney Canny Palsis, who presently shares with him the roles of justices in the state court. The Heirs of Kilafwakun Lonno is represented by MLSC Directing Attorney Palsis, who is presently a current Kosrae State Justice Pro Tem. There are presently two justices pro tem in Kosrae, Attorney Palsis and Trial Counselor Chang William. Attorney Palsis has been a Justice Pro Tem for many years, having occasionally and continue to present himself in public as one of the representatives of the Kosrae Judiciary Branch, alongside Chief Justice Aliksa as evidenced in past judges training wherein Chief Justice Aliksa sent Justice Pro Tem Palsis and other judges to represent Kosrae State justices. The issue becomes more than "impartiality" and "fairness". The issue is one of conflict and grave injustice – no citizens under a constitutional government should subject their lands and cases to this type of unfair legal process.

It is apparent from his handling of this case and his conducts, that Chief Justice Aliksa cannot adjudicate this case in a fair manner and not subject to questions of impartiality in this adversarial proceeding. Therefore, Petitioners respectfully request this court to issue a writ prohibiting Chief Justice Aliksa from presiding over this case and to have a Temporary Justice assigned to this case.

CONCLUSION

This petition is brought in good faith and is sought to protect the interests and the rights of the land owners and their legal counsel. Based upon the foregoing and in the interest of justice and fairness, the Petitioners respectfully request that this court grant this Petition for Writ of Prohibition.

DATED: August 30, 2013



YOSLYN G. SIGRAH
Attorney for Petitioners
P.O. Box 3018
Kolonias, Pohnpei FM 96941
Tel.: 923-5779

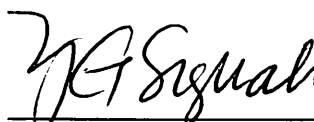
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing petition will be duly served upon the following party via regular mail or hand-delivery to the party's last known address on the date indicated below or soon thereafter:

HONORABLE ALIKSA B. ALIKSA,
Chief Justice, Kosrae State Court
P.O. Box KSC
Kosrae, FM 96944
(Respondent)

CANNEY PALSIS, ESQ.
Micronesia Legal Services Corporation
P.O. Box 38
Tofol, Kosrae FM 96944
Attorney for HEIRS OF KILAFWAKUN LONNO

DATED: August 30, 2013



YOSLYN G. SIGRAH