

CHUUK STATE SUPREME COURT APPELLATE DIVISION

TAKUCHY SHIRAI and MASAKO SHIRAI SERIOUS,)	CIVIL APPEAL NO. 01-2020
)	
Petitioners,)	
)	
vs.)	
)	
HONORABLE KERIO WALLIBY, the CHUUK LAND)	
COMMISSION, CHUUK STATE, SENIOR LAND)	
COMMISSIONER MANEICHY SONIS, ASSOCIATE)	
COMMISSIONER LEO JOHN, ASSOCIATE)	
COMMISSIONER HARRIS PHILLIP, ASSOCIATE)	
COMMISSIONER DOMININO ALWAYS,)	
ASSOCIATE COMMISSIONER ISTOR MURITOK,)	
JACK FRITZ, CATHARINA NEDELEC, MORIA)	
RUBEN, BJ MORI, KEMBO MIDA, JR., VINCENT)	
IRONS, LESTER MERSAI, MYJOYLYNN MARIE)	
KIM, and JOHNNY MEIPPEN,)	
)	
Respondents.)	
)	

ORDER DENYING RECONSIDERATION

Decided: October 16, 2020

BEFORE:

Hon. Larry Wentworth, Temporary Justice, Presiding*
Hon. Mayceleen J.D. Anson, Temporary Justice**
Hon. Eliesa Tuiloma, Temporary Justice***

*Associate Justice, FSM Supreme Court
**Associate Justice, Pohnpei Supreme Court
***Legislative Counsel, Chuuk Legislature

APPEARANCE:

For the Petitioners: Roy T. Chikamoto, Esq.
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HEADNOTES

Mandamus and Prohibition – Nature and Scope

The requirements for the issuance of an extraordinary writ of prohibition are 1) that a court or an officer is about to exercise judicial or quasi-judicial power; 2) that the exercise of such power is unauthorized or the inferior tribunal is about to act without or in excess of jurisdiction; and 3) this may or will result in

damage or injury for which there is no plain, speedy, or adequate legal remedy. Shirai v. Walliby, 23 FSM R. 69, 71 (Chk. S. Ct. App. 2020).

Mandamus and Prohibition – Nature and Scope

A writ of prohibition is a preventive remedy. A writ of prohibition’s purpose is to limit the lower courts to their proper jurisdiction. It is seldom needed, since an act beyond the court’s jurisdiction ordinarily can be attacked on appeal. However, the prohibition writ operates to facilitate early review of serious actions by a trial judge. Shirai v. Walliby, 23 FSM R. 69, 71 (Chk. S. Ct. App. 2020).

Courts – Recusal – Procedure

Once a recusal or disqualification motion is filed, the Chuuk State Supreme Court trial judge must (if the judge does not then recuse himself) refer the motion so that another trial judge can be assigned to decide the matter, and then, until the recusal or disqualification motion is decided, the trial judge cannot take any further action in the matter. Shirai v. Walliby, 23 FSM R. 69, 71 (Chk. S. Ct. App. 2020).

Courts – Recusal

Since a disqualified judge may perform purely ministerial tasks or make orders that are purely formal in character, including issuing housekeeping orders, a Chuuk State Supreme Court justice, whose disqualification motion is pending before another justice, may set hearing dates far enough in the future that the recusal or disqualification motion should be decided by then and may also make an order continuing a hearing that has already been set. Shirai v. Walliby, 23 FSM R. 69, 71 (Chk. S. Ct. App. 2020).

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COURT’S OPINION

PER CURIAM:

On September 8, 2020, the petitioners, Takuchy Shirai and Masako Shirai Serious, filed a Motion for Reconsideration, and on September 21, 2020, filed a Supplemental Memorandum in Support of Motion for Reconsideration of Order of Dismissal of Petition, and Reply to Opposition Filed by Respondent Jack Fritz. We consider the reconsideration motion to be a petition for rehearing under Appellate Rule 40. As such it was timely filed (that is, it was filed within fourteen days of our order of dismissal). The petitioners’ requests for reconsideration, and for a writ of prohibition, are denied. The reasons follow.

I. WRIT REQUESTED

The petitioners, in their September 8, 2020 filing, ask us to issue a writ of prohibition barring respondent Associate Justice Kerio Walliby from taking any further action in CSSC Civil SP No. 124-2019 until after their motion to disqualify Justice Walliby in that matter has been decided. On December 17, 2019, Justice Walliby, as required by Chuuk State Law No. 190-08, § 22(5), referred that December 6, 2019 disqualification motion to the Chuuk Chief Justice for assignment to another justice for decision.

The petitioners previously sought a writ of mandamus preventing Justice Walliby from continuing to preside over SP No. 124-2019, because of his alleged conflicts as set out in their December 6, 2019 motion to disqualify him. We denied that writ because the petitioners had an adequate, or even superior, legal remedy available in the trial division – a § 22(5) evidentiary hearing on their disqualification motion before a different trial division justice. Shirai v. Walliby, 23 FSM R. 14, 17 (Chk. S. Ct. App. 2020).

The petitioners now ask us to reconsider that denial and instead issue a writ of prohibition barring Justice Walliby from acting further in SP No. 124-2019 until after their motion to disqualify him has been

decided by a trial division justice assigned to preside over the § 22(5) hearing.¹ As a factual basis for this request, the petitioners point to two instances where Justice Walliby acted when he should not have done anything until the petitioners' recusal or disqualification motion was decided. They contend that Justice Walliby's contemporaneous (either just before, simultaneously, or just after his referral of the disqualification motion) order continuing the hearing on the motion to dismiss filed by respondents Jack Fritz, Catharina Nedelec, and the Heirs(s) of Fuminory Shirai to April 28, 2020 is one such instance. The second instance is that on April 28, 2020, the case was called on Justice Walliby's calendar, and, although the petitioners' counsel could not be present due to the covid-19 travel restrictions, Justice Walliby allegedly conferred with opposing counsel who were present, and, at their suggestion, continued the matter to June 24, 2020, which order was, according to the petitioners, never served on either the petitioners or their counsel.

II. WRIT'S REQUIREMENTS

The requirements for the issuance of an extraordinary writ of prohibition are (1) that a court or an officer is about to exercise judicial or quasi-judicial power; (2) that the exercise of such power is unauthorized or the inferior tribunal is about to act without or in excess of jurisdiction; and (3) this may or will result in damage or injury for which there is no plain, speedy, or adequate legal remedy. Albert v. O'Sonis, 15 FSM R. 226, 231 (Chk. S. Ct. App. 2007); Nikichiw v. Petewon, 15 FSM R. 33, 37 (Chk. S. Ct. App. 2007); Ruben v. Petewon, 14 FSM R. 177, 182 (Chk. S. Ct. App. 2006); Election Comm'r v. Petewon, 6 FSM R. 491, 497 (Chk. S. Ct. App. 1994). As such, a writ of prohibition is a preventive remedy. A writ of prohibition's "purpose [i]s to limit the lower courts to their proper jurisdiction. It [i]s seldom needed, since an act beyond the court's jurisdiction ordinarily can be attacked on appeal. However, the prohibition writ operates today to facilitate early review of serious actions by a trial judge." DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 2.10, at 112 (1973).

The petitioners are correct about a disqualification motion's effect. Once a recusal or disqualification motion is filed, the trial court judge, if the judge does not then recuse himself, must refer the motion so that another trial judge can be assigned to decide the matter. Chk. S.L. No. 190-08, § 22(5); Ruben, 14 FSM R. at 184. And then, until the recusal or disqualification motion is decided, the trial judge cannot take any further action in the matter. See Ting Hong Oceanic Enterprises v. Trial Division, 7 FSM R. 642, 643 (App. 1996) (writ of prohibition may issue to prevent trial judge from proceeding further on a case until the motion to disqualify the judge is denied and the reasons given).

However, a disqualified judge may perform purely ministerial tasks or make orders that are purely formal in character, including issuing housekeeping orders. Setik v. Mendiola, 21 FSM R. 537, 559 (App. 2018). We view the December 17, 2019 order setting an April 28, 2020 hearing date, and the April 28, 2020 order continuing that hearing, to be in the nature of housekeeping orders. Neither made any substantive ruling. The first, the December 17, 2019 order setting an April 28, 2020 hearing date, set the hearing far enough in the future that Justice Walliby may have expected that the petitioners' recusal or disqualification motion would have been decided by then (and in the usual course of events probably would have), and having a hearing date already in place would allow the parties to know when they could expect to resume with a hearing either before Justice Walliby or, if the disqualification motion was granted, before a successor judge. The second order, continuing the hearing for another two months, is of a similar nature.

Neither order exhibits an inclination by Justice Walliby to exercise an unauthorized power or to act

¹ Petitioners' counsel also raises, in the September 21, 2020 filing, ethical concerns about an opposing counsel's personal comments, in this or related matters, about the attitude or comments by petitioners' counsel. We believe that those concerns are best addressed by pursuing the matter through the proper channels in the trial division.

without or in excess of his jurisdiction or to commit some other serious act until the petitioners' disqualification motion has been decided. We therefore decline to issue the requested writ. We are confident that Justice Walliby is aware of his responsibilities and will take no further action in CSSC SP No. 124-2019 until the petitioners' motion to disqualify him has been decided, and then only if that motion has been denied.

III. CONCLUSION

Accordingly, the petitioners' reconsideration motion is denied.

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