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NO. CAAP-16-0000145

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

DUTCHIE KAPU SAFFERY and MIKE YELLEN,
Plaintiffs-Appellants,
v.
UNIVERSITY OF HAWAIʻI, DEPARTMENT OF LAND AND NATURAL RESOURCES,
STATE OF HAWAIʻI, BOARD OF REGENTS, OFFICE OF
MAUNA KEA MANAGEMENT, DEPARTMENT OF HAWAIIAN HOME LANDS,
PRESIDENT BARACK OBAMA/Predecessor, UNITED STATES MILITARY,
GOVERNOR DAVID IGE/Predecessor, Defendants-Appellees,
and
JANE/JOHN DOES 1-1000, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 15-1-0216)

SUMMARY DISPOSITION ORDER
(By: Fujise, Presiding Judge, Reifurth and Chan, JJ.)

Plaintiffs-Appellants Dutchie Kapu Saffery (Saffery) and Mike Yellen (Yellen) (collectively, Appellants), *pro se*, appeal from the Final Judgment entered by the Circuit Court of the Third Circuit (Circuit Court)[1] on March 1, 2016. The Circuit Court dismissed the claims against Defendants-Appellees University of Hawaiʻi, Department of Land and Natural Resources, State of Hawaiʻi, Board of Regents, Office of Mauna Kea Management, Department of Hawaiian Home Lands, and Governor David Ige/Predecessor (collectively, the State Defendants) for failure

[1] The Honorable Greg K. Nakamura presided.

to state a claim for which relief can be granted. The Circuit Court also dismissed the claims against Defendants-Appellees President Barack Obama/Predecessor and United States Military (collectively, the Federal Defendants) for lack of subject matter jurisdiction. The Final Judgment awarded judgment in favor of both State Defendants and Federal Defendants (collectively, Appellees) as to all claims brought against them by Appellants in the First Amended Civil Rights Complaint, filed on November 17, 2015.

On appeal, Appellants argue one point of error-that the Circuit Court erred in dismissing all Appellees.[2] Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we affirm.

We note that Appellants' opening brief fails to comply with the requirements of HRAP Rule 28.[3] Non-compliance with HRAP Rule 28 is sufficient grounds to dismiss this appeal. <u>See</u> HRAP Rule 30 ("When the brief of an appellant is otherwise not in conformity with these rules, the appeal may be dismissed . . . ."). Due to this jurisdiction's policy of "affording litigants the opportunity to have their cases heard on the merits, where possible[,]" however, we nonetheless proceed on the merits. <u>Marvin v. Pflueger</u>, 127 Hawai'i 490, 496, 280 P.3d 88, 94 (2012) (internal quotation marks omitted) (quoting <u>Morgan v. Planning Dep't, Cnty. of Kauai</u>, 104 Hawai'i 173, 180-81, 86 P.3d 982, 989-90 (2004)).

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[2] Appellants list a second point of error as follows: "The Circuit Court error in not exercising it's [sic] authority to stop Appellee's illegal acts, actions, and inactions." Appellants fail to state any legal basis for this alleged error. We decline to address Appellants' second contended point of error. Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7).

[3] Among other flaws, the opening brief is devoid of any citations to the record, the statement of the case is far from concise, and there is no statement of related cases.

I. State Defendants

In its order dismissing the State Defendants, the Circuit Court concluded that Appellants failed to state claims against the State Defendants for which relief can be granted and accordingly granted the State Defendants' motion to dismiss. A circuit court's ruling on a motion to dismiss is reviewed *de novo*. See Hungate v. Law Office of David B. Rosen, 139 Hawai'i 394, 401, 391 P.3d 1, 8 (2017) (quoting Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai'i 92, 104, 176 P.3d 91, 103 (2008), as amended (Jan. 25, 2008)). Courts must view the complaint in the light most favorable to the plaintiff, and should dismiss for failure to state a claim only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief." Cty. of Kaua'i ex rel. Nakazawa v. Baptiste, 115 Hawai'i 15, 24, 165 P.3d 916, 925 (2007) (citation omitted).

Count I of Appellants' First Amended Complaint alleged that all state subleases are illegal because they violate the Hawaiian Homes Commission Act (HHCA).[4] Appellants sought the following relief: that all State subleases be deemed void, that all telescopes presently on Mauna Kea be immediately removed, that all subleases issued for lands on Mauna Kea be declared in violation of the HHCA, that all land on Mauna Kea be declared sacred land, that Mauna Kea be declared Crown Land, and that the State be enjoined from subleasing any land on Mauna Kea.

From what we can discern, Appellants' main contention in Count I is that the HHCA prohibits lessees of Hawaiian home lands to sublet an interest in the land and that all subleases on

[4] The Hawaiian Homes Commission Act, 1920, Act of July 9, 1921, Pub. L. 67-34, 42 Stat. 108, reprinted in 1 Hawaii Revised Statutes (HRS) 261 (2009), was originally enacted by Congress but is now part of the Hawai'i State Constitution by virtue of the Admission Act of 1959, Pub. L. No. 86-3, 73 Stat. 4, reprinted in 1 HRS 135 (2009). The HHCA is subject to amendment or repeal as prescribed in article XII of the Hawai'i State Constitution.

Mauna Kea are therefore in violation of the HHCA.[5] The Circuit Court reviewed HHCA § 203, which designates the "available lands" subject to the HHCA; took judicial notice of the fact that the Mauna Kea summit area is not located in the boundaries established by Department of Hawaiian Home Lands (DHHL) maps depicting the lands over which it has jurisdiction; and concluded that the Mauna Kea summit area was not covered by the HHCA. The DHHL maps are a "source[] whose accuracy cannot reasonably be questioned." See Hawai‘i Rules of Evidence (HRE) Rule 201(b) (1980). As such, we conclude that the Circuit Court did not err in taking judicial notice of the fact that the Mauna Kea summit area is not located within the boundaries establishing the areas over which DHHL has jurisdiction. See In re Estate of Herbert, 90 Hawai‘i 443, 466, 979 P.2d 39, 62 (1999) ("[T]he taking of judicial notice of adjudicative facts by the trial court . . . should be reviewed by an appellate court under the right/wrong standard."). Based on the Circuit Court's review of the DHHL maps and its finding that the Mauna Kea summit area does not fall within the DHHL's boundaries, the Circuit Court correctly concluded that the Mauna Kea summit lands do not fall under the HHCA's jurisdiction and is not subject to the HHCA's provisions. See State v. Puaoi, 78 Hawai‘i 185, 188-91, 891 P.2d 272, 275-78 (1995) (taking judicial notice of venue by referring to maps in a University of Hawai‘i publication). We conclude, therefore, that Appellants failed to state a claim in Count I for which relief can be granted.

Count II of Appellants' First Amended Complaint alleged that the State was in violation of the HHCA by leasing State land to lessees who are not Native Hawaiian. Appellants sought to have the State be permanently enjoined from leasing any land that is "designated as Hawaiian Home Land, pursuant to the [HHCA]."

In arguing that the State leased Hawaiian home lands to

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[5] Although Appellants broadly allege that *all* state subleases are illegal, they do not describe or reference any other specific subleases, aside from those on Mauna Kea, that they contend to be in violation of the HHCA.

non-Native Hawaiians, Appellants point to the lands on the Mauna Kea summit area.[6] As mentioned in our discussion of Count I, *supra*, the land on Mauna Kea's summit does not fall under the purview of the HHCA. To be subject to the HHCA's mandates, the land in question must be designated Hawaiian home lands. We therefore conclude that those lands on the Mauna Kea summit area were not wrongly leased out to non-Native Hawaiians. There is no claim in Count II for which relief can be granted.[7]

Count IV of Appellants' First Amended Complaint alleged that Haw. Exec. Order No. 1719 (Jan. 26, 1956) (Governor's Executive Order), which set aside land now known as the Pohakuloa Training Area for use by the United States military, was unconstitutional and illegal because the Governor of the State of Hawaiʻi does not have the authority to give land to anyone. Appellants seem to be seeking a rescission of the Governor's

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[6] As in Count I, the Appellants broadly allege in Count II that the State leased land to lessees who were not Native Hawaiian. However, the only piece of land specifically alleged by Appellants to have been wrongly leased to non-Native Hawaiians is that on Mauna Kea.

[7] To the extent that Appellants seek to enjoin the State from leasing any land designated as Hawaiian home land to non-Native Hawaiians, this relief is not available. Section 204(a)(2) of the HHCA states, in relevant part:

> In the management of any retained available lands not required for leasing under section 207(a), the *department may dispose of those lands or any improvements thereon to the public*, including native Hawaiians, on the same terms, conditions, restrictions, and uses applicable to the disposition of public lands in chapter 171, Hawaii Revised Statutes; provided that the department may not sell or dispose of such lands in fee simple except as authorized under section 205 of this Act; provided further that the department is expressly authorized to negotiate, prior to negotiations with the general public, the disposition of Hawaiian home lands or any improvements thereon to a native Hawaiian, or organization or association owned or controlled by native Hawaiians, for commercial, industrial, or other business purposes, in accordance with the procedures set forth in chapter 171, Hawaii Revised Statutes; provided further that in addition to dispositions made pursuant to chapter 171, Hawaii Revised Statutes, the department may lease by direct negotiation and at fair market rents, and for a term not to exceed five years, any improvements on Hawaiian home lands, or portions thereof, that are owned or controlled by the department.

HHCA § 204(a)(2) (Supp. 2017) (emphasis added). The Hawaiʻi Supreme Court has clarified that this section permits leases of "available lands" to the general public, including the government and its agencies. Ahia v. Dep't of Trans., 69 Haw. 538, 544-49, 751 P.2d 81, 85-88 (1988). Thus, the HHCA does not establish a complete bar to the leasing of any Hawaiian home land to non-Native Hawaiians.

Executive Order as well as an enjoinment of future executive orders that "steal[] land from the Hawaiian people and give[] it to non-Hawaiians."

Appellants argue that the Governor's Executive Order was illegal because at the time it was issued, the land was under the ownership of the United States and the Governor did not have the authority to set the land aside. The Hawaiʻi Supreme Court has previously discussed the history of the ceded lands in Hawaiʻi:

> the United States annexed Hawaiʻi with the passage of the Newlands Joint Resolution. Joint Resolution To provide for annexing the Hawaiian Islands to the United States (Newlands Resolution), No. 55, 30 Stat. 750 (1898); see also Apology Resolution[, Pub.L. No. 103-150, 107 Stat. 1510, 1512 (1993) (hereinafter Apology Resolution)]. Upon annexation, the Republic of Hawaiʻi "ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii [to the United States], without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government." Apology Resolution at 1512. This court has recognized that the Republic "ced[ed] and transfer[red] to the United States the absolute fee and ownership of all public, Government, or Crown lands . . . belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining[.]" Trs. of the Office of Hawaiian Affairs v. Yamasaki, 69 Haw. 154, 159, 737 P.2d 446, 449 (1987) (brackets in original) (citing Newlands Resolution at 750). Under the Newlands Resolution, the revenue and proceeds from these "ceded lands" were to "be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Newlands Resolution at 750.
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> Congress then passed the Organic Act, Act of April 30, 1900, c. 339, 31 Stat. 141 (1900), reprinted in 1 [HRS] 86 (2009), which "provided a government for the territory of Hawaii and defined the political structure and powers of the newly established Territorial Government[.]" Apology Resolution, at 1512. The Organic Act stated, in relevant part:
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> > That the public property ceded and transferred to the United States by the Republic of Hawaii under the joint resolution of annexation . . . shall be and remain in the possession, use, and control of the government of the Territory of Hawaii, and shall be maintained, managed, and cared for by it, at its own expense, until otherwise provided for by Congress, or taken for the uses and purposes of the United States by direction of the President or of the governor of Hawaii.
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> Organic Act, § 91.

Corboy v. Louie, 128 Hawaiʻi 89, 91-92, 283 P.3d 695, 697-98

(2011) (footnotes omitted, some brackets added). Upon review of this history, we conclude that the territorial Governor had the authority, under Section 91 of the Organic Act, to set aside land for the United States.

Appellants do not provide any other grounds on which the Governor's Executive Order can be found to have been unconstitutional. Thus, we conclude that Governor's Executive Order No. 1719 was properly issued and Appellants fail to state a claim in Count IV for which relief can be granted.

Count V of Appellants' First Amended Complaint alleged that the blood quantum requirement under the HHCA, which defines qualified beneficiaries as being at minimum fifty percent (50%) Native Hawaiian, violates the Fourteenth Amendment of the Constitution of the United States. Appellants asked the Circuit Court to enjoin the State from "requiring a certain percentage of blood quantum in order to be able to receive the benefits of the Hawaiian Home Commission Act."

The purposes of the HHCA have been described in several ways, but at the core of these various descriptions is a consistent purpose - to benefit Native Hawaiians. See, e.g., Rice v. Cayetano, 528 U.S. 495, 507 (2000); Arakaki v. Lingle, 477 F.3d 1048, 1054 (9th Cir. 2007); Arakaki v. Hawaii, 314 F.3d 1091, 1092 n.2 (9th Cir. 2002); Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n, 588 F.2d 1216, 1218 (9th Cir. 1978); Kalima v. State, 111 Hawai‘i 84, 87, 137 P.3d 990, 993 (2006); Bush v. Hawaiian Homes Comm'n, 76 Hawai‘i 128, 131-32, 870 P.2d 1272, 1275-76 (1994); Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 336, 640 P.2d 1161, 1167 (1982). Under Section 201 of the HHCA, a Native Hawaiian is defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA § 201 (2009).

The United States District Court for the District of Hawai‘i has expressly held that the HHCA was constitutional, based in large part on Hawai‘i courts' recognition of the similar treatment of Native Hawaiians and American Indians. Naliielua v.

State of Hawaii, 795 F. Supp. 1009, 1012-13 (D. Haw. 1990), aff'd, 940 F.2d 1535 (9th Cir. 1991) ("This court finds applicable the clear body of law surrounding preferences given to American Indians and finds that the United States' commitment to the native people of [Hawaiʻi], demonstrated through . . . the Hawaiian Homes Commission Act, 1920, does not create a suspect classification which offends the constitution."). For the same reasoning, we conclude that the blood quantum requirement does not violate the Fourteenth Amendment of the United States Constitution. Furthermore, Appellants seek relief in the form of a declaratory judgment essentially redefining a Native Hawaiian under the HHCA. A modification of the HHCA requires legislative action, which is not a type of relief that is in the hands of the courts. Accordingly, Appellants failed to state a claim in Count V for which relief can be granted.

We conclude that, for all claims against the State Defendants in their First Amended Complaint, the Appellants failed to state claims for which relief can be granted.

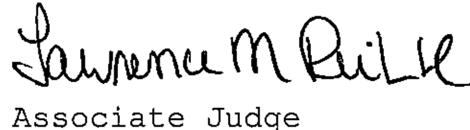
II. Federal Defendants

In its order dismissing the Federal Defendants, the Circuit Court *sua sponte* dismissed the Federal Defendants for lack of subject matter jurisdiction pursuant to Hawaiʻi Rules of Civil Procedure (HRCP) Rule 12(h)(3). On appeal, Appellants fail to state any alleged error committed by the Circuit Court with regards to its dismissal of the Federal Defendants. Rather, Appellants' argument regarding the Federal Defendants is encapsulated within a broad contention that the Circuit Court erred in dismissing all claims against all defendants. Thus, this court is not obligated to consider this argument as it relates to the Federal Defendants. See Kakinami v. Kakinami, 127 Hawaiʻi 126, 144 n.16, 276 P.3d 695, 713 n.16 (2012) (citing In re Guardianship of Carlsmith, 113 Hawaiʻi 236, 246, 151 P.3d 717, 727 (2007) (noting that this court may "disregard a particular contention if the appellant makes no discernible argument in support of that position")).

For the foregoing reasons, we conclude that the State Defendants and Federal Defendants were properly dismissed and we AFFIRM the Circuit Court's Final Judgment entered on March 1, 2016.

DATED: Honolulu, Hawaiʻi, **February 25, 2019.**

Presiding Judge



Associate Judge

Associate Judge

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