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SCWC-12-0000315

IN THE SUPREME COURT OF THE STATE OF HAWAII

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DONALD EDWARD KROG, in his capacity as Trustee of  
the Donald Edward Krog Living Trust, Dated March 25, 2010,  
Respondent/Plaintiff-Appellee,

vs.

ELEANA UMILANI KOAHOU and YVONNE MOKIHANA KEAHI,  
Petitioners/Defendants-Appellants.

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-12-0000315; CIV. NO. 11-1-1697-08)

February 28, 2014

CONCURRING OPINION BY ACOBA, J., IN WHICH POLLACK, J., JOINS

I would hold that, inasmuch as Respondent/Plaintiff-Appellant Donald Edward Krog, in his capacity as trustee of the Donald Edward Krog Trust (Respondent) did not file a motion for attorney's fees, the court had no jurisdiction to issue an order granting attorneys' fees. Because the court lacked jurisdiction, this court also lacks jurisdiction over the merits of that order. In re Rice, 68 Haw. 334, 335, 713 P.2d 426, 427 (1986). However,

Respondent may not have filed a motion for fees in reliance on the March 14, 2012 minute order (minute order) of the Circuit Court of the First Circuit (the court) granting him attorneys' fees. In that event, Respondent may have been denied a fair hearing on his request for attorney's fees. Under such circumstances, this court should remand the case to allow Respondent to file his motion and the court to set a hearing thereon. However, in this case there is no legal basis to award Respondent attorneys' fees and therefore remand would be futile.

To recount briefly, on March 9, 2012 the court entered final judgment in favor of Respondent. Subsequently, although Respondent did not file a motion for attorney's fees, the court issued the minute order on March 14, stating, inter alia, that "this action is one arising out of assumpsit, and that [Respondent] would be entitled to his attorneys' fees and costs." On March 23, Respondent filed a memorandum "regarding [the] minute order dated March 14, 2012." Based on the minute order, Respondent "request[ed] an award of \$41,509.02" in attorney's fees and costs. On March 29, Petitioners-Defendants-Appellants Eleana Umilani Kaohou and Yvonne Mokihana Keahi (Petitioners) filed a notice of appeal to the ICA. On April 27, 2012 the court issued an order awarding Respondent attorney's fees and costs.

Pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 54(d)(2), claims for attorneys' fees "shall be made by motion" within fourteen days of the relevant final judgment, unless "the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial[.]" (Emphasis added.) Here, Respondent did not file any motion requesting attorney's fees prior to the entry of the minute order. Moreover, inasmuch as the memorandum filed by Respondent on March 23 relied on the minute order, it apparently was not a motion for attorneys' fees but rather a memorandum reiterating that attorneys' fees had already been granted.

Thus, Respondent did not file any motion requesting attorneys' fees within the fourteen day time limit provided by HRCP Rule 54(d)(2). Additionally, Respondent did not file a motion requesting attorneys' fees prior to the notice of appeal filed on March 29, 2012. Thus, the court lacked jurisdiction to issue the order awarding Respondent attorneys' fees on April 27. See Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai'i 494, 500 n.4, 880 P.2d 169, 175 n.4 (1994) (noting that the ICA has held that trial courts do not have jurisdiction to rule on requests for attorneys' fees filed after a notice for appeal). Because the court was without jurisdiction, this court similarly cannot rule on the merits of Respondent's request for attorneys' fees. Also, because Respondent did not file a motion for

attorneys' fees within the fourteen day time limit provided by HRCF Rule 54(d)(2), the court would be unable to rule on a request for attorneys' fees on remand.

Due to his apparent reliance on the minute order, Respondent is now unable to further move for attorneys' fees from the court, because the deadline has passed. See discussion supra. However, it would be inequitable to penalize Respondent for his reliance on the court's minute order that granted him attorneys' fees and costs. Cf. Cabral v. State, 127 Hawai'i 175, 185, 227 P.3d 269, 279 (2012) (exercising jurisdiction over an appeal that was otherwise untimely because "Petitioners relied, to their detriment, on the order granting an extended . . . deadline, and reasonably believed that the original deadline . . . was no longer valid"); Poe v. Hawai'i Labor Relations Bd., 98 Hawai'i 416, 423, 49 P.3d 382, 389 (Acoba, J., dissenting) (an appeal from an amended judgment should be considered timely because "the amended judgment gives no notice" that it "was not the intended 'final' judgment").

Ordinarily, then, the case should be remanded to allow Respondent the opportunity to file a motion for attorneys' fees to protect his due process right to a fair hearing. However, in assessing the deprivation of a due process right to a fair hearing, it is apparent that Respondent would not be able to legally prevail on his claim. First, inasmuch as Respondent's

initial complaint plainly alleged a tort action seeking the ejectment of Petitioners, this action was not one based on assumpsit. Second, because Respondent was not the original purchaser of the property at issue, he was not entitled to attorneys fees under HRS § 667-33(c). Consequently, no legal basis existed for the court's award of attorney's fees to Respondent. In this case, then, remand would be futile. Thus, the court's order granting attorneys' fees must be reversed.<sup>1</sup>

Based on the forgoing, I respectfully concur in the result reached by the majority but for the reasons set forth herein.

/s/ Simeon R. Acoba, Jr.

/s/ Richard W. Pollack



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<sup>1</sup> I agree with the majority that the circuit court's award of damages to Respondent based on Petitioners' wrongful possession of the property at issue was not wrong.