

FSM SUPREME COURT APPELLATE DIVISION

HEIRS OF TOLENNA CLARENCE, through)
the Heirs of Shrue Langwo Clarence Lonno,)

Appellants,)

vs.)

HEIRS OF SHREW JONAS, KOSRAE LAND)
COMMISSION and KOSRAE STATE,)

Appellees.)
_____)

APPEAL CASE NO. K6-2014
(Civil Action No. 20-13)

ORDER OF DISMISSAL

Decided: August 11, 2021

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Heirs of Clarence v. Heirs of Jonas
23 FSM R. 371 (App. 2021)

BEFORE:

Hon. Dennis K. Yamase, Chief Justice, FSM Supreme Court
Hon. Beaulen Carl-Worswick, Associate Justice, FSM Supreme Court
Hon. Larry Wentworth, Associate Justice, FSM Supreme Court

APPEARANCE:

For the Appellants: Snyder H. Simon, Esq.
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HEADNOTES

Appellate Review – Dismissal

Since an appellate court has the right to control its own docket, FSM Appellate Rule 31(c) does not prevent the appellate court, in an effort to control its own docket, from moving to dismiss an appeal for an appellant's failure to timely file a brief. Heirs of Clarence v. Heirs of Jonas, 23 FSM R. 371, 373 (App. 2021).

Appellate Review – Dismissal

When the court, through a single justice, has made its own motion to dismiss an appeal as a matter of docket management, that motion cannot be decided without first giving the parties notice and opportunity to be heard because that would violate the litigant's due process rights guaranteed under the FSM Constitution since notice and an opportunity to be heard is the essence of due process. Heirs of Clarence v. Heirs of Jonas, 23 FSM R. 371, 373 (App. 2021).

Appellate Review – Dismissal

When a single justice gave the appellants time to file their brief after receiving their requested English translations; when the appellants were given an opportunity to report on the status of the requested English translations and on their ability to submit a brief; and when they were provided notice that their appeal is now subject to dismissal for failure to file a brief and were given an opportunity to show cause why it should not be dismissed, but, despite the time, notice, and opportunity given, the appellants have repeatedly failed to respond to court orders or to prosecute their appeal, the appellants have abandoned their appeal, and the court will dismiss the appeal for lack of prosecution. Heirs of Clarence v. Heirs of Jonas, 23 FSM R. 371, 373 (App. 2021).

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COURT'S OPINION

DENNIS K. YAMASE, Chief Justice:

On August 14, 2014, Appellants Heirs of Clarence, through Heirs of Shruel Langwo Clarence Lonno ("Heirs of Clarence") filed their notice of appeal and request for transcripts of proceedings and records on appeal. On October 29, 2014, a notice of briefing schedule was issued notifying the parties that the record ready notice and copies of certified list of documents and docket entries from the court appealed from have been received by the appellate division and that Appellants Heirs of Clarence's brief and appendices were due on December 8, 2014.

Unable to meet the briefing deadline, Appellants Heirs of Clarence requested for enlargement of time on three separate occasions. Appellants Heirs of Clarence's motions were granted, and according to the

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latest order entered on January 5, 2016 granting enlargement of time they were directed to file their opening brief no later than 30 days from receipt of the requested English translations.

With three years having passed and no further activity in this appeal, an order to report was entered on September 27, 2019 directing Appellants Heirs of Clarence to report no later than October 18, 2019 on the status of the requested English translations and on their ability to submit their opening brief. The certificates of service show that the order to report was served in Kosrae on Snyder Simon, counsel for Appellants Heirs of Clarence, and on Yasuo Jonas, an heir of Shrew Jonas, on September 30, 2019. Appellants Heirs of Clarence did not file a status report by that deadline.

Nearly a year later, on September 2, 2020, an order of possible dismissal was issued directing Appellants Heirs of Clarence within 40 days after they were served with this order to show cause why their appeal, now subject to dismissal for failure to file a brief, should not be dismissed. Additionally, because there was a possibility that a party may not have legal representation pursuant to FSM Appellate Rule 46(a), the order of possible dismissal contained instructions for the clerk to serve the order on the parties themselves. The certificates of service show that the order of possible dismissal was served in Kosrae on Tulpe R. Sigrah and on Yasuo Jonas on September 4, 2020, and then on Kosrae Land Court and Kosrae Attorney General's Office on December 29, 2020. That deadline to show cause has long passed, and no response has been filed with the Court.

Since a court, even an appellate court, has the right to control its own docket, FSM Appellate Rule 31(c) does not prevent the appellate court, in an effort to control its own docket, from also moving to dismiss an appeal for an appellant's failure to timely file a brief. Heirs of George v. Heirs of Dizon, 16 FSM R. 100, 112-113 (App. 2008). Additionally, when the court, through a single justice, has made its own motion to dismiss as a matter of docket management, that motion cannot be decided without first giving the parties notice and opportunity to be heard because that would violate the litigant's due process rights guaranteed under the FSM Constitution since notice and an opportunity to be heard is the essence of due process. *Id.* at 113.

It is apparent that the appellate division, through a single justice, has given Appellants Heirs of Clarence time to file their opening brief after they received their requested English translations. Additionally, Appellants Heirs of Clarence were given an opportunity to report on the status of their requested English translations and on their ability to submit their opening brief. Furthermore, Appellants Heirs of Clarence were notified that their appeal was now subject to dismissal for failure to file a brief and were given opportunity to show cause why it should not be dismissed. However, despite time, notice and opportunity given to them, Appellants Heirs of Clarence have repeatedly failed to respond to court orders, or ultimately, to prosecute their appeal. Consequently, based upon the actions of Appellants Heirs of Clarence or the lack thereof, it appears to be that Appellants Heirs of Clarence have abandoned their appeal.

Accordingly, we hereby dismiss this appeal for lack of prosecution.

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