IN THE
APPELLATE DIVISION
CHUUK STATE SUPREME COURT
Federated States of Micronesia

SEINAS SIMINA, Appellant, vs. CHUUK STATE ELECTION COMMISSION, EXECUTIVE DIRECTOR OF CHUUK STATE ELECTION COMMISSION, Appellees, MATAICHY PWECHAN, Real Party in Interest	)	**CSSC APPEAL NO. 01-2014** **ORDER DISMISSING APPEAL**

BEFORE:

Honorable Jayson Robert, Associate Justice, Presiding

Honorable Brian Dickson, Temporary Justice*

Honorable Bethwell O'Sonis, Temporary Justice**

*Attorney at Law, Legislative Counsel, Weno, Chuuk

** Directing Attorney, FSM Public Defender, Weno, Chuuk

In response to the Commission's decision, the Appellant filed the instant appeal.

II. ANALYSIS

The crux of this appeal is whether the Chuuk State Election Commission's decision was proper. Specifically, the issue is whether Mataichy Pwechan's name should be placed on the Nema Municipality General Election ballot.

This Court has previously ruled that the issue of whether an individual is entitled to be placed on the ballot is left solely in the hands of the Chuuk State Election Commission and beyond this Court's jurisdiction. *Hethon v. Os*, 9 FSM Intrm. 534, 535 (Chk. S. Ct. Tr. 2000) (The issue of whether a person is entitled to have his name placed on the ballot is an election case, over which neither division of the Chuuk State Supreme Court has original jurisdiction, and which is placed solely in the hands of the Chuuk State Election Commission with the Chuuk State Supreme Court appellate division having jurisdiction only as provided in the Election Law of 1996). In fact, Section 9 of the Chuuk State Election Law of 1996 states:

> No person shall be placed on the ballot for election to any public office unless the Commission has determined after a thorough examination and investigation that said person possesses or meets the qualifications required by law and the Constitution for the office for which he seeks nomination.

Chk. S.L. No. 3-95-26, § 9

Furthermore, the Panel notes that there is no law (including the Nema Constitution) which prevents the Commission from determining whether an individual should be placed on the Nema Municipality General Election ballot. *See Chipen v. Chuuk State Election Comm'n*, 8 FSM Intrm. 300n, 300o (Chk. S. Ct. App. 1998) (All the provisions of the Chuuk State Election Law of 1996 apply to all elections in the State of

On October 3, 2014, Appellant Seinas Simina ("Appellant") filed an "Appeal Complaint for Declaratory, TRO, and Preliminary Injunctive Reliefs"[1] ("Complaint") against Appellees Chuuk State Election Commission and the Executive Director of the Chuuk State Election Commission. In his Complaint, Appellant raised several issues in response to Chuuk State Election Commission's ("Commission") decision in finding Mataichy Pwechan ("Pwechan") was a qualified candidate and that his name should be placed on the Nema Municipality General Election ballot; necessitating a re-election.

Upon review of the Complaint and applicable authorities, the Panel finds as follows.

I. RELEVANT BACKGROUND

On August 5, 2014, the Nema Municipality General Election was held pursuant to Nema Municipal Constitution, Article IV, Section 1.

On August 14, 2014, Pwechan filed a complaint with the Commission, requesting that his name be placed on the Nema Municipality General Election ballot. (Appellant's Compl., Ex. B). In his complaint, Pwechan states that he has served as the Deputy Mayor for the Nema Municipality up to the Nema Municipality General Election held August 5, 2014. *Id.* He also alleges that the Nema Election Commissioner has refused to place his name on the ballot and is acting in violation of the election procedure and Nema Constitution. *Id.*

A hearing on Pwechan's complaint was held by the Commission on August 19, 2014, and the Commission found in favor of Pwechan. (Appellant's Compl., Ex. C). This result necessitated a re-election.

[1] Appellant filed a separate motion for temporary restraining order, which was heard and denied by the Panel at a hearing held on October 7, 2014.

Chuuk, including municipal and national elections whenever applicable unless otherwise specifically provided.). It should also be noted that the Appellate Division of the Chuuk State Supreme Court has jurisdiction of election matters as provided for in Sections 130 through 139, of the Election Law of 1996. Chk. S.L. No. 3-95-26, §§ 130-139; *see David v. Uman Election Comm'r*, 8 FSM Intrm. 300d, 300i (Chk. S. Ct. App. 1998) (the Chuuk State Supreme Court appellate division has no original jurisdiction to entertain an appeal directly from a municipal election commissioner.).

III. CONCLUSION

Based on the foregoing, the Panel lacks jurisdiction to hear this appeal. Accordingly, the relief sought by the Appellant is DENIED and the appeal is hereby DISMISSED.

IT IS SO ORDERED on this 23rd day of October, 2014.

Jayson Robert
Associate Justice, Presiding

Brian Dickson
Temporary Justice

Bethwell O'Sonis
Temporary Justice

Entered this 23rd day of October, 2014.

Clerk of Court,
Appellate Division

IN THE
APPELLATE DIVISION
CHUUK STATE SUPREME COURT
Federated States of Micronesia

ROKE PHILLIP,

Appellant,

vs.

WISEMAN MOSES,

Appellee.

CIVIL APPEAL NO. 08-2007

OPINION

Argued: March 15, 2012
Decided: April __, 2012

BEFORE:

Honorable Repeat R. Samuel, Associate Justice, Presiding
Honorable Dennis K. Yamase, Temporary Justice*
Honorable Aaron L. Warren, Temporary Justice**

*Associate Justice, FSM Supreme Court, Chuuk
**Attorney at Law, Weno, Chuuk

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For the Appellee:

* * * *

REPEAT R. SAMUEL, Associate Justice, Presiding:

This is an appeal from an August 9, 2007 trial court Pungun Kapong (Court Judgment) that was issued without the benefit of a trial or other proceeding. That judgment awarded Wiseman Moses title to land on Tonoas that the Japanese had filled in long ago. We vacate that judgment and remand the matter to the trial court

where the case should proceed to trial.

I. BACKGROUND

On May 18, 2005, Wiseman Moses filed his complaint alleging that Roke Phillip was trespassing on land Moses owned; that Phillip's aunt and uncle had been given temporary permission to stay there but Phillip's father had not; that the Phillips had erected dwellings on the land and cut down fruit trees. Moses sought to have Phillip and all his relatives also living there enjoined from occupying the land; $20,000 damages for each house the Phillips had built on the land; $200,000 for humiliation and emotional distress; and attorney's fees.

Roke Phillip answered that, at the end of World War II, his father, Yerifo Phillip, had moved onto the land that the Japanese had filled in and that Moses now claimed; that his family had resided there ever since; that in 1991, Onsin Sellem had, in Civil Action No. 104-91, sued Yerifo Phillip over ownership of the filled land; that, on October 21, 1991, the Chuuk State Supreme Court had ruled that Yerifo Phillip owned the filled land; and contended that that judgment made the ownership of the filled land res judicata. Phillip also questioned Moses's standing to sue since Moses did not plead the basis of his claim to the filled land.

Moses responded to Phillip's answer and asserted that our opinion in Appeal No. 22-1998 [Phillip v. Moses, 10 FSM Intrm. 540 (Chk. S. Ct. App. 2002)] affirming the judgment in Moses v. Phillip, Civil Action No. 103-93 (Nov. 18, 1998), confirmed his ownership of the filled land.

On August 15, 2005, the case was noticed for trial on August 26, 2005, and on September 18, 2005, it was noticed for trial on October 14, 2005. Trial was not held at either time. Phillip moved for a continuance because he was in Honolulu for medical treatment. On March 21, 2007, the case was noticed for trial on April 18, 2007, and the trial notice was served by putting copies of the notice in the boxes of the partes' counsel in the clerk's office. No trial was held.

On August 9, 2007, the trial court entered a Pungun Kapong (court judgment). That judgment, stating that it was relying, at least in part, on our judgment in Appeal No. 22-1998, decreed that Wiseman Moses owned the filled land and ordered that Phillip and all his people had 30 days to vacate all the (reportedly four) houses they had built on the land, that Phillip pay Moses $25,000 compensation, that Phillip pay $5,000 for Moses's attorney's fees and expenses, and that, if the order was not obeyed, Phillip would be arrested.

Phillip timely appealed.

II. PHILLIP'S ISSUES ON APPEAL

Phillip contends that the trial court erred by 1) not considering the trial court judgment in Civil Action No. 104-91; 2) in rendering the final judgment without a trial or allowing him to cross-examine witnesses or rebut Moses's exhibits; 3) by ordering him to pay $25,000 compensation; 4) by ordering him to pay $5,000 for Moses's attorney's fees and expenses; and 5) by threatening him with arrest.

III. DISCUSSION

A. *Lack of Due Process*

No trial appears in the record. Even if there had been a trial on April 18, 2007, of which there is no record, the notice of trial was defective since it was not properly served. Service of papers by leaving them in the counsel's box at the clerk's office is not good service and does not constitute proper notice and is tantamount to non-service. Farek v. Ruben, 16 FSM Intrm. 154, 157 (Chk. S. Ct. App. 2008) (service of a trial notice by placing the notice in a counsel's box in the clerk's office is deficient service and tantamount to non-service when it results in a party's failure to be informed of the noticed trial date). When a court's notice of trial on the merits is not served on a party, that party's rights to due process of law under the Chuuk and FSM Constitutions are violated, and the failure to serve notice of a trial date and time is plain error. *Id.*

The trial court judgment was therefore reached in violation of Phillip's due process rights — the right to notice and an opportunity to be heard because there was either no trial or the notice of trial was defective. Notice and an opportunity to be heard is the essence of due process as guaranteed by both the Chuuk and FSM Constitutions. Albert v. O'Sonis, 15 FSM Intrm. 226, 234 (Chk. S. Ct. App. 2007).

Any judgment rendered without an adversarial evidentiary hearing or trial is a summary judgment. Albert v. George, 15 FSM Intrm. 574, 579 (App. 2008) (trial court judgments issued without

a trial are summary judgments to which the trial court must apply the summary judgment standard); Carlos Etscheit Soap Co. v. McVey, 17 FSM Intrm. 102, 108 (Pon. 2010) (same), *aff'd*, 17 FSM Intrm. 427, 435-36 (App. 2011). Since it is apparent from the pleadings that genuine issues of material fact are present, and since it is apparent that the trial court's August 9, 2007 judgment included rulings on disputed factual issues, this case is not one that is appropriate for resolution by summary judgment. Doone v. Simina, 16 FSM Intrm. 487, 490 (Chk. S. Ct. Tr. 2009) (summary judgment is appropriate only if there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law); K&I Enterprises v. Francis, 15 FSM Intrm. 414, 417-18 (Chk. S. Ct. Tr. 2007) (same); Dereas v. Eas, 14 FSM Intrm. 446, 453 (Chk. S. Ct. Tr. 2006) (same); Dereas v. Eas, 12 FSM Intrm. 629, 632 (Chk. S. Ct. Tr. 2004) (same); Sauder v. Chuuk State Legislature, 7 FSM Intrm. 358, 360, 363 (Chk. S. Ct. Tr. 1995) (same).

Accordingly, the August 9, 2007 trial court judgment must be vacated and the matter remanded to the trial court for trial.

B. *Appellants' Other Issues*

In order to provide some guidance to the trial court on remand, we will briefly comment on the other issues that Phillip raised and on other aspects of the trial court decision.

1. *Decision in Sellem v. Phillip, Civil Action No. 104-91*

The trial court erred in failing to consider or even mention the trial court decision in Civil Action No. 104-91. We find this omission most puzzling because the trial judge who rendered the

Civil Action No. 104-91 decision was the exact same trial judge who rendered the Civil Action No. 91-2005 decision now on appeal before us. Phillip clearly asserted the applicability of that decision in his answer. The trial court must address it in some fashion. We take no position on how it might affect a final decision in this case, but conclude that it must be considered and addressed.

2. *Appeal No. 22-1998 Decision*

The trial court also misconstrued our holding in Appeal No. 22-1998, Phillip v. Moses, 10 FSM Intrm. 540 (Chk. S. Ct. App. 2002). In Phillip, we affirmed the trial decision that, as between the parties, Roke Phillip and Rockson Phillip on one side and Seni Moses, Kiromy Sounik, and Kirosy Maneiran on the other, Moses, Sounik, and Maneiran owned the tideland Nenus. (The Immo Clan may also have had a claim to the tideland Nenus but were not parties to the action, *see* Phillip, 10 FSM Intrm. at 545-46, and so their potential claim was not adjudicated, and we modified the trial court judgment so that it was clear that the judgment was only "final between the parties to the case and all those in privity with them," *id.* at 546.) Moses and the trial court both asserted that our decision held that Seni Moses owned the dry land occupied by the Phillips. That is not so. That decision only affirmed a trial court ruling that, between the parties, the claim of Moses, Sounik, and Maneiran to own the tideland Nenus was superior to the Phillips' and did not concern title to any dry or filled land. Phillip, 10 FSM Intrm. at 544-46.

The issue of title to the dry (filled) land occupied by the

Phillips, or to any other dry land, was never before us or before the trial court. In fact, that entire proceeding was premised on the supposition that Roke Phillip and the others owned the filled land that they were living on. In response to the Phillips' assertion that they must have rights to the tideland Nenus because it was adjacent to the filled land they owned, the Phillip court noted that "[t]he owner of dry land . . . is not necessarily the owner of the adjacent tideland." Phillip, 10 FSM Intrm. at 545 (citing Nena v. Walter, 6 FSM Intrm. 233, 236 (Chk. S. Ct. Tr. 1993)). No plausible reading of our Phillip decision can support a claim that it ruled that Moses was the owner of the filled land. Only the most twisted logic could pervert a decision in which the Phillips' ownership of the filled land was presumed undisputed into a decision that awarded title of that land to Moses.

Both the trial court decision in Moses v. Phillip, Civ. No. 103-93, Findings of Fact, Opinion and Judgment at 8 (Nov. 18, 1998), and our opinion affirming it, Phillip, 10 FSM Intrm. at 544, clearly stated in no uncertain terms that that case only concerned the tideland and did not concern the filled land where the Phillips resided or any other dry land.

3. *Monetary Awards*

The trial court also erred in awarding $25,000 in compensatory damages without making any findings about actual damage or providing any reasoning on how it reached that figure or what evidence it relied on. The trial court did not provide any reasoning on how it accounted for the houses that the Phillip

family built on the filled land. The court notes that individuals may have full title to the improvements (as distinguished from the soil) they make upon land not owned by them, Bank of the FSM v. Aisek, 13 FSM Intrm. 162, 166 (Chk. 2005), and thus may be entitled to compensation if it is determined that they do not own the land on which the improvements were made and cannot remove those improvements to another site.

Lastly, the trial court erred by making $5,000 award for Moses's attorney's fees without citing a contractual provision or a statute that would authorize such an award. We note that the FSM civil rights statute, 11 F.S.M.C. 701, cited in Moses's complaint would not apply to this case since this is not a civil rights case. This is a property dispute.

IV. CONCLUSION

Accordingly, the trial court's August 9, 2007 judgment in Civil Action No. 91-2005 is vacated and this matter is remanded to the trial court for further proceedings consistent with this opinion. The trial court may set whatever pretrial proceedings that may be needed and shall set the matter for trial. The appellant, Roke Phillip, is entitled to his costs on appeal, which may be taxed against Wiseman Moses. Chk. App. R. 39(a).

So ordered the __th day of April, 2012.

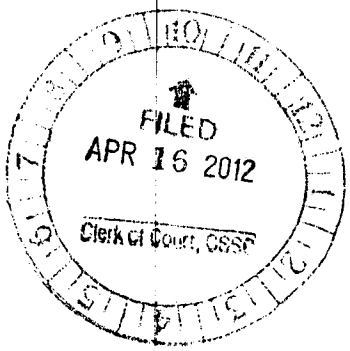
Repeat R. Samuel
Associate Justice

Dennis K. Yamase
Temporary Justice

Aaron L. Warren
Temporary Justice

Entered this 16th day of April, 2012.

Clerk of the Appellate Division



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IN THE
APPELLATE DIVISION
CHUUK STATE SUPREME COURT
Federated States of Micronesia

SAWAKO MATHIAS and FICHITA BOSSY, Appellants, vs. ROSE ENGICHY and TAKASY SOUKON, individually and on behalf of the Sapunupi of Nikoupup Clan in Mwan Village, Appellants, vs. NITE PAUL and IOSI LUDWIG, and on behalf of the children of Neikun, Kimono and Ludwig, Appellants, vs. WENO MUNICIPALITY and the MAYOR OF WENO MUNICIPALITY, in his official capacity, Appellees.	CIVIL APPEAL CASE NO. 02-1996 OPINION

FILED
JUN 14 2007
By _____
Clerk of Court, CSSC

Decided: June __, 2007

BEFORE:

Honorable Midasy O. Aisek, Associate Justice, Presiding
Honorable Benjamin Rodriguez, Temporary Justice*
Honorable Repeat Samuel, Temporary Justice**

*Associate Justice, Pohnpei Supreme Court, Kolonia, Pohnpei
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(Paul et al.)
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MIDASY O. AISEK, Associate Justice:

This appeal arises from the trial court's January 17, 1996 judgment in Civil Action No. 84-1990, in which several groups of claimants all asserted that each was the owner of a certain parcel of land on Weno. For the reasons stated below, we vacate the trial court judgment and remand the matter to the trial court for it to make proper findings of fact and conclusions of law.

I. PROCEDURAL HISTORY

A. *Trial Level*

On July 11, 1990, Nite Paul and Iosi Ludwig filed a complaint to quiet title to land they called Nukunanang, on which Weno municipal government buildings, Weno jail, and Mwan Elementary School stood. The Weno municipal government and the Weno mayor ("Weno") were the named defendants. The complaint alleged that Nukunanang had been given to their predecessors in interest (Neikun, Kimono, and Ludwig) by Chief Mailo in Japanese times, and that one of them had given Nukunanang to the municipality to use, but not to own. It also sought injunctive relief and moved for a temporary retraining order, which was granted.

On July 16, 1990, Weno filed its answer and affirmative defense. On July 23, 1990, Takasy Soukon and Miter Nakayama (Intervenors #2) filed their complaint in intervention and their

motion to intervene. Intervenors #2 alleged that the land in dispute was named Neichipwelong, not Nukunanang, and that the disputed land was lineage land of their Sapunupi clan. On July 24, 1990, Sawako Mathias and Fichita Bossy (Intervenors #1) filed their complaint in intervention and their motion to intervene. Intervenors #1 alleged that Nukunanang was lineage land of their Sapunupi clan, and that Nukunanang had been given to Weno municipality to use so long as the Sapunupi clan held the highest executive position in the municipal government.

Trial was held in January, 1991. Weno municipality moved to dismiss the case at the end of trial. The motion was later briefed by Weno and by Intervenors #1. On August 19, 1994, Weno filed its proposed findings of fact and conclusions of law. On September 16, 1994, Intervenors #1 filed their proposed findings of fact and conclusions of law. On January 17, 1996, the trial judge entered his judgment. That judgment awarded part of the land to the plaintiffs; stated that either the plaintiffs or Intervenors #1 owned the parcel of land where Mwan Elementary School and Weno jail are located and referred that question to the Land Commission to decide between the two; dismissed Intervenors #2 from the suit because Intervenors #2 had stated that they had no interest in Nukunanang; and ordered the parties to bear their own costs.

B. *Appellate Level*

Appeals were filed in February 1996. Briefs from the Sawako Mathias appellants, the Miter Nakayama (now represented by Rose Engichy) appellants, and the Nite Paul appellants were filed in

October 1998. Oral argument was set for December 11, 1998. For reasons not apparent from the record, argument was continued and then set for February 11, 2000. That argument was continued because counsel for the Paul appellants had gone to Honolulu for medical treatment. Oral argument was next set for December 14, 2001. That argument was continued because counsel for the Mathias appellants had gone to Honolulu to participate in the Compact negotiations. Counsels for the Nakayama and Paul appellants appeared and consented to the continuance. The following court order set argument for the next available appellate sitting and stated that no further continuances were contemplated.

Oral argument was next set for April 30, 2007. When the case was called on that date, counsel for the Mathias appellants and for Weno Municipality appeared. Counsel for the Nakayama and Paul appellants did not. At the hearing, we indicated that we were willing to rule based on the briefs, but were uncertain whether the non-appearing parties had proper notice of the hearing and therefore ordered that any party could file a supplemental brief no later than May 31, 2007 and further ordered that each party had to indicate whether they needed oral argument or were willing to submit the case on the briefs.

On May 31, 2007, the Paul appellants filed a motion for substitution of counsel and to extend time to file a supplemental brief, but did not state a need for oral argument. The presiding justice granted the substitution of counsel and denied any further

extension of time.[1] No other party filed anything.

We considered that the parties had then waived their right to oral argument. Under our appellate rules, "[o]ral argument shall be allowed in all cases unless the panel of three justices of the State Court Appellate Division, after examination of the briefs and record, shall be unanimously of the opinion that oral argument is not needed." Chk. App. R. 34(a). Since we were unanimously of the opinion that oral argument was not needed, we issued an order considering this case submitted for our decision.

II. PARTIES' POSITIONS

The Paul appellants (plaintiffs) contend that the trial judge erred because, in their view, the evidence clearly showed that all of Nukunanang is one piece of land and that they own all of it. They further state that Chief Petrus Mailo's[2] 1971 affidavit of title that Weno municipality owned Nukunanang was done solely to get Trust Territory government funding to build Mwan School and did not transfer or reflect the true title or ownership. They contend that it was error to divide Nukunanang and to remand to Land Commission the question of who owned the portion where the school and the jail are.

The Engichy/Nakayama appellants (Intervenors #2) contend that the trial judge erred because, in their view, the evidence clearly showed that Nukunanang was not the dry land in dispute but was

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[1]The presiding justice also granted a January 17, 2000 motion to substitute Rose Engichy for Miter Nakayama.

[2]Chief Mailo's son.

nearby tideland and that the land in dispute was Neichipwelong, to which their ancestors had given Mailo a use right the land, and that Mailo had been assimilated into the Sapunupi Clan from the Sousat Clan. They further contend that they are the true Sapunupi and the true owners of the disputed land and that the trial judge erred in not awarding the disputed land to them. They add that although the use right their ancestors gave Mailo was done in good faith and Mailo's descendants have long lived on the land, Intervenors #2 retain ownership under Chuukese custom and tradition and foreign legal concepts such as adverse possession should not divest them of their ownership rights.

The Mathias appellants (Intervenors #1) raise as issues on appeal: 1) whether the trial court had jurisdiction over the case when the disputed land was part of a land registration area and no special cause why court action (instead of Land Commission determination) was desirable; 2) whether the judgment was valid when it failed to follow the requirements of Civil Procedure Rules 52 and 58; 3) whether the judgment was supported by substantial evidence in the record; and 4) whether the judgment was consistent with public policy. They contend that public policy should prohibit the partial judgment entered by the trial court since it required further costly litigation over part of Nukunanang, which was unsupported by any evidence at trial, when the parties had all asked that question of title to all of Nukunanang be resolved. They contend that the judgment was clearly erroneous because the trial court's effort to subdivide Nukunanang and create new

boundaries for Nukunanang was unsupported by the record. They further contend that the trial court judgment is void because it is not in compliance with Civil Procedure Rule 52 requirement that the trial court find facts specially since the trial court judgment contains no findings of fact. And Intervenors #1 contend that the trial court lacked jurisdiction over the case since Weno is a land registration area and a court cannot entertain a land dispute in a land registration area unless the court has either found a showing of special cause that court action is desirable or the Land Commission itself has referred the case to the court, and neither happened in this case.

III. DISCUSSION

A. *Jurisdiction*

The Mathias appellants are correct that all of Weno is a land registration area, Barker v. Paul, 6 FSM Intrm. 473, 475, 1 CSR 1, 3 (Chk. S. Ct. App. 1994), and that courts have no jurisdiction to hear cases with regard to interests in land in land registration areas unless there has been a showing of special cause, and a finding by the court, that action by a court is desirable, 67 TTC 105; Barker, 6 FSM Intrm. at 476, 1 CSR at 3, or the Land Commission has asked the court to assume jurisdiction without the Land Commission having made a determination, 67 TTC 108(4). The Mathias appellants contend that the record does not suggest any "special cause" existed or that the trial court had promptly notified the Land Commission, as required by statute, 67 TTC 105, that it was assuming jurisdiction.

We cannot locate in the written record any court finding of special cause or prompt notification to the Land Commission. We do note that some of the relief sought – injunctive relief – is not relief available from the Land Commission. We also note the averment in the plaintiffs' complaint that in June 1990 the Land Commission's Senior Land Commissioner, Mitaro Danis, "made another request to the State Court to reconsider taking jurisdiction of this special case." Complaint ¶ 7.

It may be that the trial court considered that to be a Land Commission referral to the court in compliance with 67 TTC 108(4). Or it may be that the trial court considered injunctive relief to constitute special cause. Since we intend to remand this case for the trial judge to make his findings of fact and conclusions of law, we will require the judge to include in those findings and conclusions the basis for his jurisdiction over the case.

B. *Findings of Fact and Conclusions of Law*

"In all actions tried upon the facts the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . . ." Chk. Civ. R. 52(a).[3] Rule 52(a) requires a trial judge, after trial, to make special findings of fact and separate conclusions of law. The trial court's January 17, 1996 judgment was abrupt and contained only the judge's decision, as stated above. *See supra*

[3]The current version of the Civil Procedure Rules, adopted September 17, 1997, deleted the word "separately" from between the words "state" and "its conclusions of law." The language quoted above is the rule in effect at the time the trial court judgment was entered.

pt. II.A. It did not contain any findings of fact or conclusions of law.[4] The decision was presumably arrived at by finding facts and applying Chuukese law to those facts. But what facts were found and what law was applied to them?

The requirement that the trial court "find the facts specially" serves three major purposes: 1) to aid appellate court review by affording it a clear understanding of the ground or basis of the trial court's decision; 2) to make definite precisely what the case has decided in order to apply the doctrines of estoppel and res judicata in future cases and promote confidence in the trial judge's decision-making; and 3) to evoke care on the trial judge's part in ascertaining the facts. 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2571, at 478-80 (2d ed. 1995).[5] Purposes number one and three are implicated in this case.

The trial court satisfies its responsibility to make specific findings of fact when the findings are sufficiently detailed to inform the appellate court of the basis of the decision and to

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[4]The trial court judge also failed to make any findings of fact or conclusions of law when he issued the preliminary injunction in this case, as also required by Rule 52(a) ("and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action"). No party raised this point on appeal so we will not discuss it further.

[5]When a court has not previously construed an civil procedure rule which is identical or similar to a U.S. rule, it may look to U.S. sources for guidance in interpreting the rule. *See* Bualuay v. Rano, 11 FSM Intrm. 139, 146 n.1 (App. 2002); *In re* Engichy, 11 FSM Intrm. 555, 557 n.1 (Chk. 2003). The pertinent part of the pre-1997 Chuuk Rule 52(a) is identical to U.S. Federal Rule 52(a).

permit intelligent appellate review, but the trial court need not mention evidence it considers of little or no value. Krieger v. Gold Bond Bldg. Prods., 863 F.2d 1091, 1097 (2d Cir. 1988). "As long as the trial court clearly relates the findings of fact upon which the decision rests and articulates in a readily intelligible manner the conclusions it draws by applying the controlling law to the facts as found," no more is needed. Sierra Fria Corp. v. Evans, 127 F.2d 175, 180 (1st Cir. 1997). The trial court has the obligation to ensure that the basis for its decision is set out with enough clarity to enable the reviewing court to perform its function. Id.

We review factual findings on a clearly erroneous standard, Chk. Civ. R. 52(a); Narruhn v. Aisek, 13 FSM Intrm. 97, 99 (Chk. S. Ct. App. 2004); and questions of law we review *de novo*, Phillip v. Moses, 10 FSM Intrm. 540, 543 (Chk. S. Ct. App. 2002). But in this case, we are unable to make any meaningful review of the trial court judgment because of the virtually complete absence of any findings of fact or conclusions of law. We can glean from the judgment that the trial court must have found that the disputed land was Nukunanang and not Neichipwelong, but how or why he arrived at that finding we can only guess. The trial judge also appears to have found that Weno has a use right for the land since it did not award Weno title to it, or any part of it, but how or why he reached that point is unknown. Even gleaning these "findings" from the judgment, the judgment remains woefully inadequate as findings of fact, or of conclusions of law.

C. *Remand*

When a trial court has failed to make the findings of fact required by Rule 52(a), or if the findings are insufficient for a clear understanding and effective appellate review of the basis of the trial court's decision, an appellate court will vacate the judgment and remand the case to the trial court to make the required findings. 9A WRIGHT & MILLER, *supra*, § 2577, at 514-18. When, because of the lack of findings of fact and conclusions of law by the trial court, the appellate court cannot determine whether the judgment was founded on an erroneous or a correct view of the law or whether the record could support a factual basis for the decision, the judgment must be vacated and the case remanded with orders that the trial court enter findings of fact and conclusions of law accordingly. Sellers v. Wollman, 510 F.2d 119, 122 (5th Cir. 1975).

We cannot determine from the trial court judgment whether it was based on correct of the law or whether the record could support a factual basis for it. Some of the appellants appear to ask the court to review the entire record and make our own findings of fact (in their favor, of course). But when the trial court's findings are inadequate, the appellate court should not try to resolve the factual issues itself, but should vacate the judgment and remand. Rule v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, 568 F.2d 558, 568 (8th Cir. 1977). It is not the appellate court's place or function to make factual findings in the first instance or to supplant the trial court and act as fact

finder. Rosokow v. Bob, 11 FSM Intrm. 454, 457 (Chk. S. Ct. App. 2003). Remand is appropriate because the trial court had the opportunity to view the witnesses as they testified and to observe their demeanor before reaching its conclusions as to the witnesses' credibility, and we do not. Sellem v. Maras, 9 FSM Intrm. 36, 38 (Chk. S. Ct. App. 1999).

On remand, the trial judge shall make his findings of fact and separately state its conclusions of law used to arrive at its decision, which, since the preparation of factual findings will evoke care on the trial judge's part in ascertaining the facts, may or may not result in the same outcome as his January 17, 1996 decision. He shall include in his decision the basis of the trial court's jurisdiction over this case. We realize that it has been quite some time since the trial was held and the judge's memory has undoubtedly faded. However, a transcript was prepared, which the trial judge may consult, and two sets of proposed findings of fact and conclusions of law were filed, which he may also consult, and, if necessary, he may also take further evidence. Rosokow v. Bob, 11 FSM Intrm. 210, 217 (Chk. S. Ct. App. 2002) (when appellate court remands a case to the trial court on the ground that the lower court's findings are inadequate the reviewing court may require or recommend that the trial court take additional evidence).

IV. CONCLUSION

Accordingly, the trial court's January 17, 1996 judgment is hereby vacated and the case is remanded to the trial court for it

to make its findings of fact and conclusions of law as required by Civil Procedure Rule 52(a) before entering a judgment on a separate document in conformity with Rule 58. The findings and conclusions shall include the basis of the trial court's jurisdiction. The parties shall bear their own costs.

SO ORDERED the 14th day of June, 2007.

MIDASY O. AISEK
Associate Justice, Presiding

BENJAMIN RODRIGUEZ
Temporary Justice

REPEAT SAMUEL
Temporary Justice

ENTERED this 14th day of June, 2007.

Clerk of the Appellate Division

IN THE
APPELLATE DIVISION
CHUUK STATE SUPREME COURT
Federated States of Micronesia

RUFINA KILETO, Appellant, vs. STATE OF CHUUK, Appellee.	CIVIL APPEAL NO. 02-2000 OPINION

Argued: May 2, 2007
Decided: May __, 2007

BEFORE:

Honorable Camillo Noket, Chief Justice
Honorable Benjamin Rodriguez, Temporary Justice*
Honorable Repeat Samuel, Temporary Justice**

*Associate Justice, Pohnpei Supreme Court, Kolonia, Pohnpei
**Attorney at Law, Weno, Chuuk

APPEARANCES:

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For the Appellee:

Julius Sapelalut, Esq.
Assistant Attorney General
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Weno, Chuuk FM 96942

* * * *

CAMILLO NOKET, Chief Justice:

This appeal is from a judgment in favor of the defendant Chuuk State Government in Civil Action No. 76-1998, in which the plaintiff, Rufina Kileto, sought damages for injuries and the subsequent amputation of her fingertip that occurred when she shut off the electrical power to her home to protect her property from sudden power fluctuations in the electrical supply. Since the

trial court decision was based on an erroneous conclusion of law, we reverse and remand the case to the trial court for further proceedings.

Trial was held in this case on July 22, and August 27, 1998 and January 13, 1999. The trial court entered its decision on April 5, 2000, and held that Kileto had failed to prove that the State's alleged negligence was the proximate cause of her injuries because Kileto "was assuming the risk by handling the situation which exposed her to a greater danger." Order at 2, Civ. No. 76-1998 (Apr. 5, 2000). This appeal followed. Kileto filed an opening brief, and although the State of Chuuk failed to file an answering brief, it was permitted to present argument.

In Chuuk, the elements of actionable negligence are "the breach of a duty [of care] on the part of one person to protect another from injury," and that breach is the proximate cause of "an injury to the person to whom the duty is owed." Ludwig v. Mailo, 5 FSM Intrm. 256, 259 (Chk. S. Ct. Tr. 1992). "Assumption of the risk" is a common law defense to negligence, which acts as a complete bar to the plaintiff's recovery because it relieves the defendant of any duty of care to the plaintiff. PROSSER AND KEETON ON THE LAW OF TORTS § 68, at 480-81 (W. Page Keeton et al. eds., 5th ed. 1984). The trial court erroneously concluded that a defendant's assumption of the risk negated the causation element.

However, the assumption of the risk defense is contrary to the traditional Chuukese concepts of responsibility and is generally not available in Chuuk. Epiti v. Chuuk, 5 FSM Intrm. 162, 167

(Chk. S. Ct. Tr. 1991) (absolute defenses of assumption of the risk and contributory negligence are not available in Chuuk). Furthermore, even if assumption of the risk were an available defense in Chuuk, the trial court misapplied the defense. "Those who dash in to save their own property . . . from a peril created by the defendant's negligence, do not assume the risk where the alternative is to allow the threatened harm to occur." PROSSER AND KEETON, *supra*, § 68, at 491.

Comparative fault or comparative negligence is the rule. Under the "pure system" of comparative negligence, which has been recognized as an available defense in Chuuk, a defendant is entitled to a proportional reduction in any damage award upon proof that the plaintiff's negligence was in part the cause of the plaintiff's injuries. Epiti, 5 FSM Intrm. at 167-68. The trial court thus erroneously applied an assumption of the risk defense to the plaintiff's claims when it should have considered comparative negligence.

Accordingly, the trial court decision is reversed. On remand, the trial court shall determine whether the defendant State owed the plaintiff Kileto a duty and breached that duty, and, if so, whether that breach caused, in whole or in part, Kileto's injuries. If the trial court determines the State was negligent, the trial court shall then reduce the amount of damages by whatever percentage, if any, that Kileto's damages were the result of her own fault or negligence. A new trial may not be necessary. A complete trial transcript was prepared for this appeal. That may

be sufficient. But if the trial court deems it necessary, it may take further evidence. See Rosokow v. Bob, 11 FSM Intrm. 210, 217 (Chk. S. Ct. App. 2002).

SO ORDERED the 7th day of May, 2007.

CAMILLO NOKET
Chief Justice

BENJAMIN RODRIGUEZ
Temporary Justice

REPEAT SAMUEL
Temporary Justice

ENTERED this 8th day of May, 2007.

Clerk of the Appellate Division

IN THE
APPELLATE DIVISION
CHUUK STATE SUPREME COURT
Federated States of Micronesia

SARLOTE VALENTIN and LYDIA MESIN, on behalf of themselves and their lineage members, Appellants, vs. ROCKY INEK, WILLY INEK, and SISON INEK, Appellees.	CIVIL APPEAL NO. 03-2006 ORDER OF DISMISSAL

At the May 2, 2007 hearing in this matter, the appellees' counsel orally moved to dismiss this appeal on the ground it was not from a final order or judgment and the appellate court was thus without jurisdiction. The parties then argued the motion orally. No party sought to supplement its arguments in writing. The motion was therefore deemed submitted for our consideration.

This appeal is from a January 18, 2006 trial court order consolidating two cases and denying Sarlote Valentine's and Lydia Mesin's motion for summary judgment. It is undisputed that no final judgment has been entered in the consolidated trial court case. This is an interlocutory appeal. The general rule is that appellate review of a trial court is limited to the trial court's final orders and judgments. Final orders and judgments are final decisions. Chuuk v. Davis, 9 FSM Intrm. 471, 473 (App. 2000). A denial of a summary judgment motion is not a final order or judgment. Nor is an order of consolidation a final order or judgment. There is no indication that this interlocutory appeal is one of the few limited exceptions to the final order or judgment

rule that are permitted by the Appellate Rules.

NOW THEREFORE IT IS HEREBY ORDERED that this case is dismissed. Once the trial court proceedings have come to an end, Sarlote Valentine and Lydia Mesin may, or may not, end up as a prevailing party. If they do not prevail, they may then appeal. The appellants, in argument, also contend that the trial court justice presiding over the consolidated case below was, or should be, disqualified for certain conflicts of interest. We note that there is a motion pending in the trial division for that justice's disqualification. This appeal cannot be used as a substitute for that process.

SO ORDERED the 4th day of May, 2007.

CAMILLO NOKET
Chief Justice

BENJAMIN RODRIGUEZ
Temporary Justice

DENNIS K. YAMASE
Temporary Justice

ENTERED this 7th day of May, 2007.

Clerk of the Appellate Division

2006

rule that are permitted by the Appellate Rules.

NOW THEREFORE IT IS HEREBY ORDERED that this case is dismissed. Once the trial court proceedings have come to an end, Sarlote Valentine and Lydia Mesin may, or may not, end up as a prevailing party. If they do not prevail, they may then appeal. The appellants, in argument, also contend that the trial court justice presiding over the consolidated case below was, or should be, disqualified for certain conflicts of interest. We note that there is a motion pending in the trial division for that justice's disqualification. This appeal cannot be used as a substitute for that process.

SO ORDERED the 4th day of May, 2007.

CAMILLO NOKET
Chief Justice

BENJAMIN RODRIGUEZ
Temporary Justice

DENNIS K. YAMASE
Temporary Justice

ENTERED this 7th day of May, 2007.

Clerk of the Appellate Division

IN THE
APPELLATE DIVISION
CHUUK STATE SUPREME COURT
Federated States of Micronesia

MINIKA MORI, AISEK MORI, and ESTHER RAN, Appellants, vs. LINORA HARUO, Appellee.	CIVIL APPEAL CASE NO. 05-2006 OPINION

Argued: November 8, 2007
Decided: December __, 2007

BEFORE:

Honorable Dennis K. Yamase, Temporary Justice, Presiding*
Honorable Repeat Samuel, Temporary Justice**
Honorable Frank Casiano, Temporary Justice**

*Associate Justice, FSM Supreme Court, Pohnpei
**Attorney at Law, Weno, Chuuk

APPEARANCES:

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* * * *

DENNIS K. YAMASE, Temporary Justice, Presiding:

This is an appeal from the trial court's decision in Chuuk State Supreme Court trial division Civil Action No. 131-94 confirming Linora Haruo's ownership of certain land. We reverse. Our reasons follow.

I. BACKGROUND

The Chuuk State Supreme Court trial division judgment was entered on April 11, 2006. At issue was the validity of a land transfer from Simi Mailo, the lineage head of the appellant Souefeng Lineage members, to the appellee, Linora Haruo. A February 10, 1976 determination of ownership by the Truk District Land Commission indicated that the property was lineage land belonging to the "lineage clan of Souefeng headed by Simi Mailo." *See* Trial Court Judgment at 4. Simi Mailo sold the property to Haruo in two parcels, memorialized in separate purchase agreements, dated September 24, 1993 and December 8, 1993. On December 30, 1993, the Land Commission issued a certificate of title to Haruo. On May 25, 1994, the appellants filed suit contending that both transfers were invalid because the lineage members had not consented to sell the property.

The trial court ruled that the September 24, 1993 sale was valid because Haruo had been a bona fide purchaser without notice of the adverse claims of the lineage members. It, however, rejected the validity of the December 8, 1993 transfer, ruling that Haruo was not a bona fide purchaser without notice with respect to that parcel because, by that time, she had notice of appellants' interest in the property.[1]

II. THE LAW

A. *Issues and Standard of Review*

The issues before us are whether Haruo was a bona fide purchaser without notice and whether the consent of all adult lineage members is needed for the sale of lineage land. These are issues of law, which we review *de novo*. *Ruben v. Hartman*, 15 FSM Intrm. 100, 108 (Chk. S. Ct. App.

[1] The notice the trial court was referring to was a letter, dated October 27, 1993, wherein the three plaintiffs/appellants informed Haruo of "disagreement among the clan of Simi Mailo in his ability to sell the property." Trial Court Judgment at 6.

2007); *Rosokow v. Bob*, 11 FSM Intrm. 210, 214 (Chk. S. Ct. App. 2002).

B *Land Registration*

The current system of land registration in Chuuk dates from the Trust Territory period. Title 67 of the Trust Territory Code, governing land registration, has been retained by the Chuuk State Code. *Chipuelong v. Chuuk*, 6 FSM Intrm. 188, 196 n.6 (Chk. S. Ct. Tr. 1993).

Title 67 vests authority to register land in the Land Commission. The Commission's statutory powers and duties include designating land to be registered, 67 TTC 104, surveying the land and establishing boundaries, 67 TTC 106, and determining title and adjudicating disputed claims through investigation, notice, and public hearings, 67 TTC 107-114. *Chipuelong*, 6 FSM Intrm. at 196. Land registration, as established by Title 67, is based on the Torrens system of land registration, whereby land ownership is conclusively determined and certified by the government and thereby is easy to determine. The certificate of title issued by the government shows the state of the title and the person in whom it is vested. Determination of title is the basic requirement of the system. To that end, the Land Commission holds a proceeding to settle and declare the state of the title. *Chipuelong*, 6 FSM Intrm. at 196. Once the Commission completes its inquiry and conducts a public hearing, it must issue a determination of ownership, pursuant to which a certificate of title is issued. *Id.* Determinations of ownership are appealable to the Trial Division of the Chuuk State Supreme Court and ultimately to the Appellate Division of the Chuuk State Supreme Court. *Id.*

A party claiming ownership in land for which there is a determination of ownership showing another as owner, with the appeal period expired, has, at a minimum, the burden of showing facts to establish that the determination of ownership is incorrect. *Benjamin v. Kosrae*, 3 FSM Intrm. 508, 510 (Kos. S. Ct. Tr. 1988). Otherwise, when determining issues of ownership, the court proceeds

as if a certificate of title had been issued in accordance with the determination of ownership, whether or not one has actually been issued. *Id.*

In this case a determination of ownership was issued to the Souefeng Lineage, but no certificate of title. Since there has been no allegation in this case that the determination of ownership was incorrect, the court proceeds as if a certificate of title had been issued to the Souefeng Lineage.

C. *Bona Fide Purchaser without Notice*

The bona fide, or "innocent," purchaser rule arises from the statutory recording requirements for interests in real estate. For all real estate in each district, the clerk of court is required to "make and keep in a permanent record a copy of all documents submitted to him for recording." 57 TTC 301. No transfer of or encumbrance upon title to real estate or any interest therein, other than a lease for a term not exceeding one year, is valid against any subsequent purchaser or mortgagee of the same real estate or interest, or any part thereof, in good faith for a valuable consideration without notice of such transfer or encumbrance, or against any person claiming under them, if the transfer to the subsequent purchaser or mortgagee is first duly recorded. 57 TTC 301. The "registration" of interests in land, pursuant to 67 TTC 119 "has the same force and effect as to such land as a recording" under 57 TTC 301. In order, therefore, for a subsequent, bona fide, or "innocent", purchaser to have valid title against a prior holder of an interest in the same real estate the subsequent purchaser must "register" or "record" the interest before the prior holder. *Id.*; *Asanuma v. Flores*, 1 TTR 458, 460-61 (Pal. 1958).

Here, the property was registered with the Land Commission on February 10, 1976 when a determination of ownership was issued naming as owner the lineage of Souefeng headed by Simi Mailo. Trial Court Judgment at 4. The trial court found that Haruo did not have notice of the

interests of the lineage members in the property prior to her execution of the September 24, 1993 purchase agreement, but by time of the second purchase agreement Haruo had notice of appellants' interest through their October 27, 1993 letter. The trial court concluded that Haruo was a bona fide purchaser without notice with respect to the September 24, 1993 sale, but she was not a bona fide purchaser without notice with respect to the December 8, 1993 purchase agreement.

In concluding that the September 24, 1993 purchase agreement effectuated a valid transfer of the lineage land, the trial court placed a burden on the plaintiff/appellant lineage members to register the property in the individual names of the lineage members in order to protect their legal interest in its disposition. Otherwise, lineage members assumed the risk that the lineage leader would dispose of the property on the lineage's behalf without obtaining their consent. *See* Trial Court Judgment at 4-5. The trial court concluded that the February 10, 1976 determination of ownership was not requisite notice of the lineage members' interest in the property.

The February 10, 1976 determination of ownership, however, identifies the Souefeng Lineage's interest in the property. The registration of the determination of ownership identifying the owners as the "Souefeng Lineage" was sufficient to protect whatever interest the lineage members had against subsequent purchasers. *Benjamin v. Kosrae*, 3 FSM Intrm. 508, 510 (Kos. S. Ct. Tr. 1988); 67 TTC 119.

To the extent the trial court proceeded on the assumption that the individual lineage members were required to register their interest in their individual names in order to protect their interests as lineage members in the property, the trial court was in error. The court is unaware of any legal requirement that the individual names of the lineage members appear in a registration or recording in order to give notice of their interest or otherwise protect their legal interest in lineage property.

Indeed, such a requirement would be impracticable under the current system of lineage land ownership. If such a requirement existed, each new member of the lineage would be required to seek an amendment of the ownership documents to the lineage land in order to obtain a legally protected right in the disposition of the land. In the absence of a system to assure that new lineage members are timely added to lineage land ownership documents, the likely result would be that the currently recognized legal right of a "lineage" to own land would be completely eviscerated, as only the individuals named on the ownership documents would have a recognized legal interest. The court, therefore, concludes that the identification of Simi Mailo as the lineage head in the February 10, 1976 determination of ownership was for the purpose of clarifying the identification of the Souefeng Lineage. It is not the Land Commission's function to vest, in any particular person, the authority to sell lineage land.

The trial court's conclusion that Haruo was a bona fide purchaser for value without notice when she executed the September 24, 1993 purchase agreement is an error of law. The February 10, 1976 determination of ownership was notice to the world, and thus to Haruo, of the Souefeng Lineage's interest in the property.

D. *Lineage Members' Consent to Lineage Land Transfers*

The second issue is whether the lineage leader can transfer lineage land without the consent of the lineage members. The appellants contend that Chuuk state law requires the consent of all adult lineage members for the sale. Haruo contends that the proper Chuukese custom to apply to lineage land is the one that provides that when the lineage head speaks the other lineage members remain silent and so the consent of all lineage members was not needed because the lineage had consented when the lineage head "spoke." From the trial court's ruling that the second sale was void because

Haruo had notice that the other lineage members had not consented to the sale, we may infer that the trial court concluded that their consent was normally needed for a valid sale.

In *Nakamura v. Moen Municipality*, 15 FSM Intrm. 213, 218-19 (Chk. S. Ct. App. 2007), we held that lineage heads need the adult lineage members' consent for transfers of lineage land. This holding is consistent with a long line of authorities from the Trust Territory courts to recent decisions by the FSM and Chuuk State courts addressing the consent requirement for lineage land transfers. Some courts have held that the consent of all adult *male* lineage members is needed to alienate lineage land. *See e.g.*, *Lukas v. Stanley*, 10 FSM Intrm. 365, 366 (Chk. S. Ct. Tr. 2001); *Lus v. Totou*, 1 TTR 552, 554 (Truk 1958)). Other courts have held that the consent of *all* adult lineage members is needed. *Nakamura*, 15 FSM Intrm. at 219 n.5 (requiring consent of all adult members because "the advent of the FSM Constitution and its provision disfavoring sex discrimination, FSM Const. art. IV, § 4, favors the principle that all adult members' consent is needed"); *Marcus v. Truk Trading Corp.*, 11 FSM Intrm. 152, 160 (Chk. 2002) (same); *Epineisar v. Mori*, CSSC Civil Action No. 211-94 (Nov. 11, 1998) (adjudging that "Simi Mailo was leader of the Mailo Souefeng Lineage during his lifetime but he had no right to transfer the land of the Mailo Souefeng Lineage without the consent of all the adult members of the Lineage."); *Chipuelong v. Chuuk*, 6 FSM Intrm. 188, 197 (Chk. S. Ct. Tr. 1993) ("lineage land," indivisibly belongs to the clan and cannot be sold or divided without the consent of the clan); *Truk Trading Co. v. Paul*, 8 TTR 515, 518 (App. 1986) ("It is well recognized as a rule of law in Truk [Chuuk] that lineage land cannot be transferred, distributed or sold by an individual member of the lineage without the consent of all adult members of that lineage."); *Mesaita v. Fupi*, 5 TTR 631, 632-33 (Truk 1972); *Peretin v. Karimina*, 3 TTR 533, 535 (Truk 1968); *Narruhn v. Sale*, 3 TTR 514, 517 (Truk 1968); *Nitoka v. Nesepuer*, 2 TTR 12, 14

(Truk 1959); *see also Resenam v. Nopuo*, 5 TTR 248, 251 (Truk 1970) (consent of children needed to transfer "family land," which is not lineage land); *Yoichi v. Amas*, 4 TTR 59, 60 (Truk 1968) (oral will disposing of lineage land consented to by adult lineage members); *Fred v. Airinios*, 3 TTR 274, 276 (Truk 1967) (sale or gift of lineage land in Mortlocks requires unanimous consent of all adult members); *Irons v. Rudo*, 2 TTR 296, 300 (Truk 1961) (noted in dicta that only adults' consent needed, minors' lack of consent cannot prevent transfer of lineage land); *Kinara v. Tipa*, 2 TTR 8, 11 (Truk 1959) (transfer of lineage land to child of member must be consented to by all adult members of lineage or generally acquiesced in by them). A few authorities just state that the lineage's consent is needed without elaborating on which members' consent satisfy the requirement. *Titer v. Teifis*, 4 TTR 283, 285 (Truk 1969) ("consent of the lineage" needed); *Oneitam v. Swain*, 4 TTR 62, 73 (Truk 1968) (evidence was insufficient to indicate lineage approval of land transfer); *Pinar v. Kantenia*, 3 TTR 158, 159 (Truk 1966) (lineage leader's request to gift lineage land to second wife was rejected by other lineage members); *Nitoka v. Nesepuer*, 2 TTR 12, 14 (Truk 1959) ("consent of the lineage" needed to validate lineage head's gift of lineage property); *Nusia v. Sak*, 1 TTR 446, 447 (Truk 1958) (transfer of lineage land is by "positive agreement by the lineage as a whole or clear acquiescence").

Based on the essentially consistent line of authorities beginning with the Trust Territory High Court's 1958 *Nusia v. Sak* decision to the recent decision by the Chuuk State Supreme Court in *Nakamura v. Moen Municipality*, it is crystal clear that the applicable rule of law for the sale of lineage land in Chuuk is that the sale requires consent from all the adult lineage members.

Courts have previously noted the logistical difficulties in complying with the stringent consent

requirement for the sale of lineage land[2] and the hindrance that the consent requirement has on economic development in Chuuk.[3] These are issues that the Legislature may choose to address. The rule of law that has gained precedence in Chuuk based on customary practice, however, and which the court is bound to apply, does not provide for any legally recognizable means to assure that the sale of lineage land will be valid other than by proving that *all* living, adult members of the lineage have consented to the sale.

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[2] *See Nakamura*, 15 FSM Intrm. at 220 n.6:

> This is a subject the Chuuk Legislature may want to consider. We do not suggest that the Legislature change the customary legal requirement that all adult members agree in order to alienate lineage land, although the Legislature may have the power to do so. The court suggests that appropriate legislation may be needed to outline what steps a buyer must take to be reasonably assured that all adult lineage members have consented to the transaction. This may take the form that, if certain steps are taken, a legal presumption arises that all adult members have consented. This need is particularly noticeable now that many Chuukese are absent from the state for extended stretches of time. Many work, study, or live in Pohnpei, Guam, Saipan, or the United States, or serve in the U.S. military, before returning to Chuuk.

See also Marcus v. Truk Trading Corp., 11 FSM Intrm. at 160 (Chk. 2002) ("This subject is ripe for action by the Chuuk Legislature . . . .").

[3] *See e.g.*, Truk Trading Company v. Paul, 8 TTC 515, 521 (1986) (Hefner, J., concurring):

> There is much to say about keeping and enforcing the traditional land laws of Truk. Indeed, this court is obligated to do so. 1 TTC § 14.
>
> However, the impact of a case such as this one on developing a market for land for the economic development of Truk is clear.
>
> Truk Trading Company is probably the largest private enterprise in Truk and has invested substantial funds in placing improvements on Lot 040-A-23. I don't believe the company did this fully aware of the potential disastrous effect of failing to obtain the consent of all the lineage members.
>
> One is hard pressed to criticize customary law which safeguards lineage land for all its members. But on the other hand, a prospective buyer or developer of a business enterprise is faced with an almost impossible task of assuring that the consent of *all* lineage members is obtained before paying out funds to purchase or develop land. *All* lineage members necessarily includes minors and those who, over the years, may have moved away or lost some contact with the lineage. The problems of finding the lineage members and acquiring their consent is obvious.
>
> In the future the people of Truk will have to make the decision of which way they wish to proceed—to maintain the status quo or to opt for land laws more conducive to economic development. It is their choice not this court's.

In this case, the appellants did not consent to the sale of their interest, as lineage members, in the Souefeng Lineage land and Haruo had notice of the lineage's ownership of the land through the February 10, 1976 determination of ownership. Therefore, Simi Mailo's transfer of the property to Haruo was not valid.

Haruo may still prevail, however, despite Simi Mailo's unauthorized transfer of lineage land to her if, by their conduct, the Souefeng Lineage members ratified the sale. *See Nakamura*, 15 FSM Intrm. at 219. Haruo does not, however, contend that the other lineage members ratified Simi Mailo's unauthorized sale and the appellants' prompt objection to Haruo's first purchase shows the lack of any ratification on their part.

III. CONCLUSION

Because appellants neither consented to the sale nor ratified it by their conduct, and because Haruo was not a bona fide purchaser without notice, the trial court's ruling that the September 24, 1993 purchase agreement effectuated a valid transfer to Haruo was an error of law. Accordingly, the trial court judgment that the September 24, 1993 purchase agreement effectuated a valid transfer of Souefeng Lineage land is reversed and judgment will be entered in favor of the appellants.

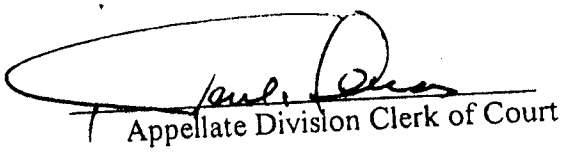
So Ordered this 14th day of January, 2008.

Dennis K. Yamase
Temporary Justice, Presiding

Repeat Samuel
Temporary Justice

Frank Casiano
Temporary Justice

Entered this 15th day of January, 2008.



Appellate Division Clerk of Court

IN THE
APPELLATE DIVISION
CHUUK STATE SUPREME COURT
Federated States of Micronesia

RESWITH NIKICHIW, as Tolensom Election Commissioner, Petitioner, vs. ASSOCIATE JUSTICE MACHIME O'SONIS, Respondent, AMANTO MARSOLO and MAKASA KAREN, Real Parties in Interest-Respondents.	ORIGINAL ACTION NO. 02-2004 OPINION AND ORDER GRANTING WRIT OF PROHIBITION

Argued: January 27, 2005
Decided: January 31, 2005

BEFORE:

Honorable Dennis K. Yamase, Temporary Justice, Presiding*
Honorable Benjamin Rodriguez, Temporary Justice**
Honorable Camillo Noket, Temporary Justice***

*Associate Justice, FSM Supreme Court, Chuuk
**Associate Justice, Pohnpei Supreme Court, Kolonia, Pohnpei
***Attorney at Law, Weno, Chuuk

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For the Real Parties in Interest-Respondents

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* * * *

PER CURIAM:

The petitioner, Tolensom Election Commissioner Reswith Nikichiw, filed this original action in the appellate division on

December 28, 2004. It seeks the issuance of an extraordinary writ of prohibition directed to the respondent sitting as a trial division justice. The petition alleges that the respondent had exceeded his jurisdiction in trial division Civil Action No. 146-2004, Marsolo v. Nikichiw.

On January 5, 2005, the court issued an order directing an answer to the petition, deeming the petition to be the petitioner's opening brief, and setting a schedule for further proceedings. The respondent trial justice filed an answer on January 14, 2005. On January 21, 2005, the respondent justice, as is his right under Appellate Procedure Rule 21(b), filed a letter that he did not wish to participate further in the proceeding. The real parties in interest filed their brief on January 24, 2005, and the petitioner filed his reply brief on January 26, 2005. Oral argument was heard from the petitioner and the real parties in interest on January 27, 2005. Those parties stipulated that the court could take judicial notice of the trial division files in Civil Action No. 146-2004, Marsolo v. Nikichiw and in Civil Action No. 132-2004, Marsolo v. Nikichiw.

After carefully considering the filings, the arguments, and the files' contents, we grant the petition and issue herewith the writ of prohibition directed to Associate Justice Machime O'Sonis. Our reasoning follows.

I.

This action arises out of the Tolensom municipal election held on September 28, 2004. On October 1, 2004, certain candidates in

that election filed a complaint for injunctive relief and a declaratory judgment in the Chuuk State Supreme Court trial division along with an ex parte motion for a temporary restraining order. It was docketed as Civil Action No. 132-2004. On October 2, 2004, Acting Chief Justice Keske S. Marar issued the temporary restraining order halting the counting and tabulating of votes. On October 4, 2004, Acting Chief Justice Marar, ruling that "all of the Justices of the Chuuk State Supreme Court Trial Division have either recused themselves or are subject to disqualification from presiding over this case," appointed a special trial division justice to handle Civil Action No. 132-2004. The plaintiffs amended and supplemented their pleadings on October 12, 2004. No party objected to the special trial justice's appointment or exercise of jurisdiction.

The plaintiffs sought as relief that of the seven ballot boxes not yet counted, five should not be counted but voided and nullified instead because of various alleged irregularities at those polling stations and that the other two should be counted and the election certified within seven days. After various motions, filings, and a trial, the special trial justice issued an order on November 1, 2004, denying a preliminary injunction and directing that all remaining ballot boxes be counted and tabulated and that the election be certified within seven days. By that order, the special trial justice also specifically "retain[ed] jurisdiction over th[e] case for such other Orders as the circumstances and justice may require."

On November 5, 2005, the plaintiffs in Civil Action No. 132-2004 filed a Verified Complaint for a Temporary Restraining Order (TRO) and for Injunctive Relief, which was docketed as Civil Action No. 146-2004, and which named as defendants the same parties previously named as defendants in Civil Action No. 132-2004. Associate Justice Machime O'Sonis issued the requested ex parte temporary restraining order the same day. The plaintiffs sought as relief that the results from two ballot boxes (which were among the five boxes they had originally objected to) be voided because of various alleged irregularities involving those two boxes discovered during the opening, counting, and tabulating of the seven uncounted Tolensom election ballot boxes. (A copy of the certified election results, dated November 4, 2004, was filed in Civil Action No. 132-2004 on November 8, 2004.)

On November 10, 2004, the Attorney General's Office filed a motion to disqualify Justice O'Sonis, with a supporting affidavit filed the next day. Pursuant to Chuuk State Law No. 190-08, § 22(5), which requires that a disqualification motion be ruled upon by another judge, the motion was apparently assigned to Associate Justice John Petewon for decision who, on November 17, 2004,[1] issued a notice of hearing for the motion. The Attorney General's Office then filed a motion to disqualify Justice Petewon.

On November 18, 2004, Acting Chief Justice Marar having

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[1]Current plaintiffs' counsel first appeared for the plaintiffs on this date. They were previously represented only by Hans Wiliander.

returned from judicial business in the outer islands, issued an order assigning Civil Action No. 146-2004 to the same special trial justice that was handling Civil Action No. 132-2004. The special trial justice had also returned from the outer islands. On November 22, 2004, without waiting for the motion to disqualify himself to be ruled upon by another judge, Justice Petewon denied the motion to disqualify Justice O'Sonis. The Attorney General's Office appealed that denial. That appeal was not assigned to this panel and the appellant has since filed a motion to dismiss it.

On November 25, 2004, the Attorney General's Office filed a Special Appearance to Object to Justice Machime O'Sonis Presiding over Any Further Proceeding in CSSC Civil Action No. 146-2004. (The Attorney General's Office had earlier filed a motion to dismiss for failure to state a claim in Civil Action No. 146-2004.) On December 8, 2004, Justice O'Sonis granted the plaintiffs' request for a preliminary injunction and set a trial or hearing date. Justice O'Sonis continued to take other actions in Civil Action No. 146-2004.

On November 18, 2004, the Civil Action No. 132-2004 special trial justice to whom Acting Chief Justice Marar had also assigned Civil Action No. 146-2004, consolidated the two cases under docket number 132-2004 and repeated that he "retain[ed] jurisdiction over th[e] consolidated case for such other orders as the circumstances and justice may require." Apparently no other filings in either 132-2004 or 146-2004 made their way to his file or to his attention. On December 15, 2004, the special trial justice issued

his Statement of the Case; Findings of Fact; Conclusions of Law; Judgment[2] based on what had been previously before him.

On December 28, 2004, the petitioner, a defendant in both civil actions, filed this original action in the appellate division for a writ of prohibition barring any further action by Justice O'Sonis on Civil Action No. 146-2004. The plaintiffs in both civil actions are the respondents who are the real parties in interest before us.

II.

The real parties in interest suggested that, as an initial matter, the court may not have jurisdiction to proceed because of the appeal of Justice Petewon's denial of the disqualification motion might need to be disposed of first and because in early January, 2005, the national government filed a petition to remove the case to the FSM Supreme Court because it had been named as an enjoined party in Justice O'Sonis's December preliminary injunction. At oral argument, they acknowledged that the other appeal would not be an issue since the appellant in that case had filed a consent to their motion to dismiss that appeal, although they rightfully stated that since that appeal had not been assigned to this panel, this panel could not dismiss it. The real parties in interest also questioned whether the appointment of a special trial justice in 146-2004 was proper because a constitutionally

[2]No judgment in compliance with Chuuk Civil Procedure Rule 58 ("[e]very judgment shall be set forth on a separate document") has been entered by the clerk.

appointed justice had previously been assigned the case.

We see no impediment to our jurisdiction over this petition. Any challenge to another judge's authority must be brought up in a proceeding other than this. The sole issue before us is whether the petitioner has established that Justice O'Sonis must be prohibited from acting in Civil Action No. 146-2004, not whether some other judge may also be disqualified. The national government's removal action does not affect our jurisdiction for the same reason. We have no way of knowing whether the required procedural steps to effect removal to that court were completed, or, even if they were, whether it might be remanded to the Chuuk State Supreme Court. This is not an appeal from Civil Action No. 146-2004. The issue is whether Justice O'Sonis may properly sit on Civil Action No. 146-2004. We also note that since the purported removal action started, Justice O'Sonis has issued another preliminary injunction that does not name the national government as a party being restrained. We therefore conclude that the later "removal" did not deprive us of jurisdiction over this original action. We may therefore turn to the merits of the petition.

III.

The petitioner contends that Justice O'Sonis should be prohibited from conducting any further proceedings in Civil Action No. 146-2004 because (1) a special trial justice had been appointed to handle the case by the Acting Chief Justice; (2) a final judgment has been rendered in the consolidated cases by the special trial justice; and (3) state law (including the ABA Code of

Judicial Ethics as adopted by reference by the Chuuk Judiciary Act) requires that Justice O'Sonis recuse himself from Civil Action No. 146-2004 since (the petitioner alleges) the lead plaintiff's sister resides in the justice's household and is married to the justice's nephew (who is also the justice's adopted son). The petitioner contends that the Acting Chief Justice's November 18, 2004 assignment of Civil Action No. 146-2004 to the special trial justice divested Justice O'Sonis of any jurisdiction he might have had and since 146-2004 was actually part of the same case as 132-2004 and 132-2004 was assigned to the special trial justice no other judge could assume jurisdiction over what was the same case.

The real parties in interest contend that since, in their view, the appointment of a special trial justice for Civil Action No. 146-2004 was invalid, Justice O'Sonis was, and is, not impliedly disqualified from Civil Action No. 146-2004 since Justice O'Sonis had already assigned it to himself in his capacity as Acting Chief Justice. They contend that since Acting Chief Justice Marar was unavailable in the Chuuk outer islands, Justice O'Sonis, as the next senior justice, was the acting chief justice and therefore his assignment of the case to himself is a valid exercise of an acting chief justice's authority and that once assigned to him it could not be reassigned by the action of another, especially to a judge who was not constitutionally appointed. They state that General Court Order 2-94, under which special trial justices are appointed, has no procedure to positively determine when or whether all constitutionally-appointed justices are disqualified. The real

parties in interest urge that we adopt a bright-line rule altering General Court Order 2-94 to require that all constitutionally-appointed justices must be shown to be disqualified before a special trial justice may be appointed.

They further contend that the issues raised in Civil Action No. 146-2004 are different from those litigated in Civil Action No. 132-2004, because they could not have been known until after the ballot boxes were opened to be counted and therefore Civil Action No. 146-2004 may proceed as a separate case before Justice O'Sonis. They also contend that, since the special trial justice's issuance of a judgment in that case after he purportedly consolidated the two cases was only based on issues raised before the boxes were opened, his judgment should only have a res judicata effect on the issues in 132-2004 and would violate their due process rights, and is therefore void, if applied to the issues in Civil Action No. 146-2004. Lastly, the real parties in interest contend that the grounds for disqualifying Justice O'Sonis based on his alleged close relationship to the lead plaintiff were not shown by competent evidence and that the affidavits in support of the disqualification motion contained hearsay and therefore the motion could not be granted.

IV.

The general requirements for the issuance of an extraordinary writ of prohibition are that a court or officer is about to exercise judicial or quasi-judicial power, that the exercise of such power is unauthorized or the inferior tribunal is about to act

without or in excess of jurisdiction which may or will result in damage or injury for which there is no plain, speedy or adequate legal remedy. Election Commissioner v. Petewon, 6 FSM Intrm. 491, 497, 1 CSR 5, 9 (Chk. S. Ct. App. 1994). We will usually not issue such a writ unless the petitioner has objected in the lower court to that court's exercise of jurisdiction. Id. We have the power to issue writs of prohibition in the appropriate case. Chk S.L. No. 190-08, § 4; Chk. App. R. 21.

One instance where it is appropriate to issue a writ of prohibition is when a trial court justice is about to exercise unauthorized power without or in excess of his jurisdiction by exercising jurisdiction over a case where another judge already has jurisdictional priority over the parties and the issues.

> [A]ny case over which the trial division has jurisdiction may be heard by any of the justices as assigned by the Chief Justice. Once a case has been assigned to a particular justice, that justice has jurisdictional priority over the parties and issues of the case to the exclusion of all other justices in the trial division. This exclusive jurisdiction continues until the case is terminated in the trial division. While the case is pending, the priority extends to any other case involving the same parties and issues, even if filed later before a court that could also take jurisdiction.

Election Commissioner, 6 FSM Intrm. 491, at 498, 1 CSR at 10. The petitioner and the real parties in interest bot rely on this case in their briefs and arguments.

The parties are identical in Civil Actions No. 132-2004 and 146-2004. The plaintiffs sought the same relief in both Civil Action No. 132-2004 and Civil Action No. 146-2004 – that the contents of certain ballot boxes not be counted and tabulated

because of election irregularities. The only difference in Civil Action No. 146-2004, was that the plaintiffs were contesting only two of the five boxes they contested in Civil Action No. 132-2004 and that the irregularities alleged in 146-2004 were discovered during and in the course of the litigation of Civil Action No. 132-2004 (that is, during the counting and tabulating ordered by the special trial justice in Civil Action No. 132-2004). Such irregularities would be expected to be brought immediately before the judge on the case in which they were discovered. They were not. Instead they were filed as a separate case.

We do not fault Justice O'Sonis for acting on the temporary restraining order application when it was filed. The assigned special trial justice was unavailable in the outer islands. The request for a temporary restraining order needed prompt action. He was the senior justice present on island. Someone had to consider the motion. That he assigned that task to himself seems proper. However, once the special trial justice again became available, the case should have been left to the special trial justice to act upon. It was not.

We therefore conclude that Justice O'Sonis's presiding over Civil Action No. 146-2004 is in excess of his jurisdiction since the special trial division justice had jurisdictional priority over the parties and the issues in that case to the exclusion of all other justices in the trial division. The petitioner objected to Justice O'Sonis's exercise of jurisdiction over Civil Action No. 146-2004 from the start. As Tolensom Election Commissioner, he

will be injured if the writ does not issue since he will be subject to conflicting and contradictory orders from two different trial division justices. There is no plain, speedy, or adequate remedy otherwise available.

V.

Accordingly, the writ of prohibition ordering Justice O'Sonis not to take any further action or to exercise further jurisdiction over Civil Action No. 146-2004 issues herewith. Having determined that the writ must issue based on the principle in Election Commissioner v. Petewon, we do not reach the issue of whether Justice O'Sonis should have been disqualified because of his alleged close relationship to a plaintiff or whether his impartiality might reasonably be questioned based upon that relationship. Nor do we take any position on the merits of the trial division case. The qualification or appointment of the special trial division justice was also not before us. Nor do we address the procedures that a chief justice must follow before he appoints a special trial justice.

If it should seem unfair that the plaintiffs may now lack a forum which may hear their claims concerning the two boxes they still dispute, we note initially that it is a problem partly of their own making caused by filing those claims as a separate action. However, there may still be avenues that might afford them relief – Civil Procedure Rule 54(b) (if no final judgment has been entered because of failure to comply with Rule 58); Civil Procedure Rules 59 or 60; or possibly Appellate Procedure Rule 4(a)(5).

SO ORDERED the 31th day of January, 2005.

DENNIS K. YAMASE
Temporary Justice, Presiding

BENJAMIN RODRIGUEZ
Temporary Justice

CAMILLO NOKET
Temporary Justice

ENTERED this 31th day of January, 2005.

Clerk of the Appellate Division