

NO. 24205

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

MOSES K. MOKE, Appellant-Appellant, v.  
HAWAIIAN HOMES COMMISSION, Appellee-Appellee

APPEAL FROM THE THIRD CIRCUIT COURT  
(CIV. NO. 99-0012)

MEMORANDUM OPINION

(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

In this secondary appeal, Moses K. Moke (Moke) appeals, *pro se*, the March 19, 2001 judgment of the circuit court of the third circuit, the Honorable Riki May Amano, judge presiding. The judgment was made upon the court's order of even date that affirmed the December 9, 1998 findings of fact, conclusions of law, decision and order of the Hawaiian Homes Commission (the Commission), which read as follows:

INTRODUCTION

On October 26, 1998, at approximately 3:00 p.m., at the U.H. Cooperative Extension service ("Komohana Ag. Complex"), Rm. 201, 875 Komohana Street, Hilo, Hawaii, a contested case hearing was held pursuant to Chapter 91, Hawaii Revised Statutes ("HRS"); section 210 of the Hawaiian Homes Commission Act, 1920, as amended ("Act"); and Title 10, Chapter 5, Subchapter 3, Hawaii Administrative Rules ("HAR"), before the [Commission] to afford [Moke] an opportunity to present objections to the HEARING OFFICER'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER ("RECOMMENDED ORDER"), pertaining to the above-captioned matter, dated June 12, 1997, for the Department of Hawaiian Home Lands ("Department or DHHL") to present new evidence in support of its motion to dismiss, and for the Commission to take final action on this case.

PROCEDURAL HISTORY

By letter dated January 24, 1997, Certified Mail Return Receipt Requested ("Certified Mail"), the Department notified [Moke] that a

contested case hearing was scheduled to be heard on February 27, 1997, at 9.00 a. m., at the Komohana Ag. Complex, to determine if the transfer of Hawaiian Homes Commission Residential Lot Lease No. 2821 from [Moke's] deceased wife Harriet K. Moke ("Mrs. Moke") to her daughter Jacqueline Kepoo-Sabate "should be held" void because Mrs. Moke was mentally incompetent at the time she executed the transfer document. See: Department's Exhibit A.

A hearing was held on February 27, 1997, before the Commission's duly appointed Hearing Officer Allen K. Hoe, Esq. [Moke] was present. He had an opportunity to present evidence, examine and cross-examine witnesses, and make arguments in support of his claim that Mrs. Moke was incompetent at the time she signed the transfer document.

Hearing Officer Hoe issued his RECOMMENDED ORDER on June 12, 1997. [Moke] was notified by Certified Mail, dated June 13, 1997, that a hearing was scheduled for final action by the Commission for June 24, 1997, at Molokai High and Intermediate School Cafeteria. The hearing was held as scheduled. [Moke] did not appear. The Commission adopted the RECOMMENDED ORDER.

However, [Moke], on June 24, 1997, faxed the Department his objections to the RECOMMENDED ORDER. Thereafter, The Commission notified [Moke] that the hearing would be reopened for the purpose of providing [Moke] with an opportunity to personally appear and present his objections to the Commission.

The hearing was scheduled for August 26, 1997, at Waimea, on the Island of Hawaii. [Moke] requested that the hearing be rescheduled. The Department rescheduled the hearing for August 25, 1997. [Moke] failed to appear at the hearing on the date and time scheduled. The Commission took no action.

[Moke] was notified by Certified Mail that a hearing was scheduled for October 26, 1998 for the purposes set forth above. [Moke] appeared, authorizing Mr. Harold Jim to speak in his behalf.

#### FINDINGS OF FACT

- 1) Pursuant to § 209 of the Act, Harriet K. Kepoo, aka Harriet K. Moke, succeeded to the lease interest formerly held by her deceased spouse John Kepoo, under Hawaiian Homes Commission Residential Lot Lease No. 2821 ("Lease No. 2821"), encumbering Lot No. 19, at Keaukaha, Hawaii.
- 2) By execution of a Designation of Successor, dated January 28, 1991, Mrs. Moke named her daughters, Jacqueline Kepoo-Sabate ("Jacqueline") and Debra Mae Akui ("Debra") as successors to her lease interest under Lease No. 2821. See: Designation of Successor form dated January 28, 1991.
- 3) Pursuant to § 208(5) of the Act, on March 10, 1994, Mrs. Moke executed a transfer of her lease interest under Lease No. 2821 to Jacqueline by-way-of an assignment agreement ("transfer"). See: Assignment of Lease and Consent document dated March 10, 1994.
- 4) By letter dated May 1, 1995, [Moke] challenged the transfer, requesting a contested case hearing in behalf of his step-daughter, Debra. [Moke] alleged that at the time of the transfer, [Mrs. Moke] was mentally incompetent and the transfer was, therefore, void. See: Department's Exhibit I.
- 5) [Moke] requested this contested case hearing in order to carry out his wife's wish, that both his step-daughters have an interest in Lease No. 2821. [Moke] states:

"MR. WATSON, BECAUSE I WAS INFORMED BY MY EAST HAWAII COMMISSIONER, ANN NATHANIEL, TO CONTEST THIS MISCARRIAGE OF JUSTICE FOR ONE OF MY WIFE'S DAUGHTERS, FROM A PREVIOUS MARRIAGE, . . . . THE LEASE TO ONLY JAQUELINE KEPOO-SABATE SHOULD BE STAYED

. . . . I STATE FOR THE RECORD THAT THE ONE (1) ACRE LEASE SHOULD BE EQUALLY SHARED BY MY WIFE'S TWO (2) DAUGHTERS, DEBORAH AND JACKIE . . . . ." See: Department's Exhibit I.

"This hearing should settle the issue as such; UPON THE DEATH OF MRS. HARRIET MOKE, BOTH DAUGHTERS SHALL BE DEEMED THE SUCCESSORS TO LEASE NO. 2821, LOT 19, KEAUKAHA. See: Petitioner's Exhibit 1.

"THE EFFORTS OF JOHN HIROTA, IS COMMENDABLE, BUT ALL THIS TIME HE FAILED TO CONTACT ME, ALSO TO REACH RESOLUTION OF THIS DELICATE SITUATION, AND ONLY SPOKE TO JAQUELINE KEPOO-SABATE AND DEBRA AKUI. WHAT ABOUT THE OTHER ISSUES OF THE REQUEST FOR A CONTESTED CASE HEARING, WHICH ARE AS FOLLOWED:

(1) CORRECT THE RECORD AND RESTORE THE WISH OF MY WIFE HARRIET MOKE; MEANS, I HAVE MANY SIGNED DOCUMENTS FROM DONALD PAKELE AND FROM HOALIKU DRAKE, THAT ASSERTS THAT THE TRANSFER WENT THROUGH. I NEED TO BE REASSURED THAT WHEN I SIGN THESE PAPERS OF AGREEMENT, THAT THE TRANSFER THROUGH SUCCESSIONSHIP, TO BOTH DAUGHTERS, WILL COMMENCE "UPON THE DEATH OF THE LESSEE, HARRIET MOKE". See: Petitioner's Exhibit 5.

6) With Department staff assistance, Jacqueline and Debra have agreed to share Lease No. 2821. Jacqueline has agreed to subdivide Lot No. 19 into two lots, and to transfer one of the two lots to Debra; so that each would have her own lot. Subdivision of Lot No. 19 has already begun.

#### CONCLUSIONS OF LAW

1) If this Commission ruled against [Moke's] claim and adopted the RECOMMENDED ORDER, Jacqueline would be the legitimate lessee of Lease No. 2821. However, Jacqueline has agreed to share Lease No. 2821 with her sister, Debra.

2) If this Commission ruled in favor of [Moke's] claim, that the transfer is void because at the time she executed the transfer document, Mrs. Moke was mentally incompetent, then, in accordance with Mrs. Moke's Designation of Successors, dated January 28, 1991, both Jacqueline and Debra would be the legitimate lessees of Lease No. 2821.

3) [Moke] has no interest in Lease No. 2821.

4) Any conclusion of law improperly designated as a finding of fact shall be deemed or construed a conclusion of law; any finding of fact improperly designated a conclusion of law shall be deemed or construed as a findings of fact.

#### DECISION

The duty of a judicial tribunal, such as this Commission presiding over a contested case, is to decide actual controversies by a judgment which can be carried into effect, and not give opinions upon moot questions or abstract propositions which cannot affect the matter before it. Re: App'n of J.T. Thomas, 73 Haw. 223 (1992), Wong v. Board of Regents, University of Hawaii, 62 Haw. 391, 394 (1980).

In this case, Jacqueline and Debra have agreed to subdivide Lot No. 19 now held by Jacqueline under Lease No. 2821, in order to provide each one with their own lot under Lease No. 2821.

In view of the foregoing, no matter how this Commission ruled on the question before it, the [e]ffect would be the same. Both of [Moke's] step-daughters will share in Lease No. 2821.

[Moke] requested this contested case hearing to assure himself that Mrs. Moke's wish, that both his step-daughters would share in Lease No. 2821. This has, in fact, occurred. [Moke] can now rest at ease, that his deceased wife's wish, as he understood it, has come true.

In view of the above, the question brought before this Commission

by [Moke] has been rendered MOOT, and this case is DISMISSED.

ORDER

IT IS HEREBY ORDERED, that for the reasons stated above, this case is DISMISSED.

In a secondary appeal, the following standards of review apply:

Review of a decision made by the circuit court upon its review of an agency's decision is a secondary appeal. The standard of review is one in which this court must determine whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91-14(g) to the agency's decision. This court's review is further qualified by the principle that the agency's decision carries a presumption of validity and appellant has the heavy burden of making a convincing showing that the decision is invalid because it is unjust and unreasonable in its consequences. Konno v. County of Hawai'i, 85 Hawai'i 61, 77, 937 P.2d 397, 413 (1997) (citations omitted).

HRS § 91-14(g) (1993) enumerates the standards of review applicable to an agency appeal and provides: Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

- (1) In violation of constitutional or statutory provisions; or
- (2) In excess of the statutory authority or jurisdiction of the agency; or
- (3) Made upon unlawful procedure; or
- (4) Affected by other error of law; or
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

GATRI v. Blane, 88 Hawai'i 108, 112, 962 P.2d 367, 371 (1998) (citing Poe v. Hawai'i Labor Relations Board, 87 Hawai'i 191, 194-95, 953 P.2d 569, 572-73 (1998)).

An agency's findings of fact are reviewable under the clearly erroneous standard to determine if the agency decision was clearly erroneous in view of reliable, probative, and substantial evidence on the whole record. Alvarez v. Liberty House, Inc., 85 Hawai'i 275, 277, 942 P.2d 539, 541 (1997); HRS § 91-14(g) (5).

An agency's conclusions of law (COLs) are freely reviewable to determine if the agency's decision was in violation of constitutional or statutory provisions, in excess of statutory authority or jurisdiction of agency, or affected by other error of law. Hardin v. Akiba, 84 Hawai'i 305, 310, 933 P.2d 1339, 1344 (1997) (citations omitted); HRS §§ 91-14(g) (1), (2), and (4).

"A COL that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the conclusion is dependent upon the facts and circumstances of the particular case." Price v. Zoning Bd. of Appeals of City and County of Honolulu, 77 Hawai'i 168, 172, 883 P.2d 629, 633 (1994). When mixed questions of law and fact are presented, an appellate

court must give deference to the agency's expertise and experience in the particular field. Dole Hawaii Division-Castle & Cooke, Inc. v. Ramil, 71 Haw. 419, 424, 794 P.2d 1115, 1118 (1990). "[T]he court should not substitute its own judgment for that of the agency." Id. (citing Camara v. Aqsalud, 67 Haw. 212, 216, 685 P.2d 794, 797 (1984)).

Poe, 87 Hawai'i at 197, 953 P.2d at 573.

Curtis v. Board of Appeals, 90 Hawai'i 384, 392-93, 978 P.2d 822, 830-31 (1999) (brackets in the original).

Moke presents two issues on appeal. Presented here verbatim, they are:

1. Did the low-court err by not acknowledge the State officials with Jacqueline engaged in fraud of the deceased Harriet K. Moke's, Lease No. 2821, which involves a breach of legal duty injurious to others and dismissed the contested case as moot.
2. Did the low court err by not acknowledge the Commission dismissed Mr. Moke as surviving spouse of the deceased wife, Mrs. Harriet Moke, as successor to his leasehold interest provided in Hawaiian Homes Commission Act, Sec. 209(a) in conjunction with Department Rules and Chapter 560.

Opening Brief at 1.

Moke does not challenge any of the Commission's findings of fact. In a secondary appeal, as in other appeals, findings of fact that are unchallenged on appeal are the operative facts of the case. Poe v. Hawai'i Labor Relations Bd., 97 Hawai'i 528, 536, 40 P.3d 930, 938 (2002) ("Unchallenged findings are binding on appeal." (Citation omitted.)). Upon the Commission's findings of fact, it is apparent that the first issue Moke presents on appeal is moot. No matter how the Commission would have ruled on the fraud alleged and the issue of Mrs. Moke's competence, and error or not, Moke's stepdaughters, Jacqueline and Debra, now share Lot 19 -- the very and only result Moke sought by his contested case before the Commission --

via an agreed subdivision.

"This court may not decide moot questions or abstract propositions of law." Life of the Land v. Burns, 59 Haw. 244, 250, 580 P.2d 405, 409 (1978) (citation, internal quotation marks and brackets omitted). See also Wong v. Board of Regents, Univ. of Hawaii, 62 Haw. 391, 395, 616 P.2d 201, 204 (1980) ("Courts will not consume time deciding abstract propositions of law or moot cases, and have no jurisdiction to do so." (Citation omitted)). The application of the mootness doctrine is well established:

It is well-settled that the mootness doctrine encompasses the circumstances that destroy the justiciability of a case previously suitable for determination. A case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where "events . . . have so affected the relations between the parties that the two conditions for justiciability relevant on appeal -- adverse interest and effective remedy -- have been compromised."

In re Thomas, 73 Haw. 223, 225-26, 832 P.2d 253, 254 (1992)

(ellipsis in the original) (citing Wong, 62 Haw. at 394, 616 P.2d at 203-4). The policy underlying the mootness doctrine is also well recognized:

This court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this court uniformly has declined to entertain.

Brownlow v. Schwartz, 261 U.S. 216, 217-18 (1923) (citations

omitted). See also Wong, 62 Haw. at 394-95, 616 P.2d at 204 (“The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.” (Citations omitted)).

Clearly, Moke’s case before the Commission was moot, and the Commission did not err in so holding. Yet Moke raises his second issue on appeal, that an interest in Lot 19 he claims was his, was erroneously passed over by the Commission. Moke did not raise this issue before the Commission; indeed, he disclaimed any interest in Lease No. 2821. At the February 27, 1997 hearing before the Commission’s hearing officer, Moke testified that, “I’m not the lessee. I’m not the owner.” And swore that, “I don’t want no part of the land or whatsoever.”

Except in the case of constitutional issues, “judicial review of an agency determination must be confined to issues properly raised in the record of the administrative proceedings below. For under the Hawaii Administrative Procedure Act, ‘[t]he review [is] conducted by the appropriate court without a jury and [i]s confined to the record[.]’ HRS § 91-14(f).” HOH Corp. v. Motor Vehicle Industry Licensing Bd., 69 Haw. 135, 141, 736 P.2d 1271, 1275 (1987) (some internal quotation marks omitted;

brackets in the original). This principle is well settled:

Our supreme court has stated that "the general rule that an appellate court will consider only such questions as were raised and reserved in the lower court applies on review by courts of administrative determinations so as to preclude from consideration questions or issues which were not raised in administrative proceedings." Waikiki Resort Hotel, Inc. v. City & County of Honolulu, 63 Haw. 222, 250, 624 P.2d 1353, 1372 (1981) (citation omitted). See also, Kalapodes v. E.E. Black, Ltd., 66 Haw. 561, 565, 669 P.2d 635, 637 (1983) (the supreme court will not consider issues which were not first raised before the Labor and Industrial Relations Appeals Board). This precept "is based upon the demands of orderly procedure and the justice of holding a party to the results of his [or her] own conduct[.]" Ariyoshi v. Hawai'i Public Employment Relations Bd., 5 Haw. App. 533, 545, 704 P.2d 917, 926 (1985).

Takahashi v. Tanaka, 10 Haw. App. 322, 329, 871 P.2d 796, 799 (1994) (brackets in the original). Moreover, we do not allow a party to blow hot below and cold above, as Moke attempts to do here, under the doctrine of "judicial estoppel." Roxas v. Marcos, 89 Hawai'i 91, 124, 969 P.2d 1209, 1242 (1998) (the doctrine of judicial estoppel "prevents parties from playing 'fast and loose' with the court or blowing 'hot and cold' during the course of litigation" (citations and some internal quotation marks omitted)). Hence, we decide Moke's second contention on appeal against him.



Accordingly, we affirm the March 19, 2001 judgment of the court, and the court's order of even date that affirmed the December 9, 1998 findings of fact, conclusions of law, decision and order of the Commission.

DATED: Honolulu, Hawaii, February 10, 2003.

On the briefs:

Moses K. Moke,  
appellant-appellant, *pro se*.

Acting Chief Judge

Clayton Lee Crowell,  
Deputy Attorney General,  
State of Hawai'i, for  
appellee-appellee.

Associate Judge

Associate Judge