

**IN THE COURT OF APPEAL OF  
THE REPUBLIC OF VANUATU**  
*(Appellate Jurisdiction)*

Civil Appeal  
Case No. 18/2177 CoA/CIVA

**BETWEEN: MICHAEL LEIPER & WENDY MOSS**

Appellants

**AND: KARL KALSEV AND DAVID ALIKAU**  
**representative of Tassiriki Community**

Respondents

**Coram:** *Hon. Chief Justice Vincent Lunabek*  
*Hon. Justice John von Doussa*

**Counsel:** *Mr. Colin Leo for the Appellants*  
*Mr. Nigel Morrison for the Respondents*

**Date of Hearing:** *Monday 11<sup>th</sup> February 2019*

**Date of Judgment:** *Friday 22<sup>nd</sup> February 2019*

---

**JUDGMENT**

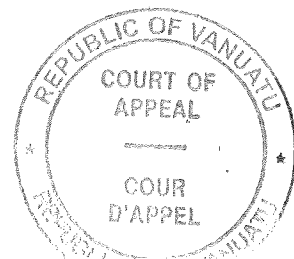
---

**Introduction**

1. This is an appeal against a judgment of the Supreme Court dated 19 July 2018 dismissing the Appellants' claim under a Purchase Agreement for a Rural Leasehold Title 12/0242/015 ("Lease 015") described as Lot 10 in Emotu (Moso) Subdivision, North Efate, on the basis that the said Purchase Agreement was unlawful and, thus, unenforceable.

**Background**

2. The Appellants are Australian investors and they live in Brisbane, Australia.
3. The Respondents are custom owners and representative of custom owners of various plots of land at Emotu (Moso) Subdivision, North Efate.



4. Plots of land at Emotu (Moso) Subdivision were advertised for sale and purchase to the investors via internet through facebook of First National Real Estate & Waterfront Real Estate since 2012.
5. The Appellants discovered the plots of land as advertised through agent, Eloise Viart of First National Real Estate & Waterfront Real Estate. On 29th July 2015, they entered into a sale and purchase agreement of Lot 6 Title 12/0242/011 ("Lease 011") with the Respondents.
6. The Respondents Karl Kalsev and David Alikau were custom owners and they are also representatives of custom owners registered as Lessors. The Respondent Karl Kalsev is the only authorised representative of the Tasiriki Community lessee. He signed the purchase agreement with the Appellants in respect to Lot 6 as the vendor (lessee). He was also consened to and signed the transfer of that lease on Lot 6 to the Appellants..
7. Relevantly, on 15 December 1999, the Tasiriki Council of chiefs together with the Tassiriki Community of Moso Island, North Efate, had approved that Respondent Karl Kalsev follow up with the Lands Department to register leases on their custom lands on their behalf. They further approved that Respondent Karl Kalsev represent the Tassiriki Community and sign all documents on behalf of the Tassiriki Community to obtain registration of the leases. This is revealed by the letter dated 25th April 2013 signed by Respondent Alikau David as paramount chief of Tassiriki Village and other chiefs of Moso Island exhibited at "KK1" to Karl Kalsev sworn statement filed on 5 November 2017.
8. It was on this basis that land leases on Emotu Subdivision, Moso Island, are registered and Lots created. Land lease 015 was registered on 25th August 2011 and Lot 10 was thereby created. It was a rural residential lease but not a rural commercial lease. Karl Kaltakau Maraata (the same person as Karl Kalsev) and David Alikau are Lessors and they both signed the lease 015 (Lot 10) as Lessors. The Tassiriki Community of Moso Island is the Lessee. Karl Kaltakau Maraata represents the Tassiriki Community as Lessee and signed the said lease 015 as Representative for Tassiriki Community. The same process was followed for the registration of the land leasehold title No. 12/244/016 ("Lease 016") creating Lot 11. However, Lots 10 and 11 were not



advertised for sale and had no price. They are left for usage that will benefit the Subdivision and the community.

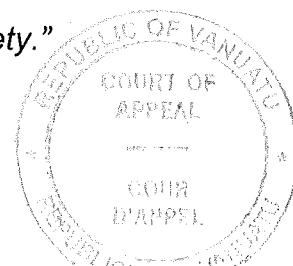
9. In or about early April 2017, the Appellants expressed their interests to buy another plot known as Lot 10 on the leasehold title No.12/0242/015 to establish a business. That plot is not commercial but a residential lease. On 6 April 2017 they met with one Tal Milfirer who assisted the Tassiriki Community to develop Emotu Subdivision and also acted as its agent to discuss the option to purchase Lot 10. He explained to them that Lot 10 is not available for sale for various reasons, among others, that it is used as a public access point and landing place for the Subdivision, the community and the visitors to the Island. Tal Milfirer offered them Lot 11 but they insisted on Lot 10 because they wanted to have access to the water. A survey was conducted to verify if Lot 11 has water access. The survey concluded Lot 11 has no water access. In May 2013, Respondent Karl Kalsev emailed the Appellants and made it clear to them that Lot 10 was not for sale, explaining inter alia that *"Initially when developing Emotu Subdivision on creating the Lots, I reserved Lot 10 as landing base for development at Embassy Bay.."* (see "KK2" attached to sworn statement of Karl Kalsev filed on 5 November 2017).
10. In or about May 2017, the Appellants and the Respondent David Alikau entered into two Purchase Agreements to purchase lease 015 and Lease 016 which are referred to as Lots 10 and 11. It is the second Rural Lease 015 (Lot 10) which is the subject of the claim and this appeal.
11. The Appellants effected a full payment for Lease 015 of VT2,500,000 being the amount stated in the Purchase Agreement in favour of the Tassiriki Community through Rambay and Associates as their agent on 03 May 2017. The evidence of payment is a receipt for Vatu 2,500,000 said to be paid to the Tassiriki Community through Rambay and Associates for Lot 10.
12. The Respondent Karl Kalsev as the only authorised representative of the Lessee, Tasiriki Community, refused to execute the transfer of the Rural Lease 015 and did not sign the Purchase Agreement for that Lot 10 either.



13. Despite the refusal of Karl Kalsev to consent to the transfer of lease 015 as the only authorised representative of the Tassiriki Community of Moso Island, Rambay and Associates or one Alick Kalsev within Rambay and Associates released the fund on 23 May 2017. Because money was released and could not be repaid back to the Appellants, the Respondent, Karl Kalsev, reluctantly executed the transfer of lease title 016 in Lot 11 out of good will to honour the difficult situation the Tassiriki Community was facing. He, however, maintained his refusal to execute the transfer of lease 015 in Lot 10.
14. The Appellants then filed their claim in the Supreme Court on 17th August 2017. They sought orders directing the Respondent Karl Kalsev to execute the transfer of the Lease 015 in favour of the Appellants and they also sought damages, interest and costs.
15. The Respondents denied the claim on the basis that they are custom owners of the Rural Lease 015. They denied there were sale and purchase agreements to purchase Lease 016 and Lease 015 on respective Lots 10 and 11. They said the Purchase Agreements were made between the Appellants and other entities but not between the Appellants and the Respondents. They denied receiving the purchase money of VT2,500,000. They said Lots 10 and 11 are not to be sold. However, they said Lot 11 was, in any event, transferred to the Appellants out of good will.

**Decision appealed from.**

16. In his judgement dated 16 July 2018, the primary judge identified and determined the issue which was whether or not there was any lawful sale and purchase agreement made between the Appellants and the Respondents in relation to lease title 015 on Lot 10.
17. The judge accepted the Respondents' arguments and submissions that there was no contract. He went on stating that *"But even if there was, it was with persons or entities who were not authorised to execute the contract.....the Claimants' remedy does not lie against the Defendants but other persons or entities who may be sued seperately..... The Claimants are therefore unsuccessful in their claims which are hereby dismissed in their entirety."*



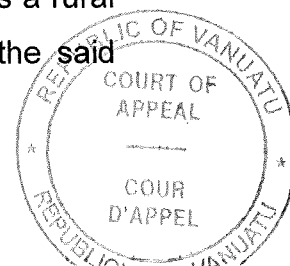
## Appeal

18. The Appellants advance their appeals on the following grounds:

1. That the judge erred in fact and law in failing to consider that the Respondent Karl Kalsev executed a transfer of Lease Title Number 12/0244/016 to the Appellant with the full knowledge that only David Alikau had signed the Agreement for sale and purchase for leasehold title number 12/0244/016.
2. That the judge erred in ruling that the amount of VT2, 500, 000 was paid to a wrong entity.
3. That the judge erred not to have ordered the refund of the money (VT2,500,000) to the Appellants.
4. That the judge erred in fact and law in failing to consider that when the Respondent received VT2,500,000 from the Appellants none of the Respondents complained or raised any objections about the sale and purchase agreement for the sale of lease title No. 12/0242/015 but they used up the Appellants money.
5. That the judge erred in fact and law in failing to give weight to David Alikau's evidence that he was only waiting for Karl Kalsev to sign but Karl Kalsev refused to sign the transfer of Lease Title No. 12/0242/015 to the Appellants.
6. That the judge failed to give weight to the evidence that Karl Kalsev requested of Mr. Leiper to re-finance his mortgage with the bank on condition that he signed the transfer documents.

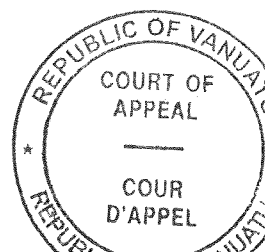
## Discussion

19. We consider all grounds of appeal together. We note that Lot 10 is created in the lease title 12/0242/015. It was registered on 25 August 2011. It was a rural residential lease but not a rural commercial lease as described in the ~~said~~



Purchase Agreement which is subject to the dispute between the parties. Karl Kalsev and David Alikau are registered Lessors. The Tassiriki Community of Moso Island is the registered Lessee. Karl Kalsev signed the lease 015 as Lessee on behalf of and representing the Tassiriki Community of Moso Island on the basis of the authority given to him by the council of chiefs and the Tassiriki Community of Moso Island on 15 December 1999 as reflected in the letter of 25 April 2013 (see KK1 – evidence of Karl Kalsev).

21. We also note that the Purchase Agreement for Lot 10, among other matters, wrongly described the vendor and it was never signed or initiated by the registered Lessee.
22. We further note that before any money was released by agent Rambay and Associates or one Alick Kalsev, the Appellants were advised that Lot 10 was not available for sale and they also knew that Karl Kalsev refused to sign the Purchase Agreement for Lot 10 and they further knew that Karl Kalsev refused to execute the lease transfer document in respect to that lease 015.
23. During the hearing, we invited Mr. Leo on behalf of the Appellants to show how the Purchase Agreement for Lot 10 is enforceable and whether the registered Lessors and Lessee had consented to it. Mr. Leo was unable to show this irrespective of the inadmissible material contained in the sworn statement of Harry Tele Rambay in “HTR 1” and “HTR2” filed on 13 June 2018.
24. We agree with the primary judge that there was never a legal enforceable contract. The agent should never have released any funds held for the appellants’ intended purchase of Lot 10. The agent ignored the terms of the proposed contract when he released those funds. He or they may be negligent. The Appellants may have an action available to them against the agent in negligence for any money they paid for Lot 10. In this case, the only evidence of payment is a receipt of vatu 2,500,000 which was said to be paid to the Tassiriki Community. There was no other evidence of other payments. It was apparent that the payment was not dealt with by the sales agent in accord with the terms of the Purchase Agreement. The Respondents denied receiving money intended for the purchase of Lot 10 by way of personal gain and there was no evidence to the contrary.



25. The primary judge was also correct that the Appellants' remedy does not lie against the Respondents but other persons or entities who may be sued separately.
26. What we say in [Paragraphs 20-25] above answers negatively each and all grounds of the appeal. Each and all grounds are accordingly dismissed as having no foundation.

### **Result**

27. The appeal is dismissed. The Respondents are entitled to their costs on the appeal assessed at vatu 80,000 against the Appellants and shall be paid by the Appellants to the Respondents within 21 days.

**DATED at Port Vila, this 22<sup>nd</sup> day of February, 2019.**

**BY THE COURT**



**Vincent Lunabek**

**Chief Justice**

