

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Civil Jurisdiction)

Civil Case No .2135/2017

BETWEEN: MICHEAL LEIPER & WENDY MOSS
Claimants

AND: KARL KALSEV AND DAVID ALIKAU
Defendants

Coram: *Mr. Justice Oliver A. Saksak*

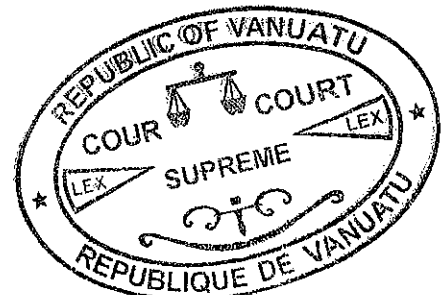
Counsel: *Colin B Leo for the Claimants*
Nigel Morrison for the Defendants

Date of Hearing: *25th and 28th June 2018*
Date of Judgment: *19th July 2018*

JUDGMENT

Introduction and Background

1. This claim is made pursuant to an agreement for sale and purchase (the Agreement) of a commercial property comprised in Leasehold Title No. 12/0242/015 (Lease 015) executed in or about May 2017.
2. The Claimants paid VT 2.500.000 to Rambay and Associates as the purchase price of the property in Lease 015.
3. On 3rd May 2017 Rambay and Associates paid the sum of VT 2.500.000 to the Moso Island Community as full and final payment for Lot 10 which contains the property in Lease 015.



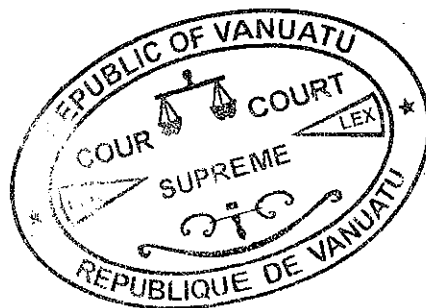
4. Lease 015 is a residential lease registered in both defendants names as lessors and in Tassiriki Community's name as lessee.
5. For Lease 015 to be transferred into the Claimants' names a consent to transfer was required. Only Karl Kalsev was authorized to give consent to such a transfer. He refused to give consent and therefore no transfer has been made.
6. The Claimants therefore filed this proceeding claiming-
 - a) For an order directing Karl Kalsev to execute to the transfer of Lease 015 to the claimants,
 - b) For damages, and
 - c) Costs

Defence

7. The defendants denied liabilities for all claims. They say the agreement entered into by the Claimants was with a wrong entity. Further they say any money paid to any person or entity which had no lawful power to transfer Lease 015.

Evidence

8. The Claimants relied on the evidence of-
 - a) Micheal Leiper- sworn statements exhibit C1 filed on 25th January 2018 and exhibit C2 filed on 11th April 2018.



- b) Wendy Moss- Sworn statement exhibit C3 filed on 16th November 2017.
- c) Tele Harry Rambay- Sworn statements exhibit C4 filed on 13th June 2018 and exhibit C5 filed earlier on 25th January 2018.

All three witnesses were cross- examined by Mr Morrison.

9. The defendants relied on the evidence of-

- a) Karl Kalsev, exhibit D1 by sworn statement filed on 5th November 2017 and exhibit D2 by sworn statement filed on 25th April 2018,
- b) David Alikau, exhibit D3 by sworn statement filed on 5th December 2017, and
- c) Tal Milfirer, exhibit D4 by sworn statement filed on 25th April 2018.

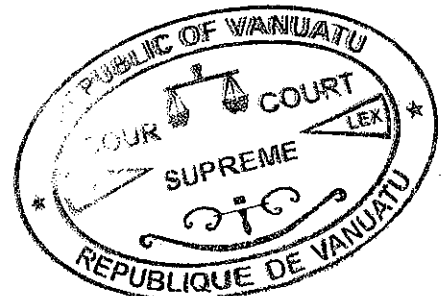
All three witnesses were cross-examined by Mr Leo.

Issues

10. The Claimants did not raise any specific issues for the Court's determination but the defendants raised the real issue which is whether or not there was any lawful sale and purchase agreement made between the claimants and the defendants.

Discussions

11. To answer the issue the Court will examine the agreement carefully. There were in fact two separate agreements. The first agreement was made in relation to Leasehold Title No. 12/0244/016 and this is annexure "WM1" to Wendy Moss's statement, Exhibit



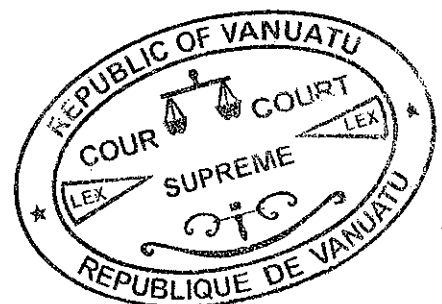
C3. The second agreement was made in relation to Lease 12/0242/015 and is annexure "WM3" to the same statement.

12. According to the evidence of the Claimants these two agreements were executed on the same day by the two claimants with defendant David Alikau and one Alick Kalsev as witness. It is accepted that defendant Karl Kalsev was not present at the execution of these agreements and did not sign either of them. The execution happened in May 2017. Neither the claimants nor David Alikau disclosed the actual date of execution.

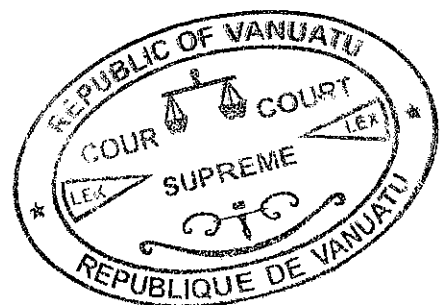
13. It was the evidence also that despite Karl Kalsev not signing the agreement in relation to Lease 016, he nonetheless signed the consent to transfer and the title was accordingly transferred to the claimants.

14. Having done so, Mr Leo argued, that there was no justifiable reason why Karl Kalsev could not also give consent to the transfer of Lease 015 to the Claimants, after all they have paid VT 2.500.000 as the purchase price of the land in Lot 10 comprised in that title.

15. Karl Kalsev did explain the reason why he reluctantly gave consent to transfer Lot 11 (Lease 016). His evidence was that this Lot and Lot 10 were reserved for community use and benefit and were not for sale, however as money had been paid and distributed and could not be repaid, he reluctantly gave consent to transfer Lease 016 but withheld his consent in relation to the transfer of Lease 015.



16. The Claimants have not raised consent unreasonably withheld by Karl Kalsev as an issue and therefore it is not an issue for determination by the Court.
17. Mr Morrison submitted that there was no agreement for sale and purchase of Lease 015. There was in fact an agreement executed. The issue is whether it is capable of being enforced by the Court after the Claimants have founded their claims on it.
18. Mr Morrison attached the copy of the Lease dated 25th August 2011 in relation to Lease 015 in favour of Tassiriki Community as lessee. That lease is classified as “Residential” lease. It is in direct contradiction to the agreement which states that it is a commercial property.
19. The agreement for sale and purchase disclosed by Wendy Moss as “WM3” is headed “COMMERCIAL PROPERTY”. It is not dated. No specific date and month are indicated at the front or on any other pages. Corresponding to “ZONING” it is stated “Rural commercial”. The Lease Title is stated as 12/0242/015. Immediately below, the “LESSORS” are not named or specified. At the very end of the agreement there is no signature of Karl Kalsev. These are factors which show the illegal features of the agreement.
20. Further from the evidence it is seen the performance by the claimants under the purported agreement was a problem. Wendy Moss disclosed a receipt of payment of VT 2.500.000 dated 3rd May 2017 as “WM4”. At the bottom of the receipt it is written “for and on behalf of the Moso Island Community.”



21. Whoever received this money was not clearly established by the evidence. Secondly no one explained whether Moso Island Community is the same as Tassiriki Community.

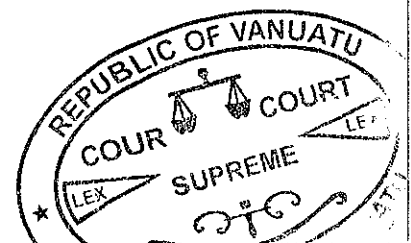
22. But of more serious concern is the "Payment of the Purchase Price of VT 2.500.000 by the Claimants under the Agreement.

23. It states:

VT 2.500.000 in cash is one sum on the exchange of consent for Transfer and of a registrable Transfer of Lease provided to the Purchaser fully executed (Completion date), which payment shall be paid to the nominated bank account of the vendor's agent". (emphasis added).

24. The evidence is very clear. On 3rd May 2017 Rambay and Associates released payment to Moso Island Community through its agent. That was in direct contravention of this payment clause of the agreement. It is clear also that on that date there was yet no consent to transfer given by Karl Kalsev. And further mores payment was to have been made to the vendor's bank account. The claimants acted in breach of this payment clause.

25. Finally Tal Milfirer disclosed as "TM 04" an agreement for sale and purchase of Lot 6, Title 12/0242/011 dated 29th July 2015. By comparison, this is the better agreement than that made in relation to Lot 10, Lease 015 which is the subject of this claim. And I can understand the reason which is that the former was done by a lawyer whereas the later was not. This explains the reason why there were omissions and mistakes in



the purported agreement which have rendered the agreement invalid and unenforceable.

26. I am therefore persuaded by Mr Morrison's arguments and submissions to accept that there was no contract. But even if there was, it was with persons or entities who were not authorized to execute the contract. And finally I accept that the Claimant's remedy does not lie against the defendants but other persons or entities who may be sued separately.

The result

27. The Claimants are therefore unsuccessful in their claims which are hereby dismissed in their entirety.

28. The defendants claim costs on an indemnity basis but this request is declined. This proceeding could have been avoided had defendant David Alikau been more consultative with Karl Kalsev before signing the agreement. In any event they have benefited from VT 2.500.000 of the Claimant's money and they cannot be entitled to any more.

29. There is therefore no order as to costs. Each party will bear their own costs.

DATED at Port Vila this 19th day of July 2018
BY THE COURT


OLIVER A. SAKSAK
Judge

