

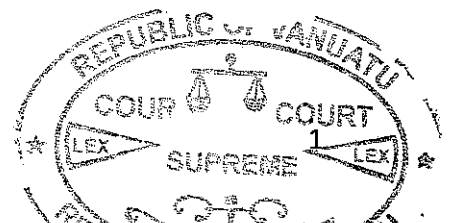
IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case
No. 21/3042 SC/CIVL

- BETWEEN:** **Karl Kaltakau Mar'aata Kalsev** as
authorized representative of Tassiriki
Community of Moso Island, North Efate in
the Republic of Vanuatu
First Claimant
- AND:** **Karl Kaltakau Mar'aata Kalsev and
David Alikau** of Moso Island, North Efate
in the Republic of Vanuatu
Second Claimant
- AND:** **Esther & K. Markson Murumo**
First Defendants
- AND:** **Harry Tele Rambay trading as Rambay
& Associates**
Second Defendant
- AND:** **Director of Lands Department for the
Republic of Vanuatu**
Third Defendant

Date: 9 October 2023
Before: Justice V.M. Trief
Counsel: Claimants – Mr N. Morrison
First Defendants – Mr J. Tari
Second Defendant – Mr J.I. Kilu
Third Defendant – Mr L. Huri & Mr J. Wells

**JUDGMENT AND DECISION AS TO QUANTUM OF DAMAGES SOUGHT AGAINST
SECOND DEFENDANT**

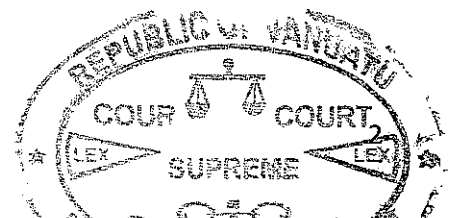


A. Introduction

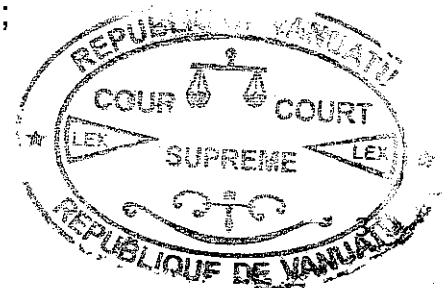
1. This was a Claim in which it was alleged that the transfer of a lease to the First Defendants Esther and K. Markson Murumo was obtained by fraud or mistake.
2. The Second Defendant Harry Tele Rambay trading as Rambay & Associates ('Mr Rambay') provided real estate agency services in respect of the transfer of lease. He did not file a defence. On 12 July 2022, default judgment was entered against him for an amount to be determined.
3. This matter proceeded by way of written submissions as to quantum of damages sought against Mr Rambay, and to trial between the Claimants and Mr and Mrs Murumo.
4. The Third Defendant State was excused from the trial and will abide the orders of the Court.
5. This is the decision.

B. Pleadings

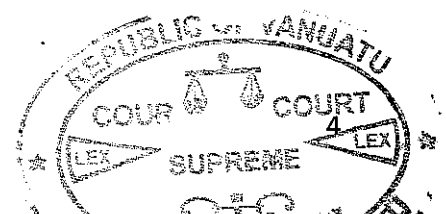
6. The First Claimant Karl Kaltakau Mar'aata Kalsev ('Karl Kalsev') as authorised representative of the Tassiriki Community of Moso Island, North Efate and the Second Claimants Karl Kalsev and David Alikau alleged the following in the Claim:
 - a) That on 15 February 2012, lease title no. 12/0244/009 on Moso island between the Second Claimants (lessors) and the First Claimant (lessee) was registered (the 'lease');
 - b) Subsequently, Mr Rambay prepared the sale and purchase agreement between the First Claimant and the First Defendants Mr and Mrs Murumo in respect of the lease (the 'S&P Agreement') and purported to act for Mr and Mrs Murumo;
 - c) That on 20 December 2016, a transfer of the lease to Mr and Mrs Murumo was registered consequent upon the S&P Agreement;
 - d) That there were numerous breaches of and irregularities within the S&P Agreement including the following:
 - i) The person claiming to represent the Vendor/First Claimant was never appointed or given consent to represent the Vendor. No power of appointment was attached to the S&P Agreement;
 - ii) Mr Rambay/Rambay & Associates falsely claimed in the S&P Agreement that they were "Vendor's agent property manager" whereas there was never any such authority;



- iii) Mr and Mrs Murumo failed to pay the balance of the purchase price as stipulated in the S&P Agreement;
 - iv) Despite demand, Mr and Mrs Murumo have failed to pay the balance of the purchase price and refused the Claimants' efforts to resolve the matter out of Court;
 - v) Interest for late payment as stipulated in the S&P Agreement was never paid;
 - vi) Mr Rambay did not hold in trust funds paid under the Agreement and funds were not paid to the Vendor as required by the Agreement;
 - vii) In the S&P Agreement, the witness' name is missing; and
 - viii) The pages of the S&P Agreement are not initialled by any of the parties to the Agreement; and
- e) That Mr and Mrs Murumo and Mr Rambay committed fraud and mistake as follows:
- i) The First Claimant never appointed anyone to sign on his behalf nor did he sign the S&P Agreement as the Vendor. The person that claims to have signed on the Vendor's behalf was an employee of Rambay & Associates and had no authority to sign on behalf of the Vendor;
 - ii) The lessor benefit receipts (referred to as "Unimproved Value to Landowners") for 4 titles (including title 12/0244/009) dated 22 July 2016 is different from the receipt on file at Land Department records dated 20 December 2016 for title 12/0244/009 only;
 - iii) The signatures of Karl Kalsev as lessor are different on each lessor benefit receipt and specifically different from his signatures on the original lease and Mr Karl Kalsev denies signing any of these receipts;
 - iv) The lessor benefit receipts were not signed by the second lessor Mr David Alikau (being the Second Claimant in these proceedings);
 - v) The Second Claimants, the lessors, never received the lessor benefit payment;
 - vi) Mr Karl Kalsev, one of the two lessors and the Second Claimant, denies ever signing the consent to transfer;
 - vii) Mr David Alikau, being one of the two lessors and the Second Claimant was fraudulently convinced by Mr Rambay and/or his employees to sign the Consent to Transfer on the false assumption that the other lessor, Mr Karl Kalsev, already signed it before him;



- viii) The lessor benefit receipt is fraudulently calculated on consideration value of VT1,000,000 while the S&P Agreement is for VT3,000,000 depriving the lessors of VT200,000 in lessor benefit;
 - ix) The consideration value fraudulently declared on the consent to transfer and on the transfer of lease to the Vanuatu Financial Services Commission ('VFSC') and the Lands Department is VT1,000,000 while the S&P Agreement is for consideration of VT3,000,000, consequently, depriving the Government of Vanuatu of VT140,000 in stamp duty and registration fees;
 - x) The signature of the person claiming to represent Karl Kalsev (Alick Kalsev or Alick Kalsef) is different in all appearances (twice as witness on the transfer of lease, once on the S&P Agreement, on the WoC, etc);
 - xi) The transferor of the lease (the First Claimant) did not initial the First and Second Schedule of the transfer of lease document;
 - xii) The First and Second Claimants claim that they never appeared before the witness Commissioner of Oaths Eric Amos to sign the consent to transfer or the transfer of lease or any other document;
 - xiii) The First Claimant denies signing the transfer of lease and claims that his signature was forged by Rambay & Associates or its employees; and
 - xiv) The consent to transfer, the transfer of lease, the witnessing by the Commissioner of Oaths, the stamp duty and the registration of the lease are all purported to be signed and executed on 20 December 2016, mere days before Christmas.
7. The relief sought included an order declaring that the S&P Agreement is null and void, that Mr Rambay pay VT1,000,000 (supposedly held in trust until completion) to the First Defendants as liquidated damages, an order declaring the lessor benefit receipts, consent to transfer and transfer of lease were all signed in a fraudulent or mistaken manner and are null and void, and orders cancelling the registration of the transfer of lease to the First Defendants and reinstating the First Claimant as lessee of the lease, and costs.
8. The Claim is opposed by Mr and Mrs Murumo. In their Defence, they admitted that Mr Rambay prepared the S&P Agreement but not as their agent but as the Claimants' agent. They admitted that the transfer of lease to them was registered on 20 December 2016 consequent upon the S&P Agreement. They pleaded that they do not know (and presumably do not admit) the alleged breaches of and irregularities within the S&P Agreement, and that the balance due is with their bank to be released when the Claimants sort out their differences. They also denied fraud and mistake alleged as all the documents were prepared by Mr Rambay and that they are *bona fide* purchasers of the land for value and are protected by subs. 100(2) of the *Land Leases Act* [CAP. 163] (the 'Act').



C. The Law

9. Section 100 of the Act provides as follows:

100. (1) Subject to subsection (2) the Court may order rectification of the register by directing that any registration be cancelled or amended where it is so empowered by this Act or where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake.
- (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the interest for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.

10. Paragraph 109(2)(a) of the Act provides as follows:

109. (2) Any person who –

- (a) fraudulently issues or makes or fraudulently procures the issue or making of any document relating to a registered interest in land or any registration, or any erasure or alteration in any document as aforesaid or in any register; or

...

shall be guilty of an offence and shall be liable on conviction for a term of imprisonment not exceeding 3 years or to a fine not exceeding VT 300,000 or to both.

(my emphasis)

11. Sections 11 and 47 of the *Stamp Duties Act* [CAP. 68] provide as follows:

11. Every person who with intent to defraud the revenue –

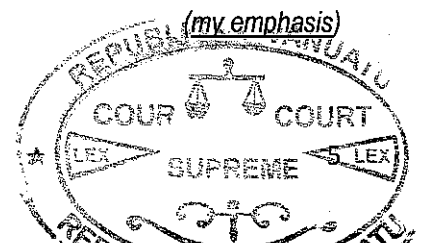
- (a) executes any instrument in which all the said facts and circumstances are not fully and truly set forth; or
- (b) being employed or concerned in or about the preparation of any instrument neglects or omits fully and truly to set forth therein all the said facts and circumstances;

shall, in addition to his liability for the amount of duty short-paid by reason of any such fraudulent act as aforesaid, commit an offence punishable upon conviction by a fine not exceeding VT30,000 or by imprisonment for a term not exceeding 6 months, or by both such fine and imprisonment.

...

47. Every person who wilfully and fraudulently evades or conspires to evade, or assists another person to evade, payment of duty to which any instrument is liable under this Act shall commit an offence punishable upon conviction by a fine not exceeding VT 300,000 or imprisonment for a term not exceeding 2 years, or by both such fine and imprisonment.

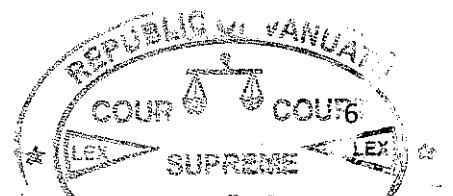
(my emphasis)



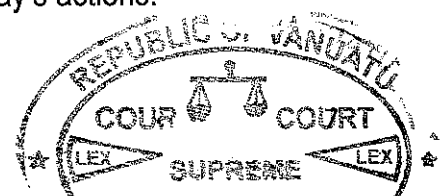
D. Evidence as to quantum of damages sought against the Second Defendant

12. Karl Kaltakau Mar'aata Kalsev deposed in his Sworn statement filed on 10 October 2022 [Exhibit C2] that:

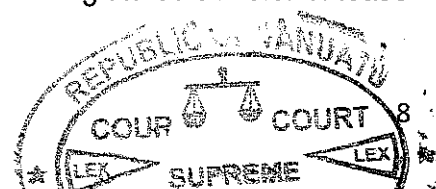
- a) The community appointed him alone and he signed the subdivision leases on creation, including lease title no. 12/0244/009 (in respect of lot 22), as lessee on behalf of the community;
- b) Since 2017 when they found out that the lease was fraudulently transferred until late 2021 when they filed this Court case, they tried in person, by emails and by proxies to settle the issue with Mr and Mrs Murumo in good faith. They offered to pay the balance of the purchase price or to return the lease and their money plus VT500,000 refunded to them. They declined all efforts therefore leaving them with no choice but to file these proceedings;
- c) They, the lessors, depend on the land rent from the subdivision for their livelihood and cannot afford not being paid for the sale of the lease, not being paid consent fees and lessors' benefit and not being paid the annual rent;
- d) The purchaser failed to comply with the conditions of the lease to keep the land clear and free of weed so as part of general subdivision maintenance, they had to get the lease cleaned at the lessees' cost. Tommy Kalsev collected funds for clearing the plot, but not on the lessors' behalf;
- e) Alick came to his (Karl Kalsev's) house to sign the consent and transfer of lease. He refused;
- f) Chief Alikau needed to sign the consent of transfer only as one of the two lessors. He (Karl Kalsev) was signing as the second lessor and as lessee on behalf of the community. He learnt later that Chief Alikau signed the consent only because he believed Alick who told him that Karl Kalsev had already signed it;
- g) He (Karl Kalsev) never signed the consent to transfer. His signature was forged;
- h) His signature was also forged on the transfer of lease document and Chief Alikau's signature is not there at all;
- i) They never sign and provide the purchaser original consent to transfer and transfer to lease when the purchasers use the option of vendor finance. They deliver the originals of the signed documents only on completion once the agreement is unconditional and has been paid in full;
- j) Mr Rambay was meant to hold the deposit in trust until the contract was unconditional or cancelled. As trustee for the transaction, he had no right to disburse any funds or to action the transfer of lease until full payment was received;



- k) It is very unusual that agreement, consent to transfer, transfer of lease, stamp duty and registration of lease were all executed on the same day an especially 3 days before the long Christmas weekend of 2016. It seems Alick managed to accomplish a lot on that 20 December 2016;
 - l) It is very unusual that deposit payment was only made after all the documents had been executed and the lease had already been registered to the purchaser. Usually deposit payment takes place first, then the contract becomes unconditional and the balance of the purchase price is paid at settlement when the original consent and transfer of lease are provided to the purchaser. He/she then continues with registration to his name at his own expense;
 - m) He denied that he was ever in Mr Rambay's office together with Chief Alikau;
 - n) He denied that he ever collected any money for lot 22 from Mr Rambay with or without Chief Alikau;
 - o) He denied receiving payments from Mr Rambay. Cost of transfer of lease is for the purchaser therefore it should not be deducted from the vendor's money; and
 - p) The S&P Agreement had a sale price of VT3,000,000 but the Defendants declared to VFSC and the Lands Department consideration value of VT1,000,000 only. He (Karl Kalsev) would never have signed a fraudulent document like that. If the consent and transfer of lease reflect a different price from the agreed purchase price, and the transfer of lease is registered based on an understatement of the consideration, that is a fraudulent action.
13. The other sworn statements relied on were not formally tendered at a hearing or at trial but having been filed and served, were evidence in this matter pursuant to rule 11.7(1) of the *Civil Procedure Rules*.
14. **David Alikau** deposed in his Sworn statement filed on 10 October 2022 that:
- a) He agreed with Mr Kalsev's sworn statement;
 - b) Following the unfortunate turn of events and Mr Rambay's fraudulent actions, he had no alternative but to borrow funds from Tal Milfirer to meet their financial commitments;
 - c) Mr Milfirer gave him friendly loans at 6% interest per annum (accumulated) with no monthly payments. The loan is due to be paid from the proceeds of sale of lot 22;
 - d) His current balance owed to Mr Milfirer is VT1,500,000 principal plus VT523,275 accumulated interest; and
 - e) He suffered damage of VT532,275 due to Mr Rambay's actions.



15. **Harry Tele Rambay** deposed in his Sworn statement filed on 18 October 2022 that:
- a) On or about 7 December 2016, Alick Kalsev, a close family member (nephew) of Chief Karl Kalsev and Chief David Alikau of Tassiriki Village, Moso Island approached his office and stated that he was the sales representative of the community and was acting as representative of Chief Karl Kalsev and Chief David Alikau;
 - b) That Alick Kalsev was living with Chief Karl Kalsev at Fresh Wota in Vila, and was acting as his representative and conveying specific instructions from Chief Karl daily;
 - c) Alick Kalsev also told him that the two chiefs wished to sell a leasehold title within the Emotu Bay subdivision on Moso island and were seeking Rambay & Associates' assistance in handling the sale documentation and processes namely the preparation of the sale contract, the consent to transfer and the transfer of lease documents;
 - d) Further, that Chief Karl Kalsev and Chief David Alikau specifically wanted them to conclude the sale quickly as they had urgent need for funds from the sale;
 - e) He (Mr Rambay) agreed and requested Alick Kalsev to provide the particulars of sale so that they could prepare the required documentation;
 - f) Alick Kalsev told him that he had negotiated with Mr and Mrs Murumo to buy the property for VT3,000,000 with a deposit of VT1,000,000;
 - g) He (Mr Rambay) spoke with Mrs Murumo who is personally known to him and she confirmed her interest and consent to the sale conditions;
 - h) They provided the S&P Agreement to Mrs Murumo to review. On 7 December 2016, she and her husband signed it and paid the deposit to Rambay & Associates. In the meantime, Rambay & Associates prepared the consent to transfer and transfer of lease documents;
 - i) Also on 7 December 2016, Alick Kalsev obtained the documents from his office to arrange for Chief Karl Kalsev and Chief Alikau to execute the documents. They did and then Alick returned the documents to his office with a request to release the deposit monies to them immediately;
 - j) He advised the Chiefs through Alick Kalsev that the deposit would only be released on condition that they proceed with complete registration of title and the balance of the purchase price would be released to them once the NBV released Mrs Murumo's loan for the full purchase. The Chiefs agreed;
 - k) They then lodged the application for registration of transfer of lease with the Department of Lands and on 20 December 2016, the transfer of lease was registered [copy of transfer of lease attached as **Annexure "THR1"**]. The stated consideration for the transfer shown on the registered transfer of lease is VT1,000,000;



- l) On 22 December 2016, Alick Kalsev brought both Chiefs to their office, requesting the release of VT1,000,000. He agreed and released the funds as follows:
- i) To Chief Karl Kalsev and Chief Alikau VT550,000;
 - ii) To Tassiriki Community VT200,000;
 - iii) Transfer Registration & commissions VT250,000;
 - iv) TOTAL **VT1,000,000**; and
- m) Attached as **Annexure "THR2"** was stated to be a true copy of the payment records. This shows the division of the VT1,000,000 as follows:
- i) To Chief Karl Kalsev and Chief Alikau VT550,000;
 - ii) Rambay – Management Commission VT250,000;
 - iii) Refund of costs to Rambay VT200,000;
 - iv) TOTAL **VT1,000,000**; and
- n) Mrs Murumo later advised his office that the NBV had approved her personal land loan and that funds would be paid to the proprietors of the lease as soon as all bank conditions were met. He told Alick Kalsev so that he would advise both Chiefs.

16. **Mr Rambay** deposed in his Sworn statement filed on 4 November 2022 that:

- a) The price of VT3,000,000 for lot 22 was agreed to by both Chiefs, as negotiated between themselves and Alick Kalsev. On that basis, the sale document was prepared and signed by the parties under their direction;
- b) It is completely untrue that the two Chiefs did not know the sale and transfer of lot 22 as they personally negotiated and executed the transfer papers and personally benefited from the monies. Rambay & Associates were only facilitating the documentation and registration of the lease transfer on their behalf at their request; and
- c) He denied fraudulent action on his part and did not agree that the Claimants suffered loss and damages.

E. Evidence at trial

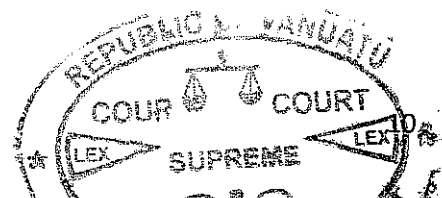
17. The standard of proof that the Claimants were required to establish to succeed on the Claim was "on the balance of probabilities." That is, that their assertions were more likely than not to be correct. There was no onus on the Defendants to establish facts or their non-liability.
18. The evidence had to be analysed to ascertain what was accepted and what was not.



19. I assessed the credibility and accuracy of a witness' evidence not only by how the witness appeared in Court but more significantly, by the consistency of accounts. I looked firstly for consistency within a witness' account. Secondly, I looked for consistency when comparing that account with the accounts of other witnesses, and then, when comparing the account of a witness with relevant exhibits.
20. I also had regard to the inherent likelihood of the situation then prevailing.
21. I reminded myself that if I were to draw inferences, they could not be guesses or speculation but had to be logical conclusions drawn from other properly established facts.
22. I now set out my summary of the relevant evidence of each witness, and my assessment of what weight should be given to that particular evidence.

The Claimants' Witnesses

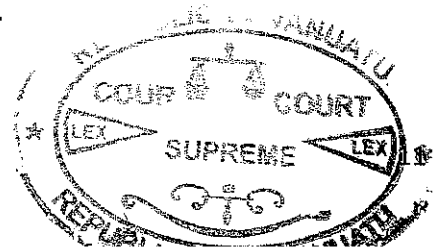
23. **Mr Karl Kaltakau Mar'aata Kalsev** relied on his Sworn statement filed on 14 February 2022 [Exhibit C1] in which he deposed that the subject lease was part of a subdivision that was a joint venture between Mr Milfirer and the Claimants. Normally Mr Milfirer prepared all the documentation required but that was not done in this case. Before the transfer of the lease, he never met or discussed the sale with the Defendants, and never appointed Mr Rambay as the Claimants' agent. He never signed or initialled the S&P Agreement and never saw it until after the transfer of lease. He would not have signed the S&P Agreement as it provided for VT3,000,000 sale price but the price for this lot was VT5,950,000. He also never signed the consent to transfer, the lease transfer or the lessors' benefit receipt; all the signatures alleged to be his were forged by Mr Rambay and/or his employees. All those signatures also look different from his actual signatures as they appear on the registered copy of the lease [**Annexure "KK5", Exhibit C1**]. He also never received any payment from the lease transfer including the deposit, balance of purchase price or lessors' benefit.
24. He also deposed that they tried to resolve the matter out of Court with Mr and Mrs Murumo but they refused all efforts. They refused to pay the balance of the purchase price unless they were provided with a 'green certificate' as stated in their lawyer Mr Tari's letter dated 4 May 2018 [copy attached as **Annexure "KK4"**].
25. Mr Kalsev deposed that he never gave permission to Alick Kalsef (Alick Kalsev) to act on his behalf and to execute any document under his name. Alick was employed by Mr Rambay. Alick not only forged his signature on the transfer of lease but also signed that he witnessed him (Karl Kalsev) signing it. He never appeared before Commissioner of Oaths Eric Amos to sign either the consent to transfer or the lease transfer.



26. Mr Kalsev also relied on his Sworn statement filed on 10 October 2022 [Exhibit C2] – see summary set out above.
27. In cross-examination, Mr Kalsev agreed that he did not sign the S&P Agreement nor the lease transfer. He agreed that he knows Mr Rambay and that Mr Rambay prepared those documents. He denied appointing Mr Rambay to prepare the documents. He agreed that after the lease transfer was registered, that he collected annual land rent of VT10,000 from Mrs Murumo for 2019-2021 and that he had not yet collected the 2022 land rent. He denied signing the S&P Agreement and stated that he collected land rent as the lease was in Mr and Mrs Murumo's name and they must pay land rent. He recalled that Alick brought the lease transfer to him to sign but he (Karl Kalsev) refused to sign it.
28. In re-examination, Mr Kalsev stated that he did not authorise anyone to sign the documents on his behalf. The signature on the lease transfer is not his. He knows Commissioner of Oaths Eric Amos but he never signed the lease transfer in front of Mr Amos.
29. Mr Karl Kalsev's account remained unchanged in cross-examination. It is consistent with that of Mr Alikau. I consider that he was a reliable and accurate witness, and accepted his evidence.
30. **Mr Alikau's** Sworn statement filed on 14 February 2022 [Exhibit C3] was tendered by consent. He deposed that he was fraudulently convinced by Mr Rambay and his employees to sign the consent to transfer on the false assumption that Mr Karl Kalsev had already previously signed it. He later learned that the signatures of Mr Karl Kalsev were forged. He never received lessors' benefit or signed receipt for that. The actual price of this lot was VT5,950,000 which increases the shortfall in lessors' benefit. He never appeared before Commissioner of Oaths Eric Amos to sign the consent to transfer or any document. He never appointed Mr Rambay as agent for the Claimants.
31. I accepted Mr Alikau's evidence as there was no challenge to it.

The First Defendants' Witnesses

32. **Esther Murumo** relied on her Sworn statement filed on 26 September 2022 [Exhibit D1] to which she attached a copy of the S&P Agreement which both she and her husband signed [**Annexure "EM1"**]. She and her husband had heard about the subdivision on Moso, visited there one Sunday and chose lot 22. They agreed to the VT3,000,000 purchase price and signed the S&P Agreement then the transfer of lease. After that, they paid the VT1,000,000 deposit to Mr Rambay's bank account at BSP. They have not paid the balance of VT2,000,000 as they are still waiting to be advised the trust account to make payment into.



33. They have paid land rent for 2017-2021 to Mr Karl Kalsev, each time collected from her. Mr Kalsev changed his signature on the receipts for those payments. In 2021, Mr Karl Kalsev arranged cleaning of the plot without their consent then came after them for payment of VT30,000 for that. They paid that, collected by Tommy Kalsev.
34. In cross-examination, Mrs Murumo agreed that Mr Rambay prepared the S&P Agreement and called her and her husband to his office to sign the document. He was there and watched when they signed it although he did not sign it himself. She was shown a document that she confirmed as the "Transfer of lease" that she and her husband signed [**Exhibit C4**]. She agreed that the consideration for the transfer stated in the transfer of lease is VT1,000,000. She confirmed that Alick Kalsev witnessed their signatures and was there when they signed. She stated that Eric Amos, Commissioner of Oaths was not there and they understood from Mr Rambay that Mr Amos would complete his part afterwards.
35. Mrs Murumo was shown a document which she confirmed as the "Consent" to the transfer of lease to her and her husband [**Exhibit C5**]. She agreed that the value of the transfer stated in that document is also VT1,000,000. She agreed that the purchase price for the land stated in the S&P Agreement was VT3,000,000.
36. In re-examination, Mrs Murumo stated that they had not yet paid the VT2,000,000 balance of the purchase price as no trust account details had been provided to them. Mr Kalsev had provided his private bank account details but she said no, she would prefer to see a community trust account for them to pay the balance into.
37. Mrs Murumo's evidence supported the Claimants' case in that the S&P Agreement, which was prepared by Mr Rambay, led to the registered transfer of the lease to her and her husband, and that the S&P Agreement provided for a VT3,000,000 purchase price whereas the lease transfer and consent documents stated transfer consideration of VT1,000,000, and that the lease transfer has been registered even though they have not yet paid the VT2,000,000 balance of the purchase price. In addition, that Mr and Mrs Murumo signed the S&P Agreement then the transfer of lease and only after that paid the VT1,000,000 deposit to Mr Rambay's bank account. I consider that Mrs Murumo was truthful in what she related to the Court however that evidence entirely supported the Claimants' case rather than her and her husband's own case.
38. **Alick Kalsev** relied on his Sworn statement filed on 26 September 2022 [**Exhibit D2**]. He deposed that he was authorised by his fathers, including Karl Kalsev, and the community to work on their subdivision sales. In December 2016, he was living with Karl Kalsev at Fresh Wota area and told Karl Kalsev about the interest to buy the lease for VT3,000,000. Both Karl Kalsev and Mr Alikau agreed to the sale and asked him to ask Mr Rambay to prepare the sale documents, which he did.
39. Alick Kalsev deposed that on 20 December 2016, Mr Karl Kalsev signed the consent to transfer and the transfer of lease in front of him at Karl Kalsev's house at Fresh Wota. On the same day, Mr Alikau signed those documents in front of him at the

Sebel Hotel. They both asked for the deposit to be paid to them immediately. When he relayed this to Mr Rambay, Mr Rambay said in that case the lease must be registered first before he can release the deposit to them. Karl Kalsev and Mr Alikau agreed so he (Alick Kalsev) followed up on the registration and the transfer of lease was registered on 20 December 2016. On 21 December 2016, Mr and Mrs Murumo paid the VT1,000,000 deposit to Mr Rambay's bank account.

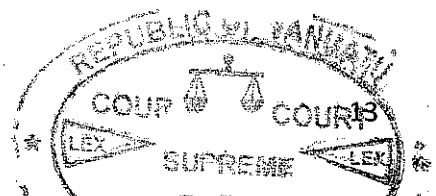
40. On 22 December 2016, he took Karl Kalsev and Mr Alikau to Mr Rambay's office and witnessed Mr Rambay giving the deposit monies to them as follows:

- Karl Kalsev and David Alikau VT550,000;
- Tassiriki Community VT200,000; and
- Transfer registration & costs & fees VT250,000
- TOTAL **VT1,000,000**

41. In cross-examination, Mr Kalsev agreed that "boss Harry Rambay" prepared most documents. He agreed that he had seen the Consent to transfer document [**Exhibit C5**] before. He disagreed with Mr Alikau's evidence that Mr Alikau signed the consent to transfer after seeing that Karl Kalsev had already signed it; he stated that Mr Alikau signed it first then he took it to Karl Kalsev. He denied signing it for Karl Kalsev. He also disagreed with Karl Kalsev's evidence that he (Karl Kalsev) never signed the consent to transfer. He said that he took it to Karl Kalsev who was sick, he called him, Karl Kalsev stood up and signed it.

42. Mr Kalsev agreed that he had seen the transfer to lease document [**Exhibit C4**] before. He agreed that in his sworn statement, he said that he took it to Karl Kalsev who signed it then to Mr Alikau who signed it. It was put to him that Mr Alikau did not sign that document. He said, no, he signed it at my office! It was put to him that only Karl Kalsev as the lessee was to sign that document. He agreed. He agreed that his sworn statement was not correct where he said that Mr Alikau signed the transfer of lease. He stated that he gave the document also to Mr Alikau but only Karl Kalsev was to sign it.

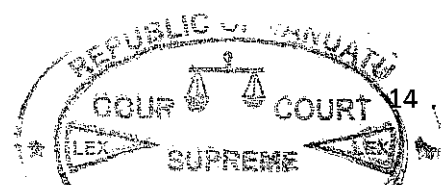
43. Mr Kalsev agreed that the S&P Agreement provided for VT3,000,000 purchase price [**Annexure "EM1", Exhibit D1**] but the consent and lease transfer provided for VT1,000,000 consideration value. On page 7 of the S&P Agreement, below Mr and Mrs Murumo's signatures was a circle-like signature next to Mr Karl Kalsev's name "Represented by Alick Kalsef". He was asked who did that circle-like signature as Karl Kalsev's evidence was that he did not. Mr Kalsev said he could not remember who did that one. It was put to him that he did it. He disagreed. The words, "Represented by Alick Kalsef" were pointed out to him and he was asked if he represented Karl Kalsev. He said he did not. There was also a signature on the bottom of page 7 of the "Witness". Mr Kalsev said he could not remember who signed as witness.



44. Finally, Mr Kalsev agreed that he organised for Mr Amos to sign the consent document. It had already been signed then he passed it to Mr Amos to sign and stamp it as Mr Amos knew them well.
45. In re-examination, Mr Kalsev stated that he worked on the sale of this lot with Mr Milfirer, Karl Kalsev and Mr Alikau's agreement. He was asked to explain the purchase price and how only VT1,000,000 was in the registered documents and the process for payment of the balance. He replied that Mr and Mrs Murumo paid the VT1,000,000 and signed the documents but this was just the deposit and they are still to pay the balance to them.
46. Mr Alick Kalsev's evidence was not credible. He conceded in cross-examination that he lied in his sworn statement that Mr Alikau signed the transfer of lease in front of him at the Sebel Hotel. He eventually agreed that only Karl Kalsev as lessee was to sign that document. He denied that he represented Karl Kalsev as stated in the words, "Karl Kaltakau Mar'aata Represented by Alick Kalsef" in the S&P Agreement however that was inconsistent with the rest of his evidence and with Mr Rambay's evidence which was that he was authorised by Karl Kalsev and others to work on this land sale and made numerous representations to Mr Rambay on Karl Kalsev's and their behalf. What is more inherently likely and more likely than not to be correct, and consistent with the Claimants' accounts, is that he (Alick Kalsev) represented himself, including to Mr Rambay, as authorised by Karl Kalsev but he was not so authorised. I also do not believe that he was being truthful in stating that he did not remember who signed the S&P Agreement next to Mr Karl Kalsev's name "Represented by Alick Kalsef" or who signed as "Witness". It was also dishonest on his and the Commissioner of Oaths Eric Amos' part to have Mr Amos complete his part on the consent and transfer documents after the signatories had signed when the Act requires and the documents set out that the signatories sign "in the presence of" the Commissioner for Oaths as witness. For these reasons, I considered that Alick Kalsev's evidence lacked credibility and that I could not accept him as a witness of truth.

F. Submissions as to quantum of damages sought against the Second Defendant

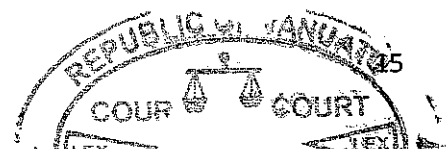
47. Mr Morrison submitted that due to the unlawful sale of the subject lot by Mr Rambay and his failure to account to them, the Claimants borrowed funds on 1 December 2017 for personal expenses. The loan principal of VT1,500,000 will be repaid from the proceeds of sale of lot 22 therefore they claim only for interest on the money borrowed being VT697,700 for Karl Kalsev and VT523,275 for Mr Alikau, totalling VT1,220,975 plus interest and costs. He submitted that this was a foreseeable loss flowing from Mr Rambay's unauthorized sale and failure to account.
48. Mr Kilu submitted that the Court should not assess any damages against Mr Rambay unless it had first found the transfer of sale to have been obtained unlawfully. Further, that the transfer and sale was proper and therefore Mr Rambay is not liable for any damages.



49. Mr Kilu also submitted that the loans taken by the Claimants are both personal matters strictly between them and Mr Milfirer. He submitted that there was no agreement between the Claimants and Mr Rambay connecting the sale and transfer of lease to the Claimants' loans and there is no agreement that the funds from the sale of the landowners' land would be used to repay their respective personal loans. Further, that the sale was approved in order to secure funds for the Claimants for their Christmas season, not to refund the Claimants' personal loans. There is also no evidence of an agreement between the Claimants and the landowners that the proceeds of land sale would go towards repayments of the two Claimants' personal loans.
50. Finally, Mr Kilu submitted that Mr Rambay should be permitted to take part in the trial to defend his own action in the conduct of the sale. This submission was made by written submissions dated 27 January 2023. As default judgment had already been entered against Mr Rambay, there was nothing for him to defend at trial. Further, the submission was futile given it was made months after the trial had been held, which Mr Kilu knew the date of as he was present in Court on 18 October 2022 when the trial date was set (28 October 2022).

G. Submissions after trial

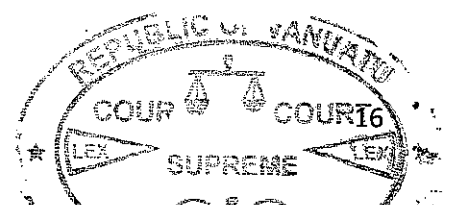
51. The Claimants' closing submissions were filed on 7 November 2022. Mr Morrison submitted that there was never any validly executed S&P Agreement and therefore there was never a legally enforceable contract. He also submitted that the grossly understated transfer value (a third of the purchase price) stated on the consent and lease transfer breached ss 11 and 47 of the *Stamp Duties Act* and subs. 109(2) of the Act and denied the Government lawful revenue. He submitted that the registration of the lease transfer was obtained by fraud or mistake, citing *Monvoisin v Mormor* [2019] VUCA 6. He submitted that the relief sought should be granted.
52. By the First Defendants' submissions filed on 14 November 2022, Mr Tari submitted that his clients are *bona fide* purchasers for value. He submitted that it was a question for the Court whose evidence to rely on – Karl Kalsev's evidence that he did not sign the lease transfer or Alick Kalsev's evidence that he took the transfer document to Karl Kalsev's house and the latter signed it. He urged the Court to rely on Alick Kalsev's evidence rather than on Karl Kalsev's.
53. Mr Tari also submitted that subs. 100(2) of the Act required Mr and Mrs Murumo to be part of the fraud or have knowledge of the fraud. However, there was no evidence of knowledge from Mrs Murumo's evidence. He invited the Court to dismiss the Claim.
54. In the Claimants' reply submissions filed on 22 November 2022, Mr Morrison submitted that with respect, Mr and Mrs Murumo were an integral part of the fraud/mistake as they signed the transfer of lease when they knew the correct transfer price from the S&P Agreement. They then submitted that false transfer and



false consent for stamping and registering and paid Mr Rambay for that task to be completed. On Mrs Murumo's own evidence, she and her husband "substantially contributed" to the fraud/mistake: *Orah v Butlin* [2020] VUCA 30.

H. Consideration

55. The Claim principally seeks cancellation of the transfer of the lease to Mr and Mrs Murumo.
56. The Claimants as lessors and lessee of the (original) lease variously deny signatures on the S&P Agreement, on the consent to transfer and on the transfer of the lease.
57. On Mrs Murumo's own evidence, the S&P Agreement, which was prepared by Mr Rambay, led to the registered transfer of the lease to her and her husband.
58. The S&P Agreement provided as follows:
 - Vendor – Karl Kaltakau Mar'aata (First Claimant/Karl Kalsev);
 - Purchaser – Markson and Esther Murumo (First Defendants);
 - Purchase price – VT3,000,000;
 - Deposit to be paid – VT1,000,000;
 - Clause 2 – The deposit shall be paid to Rambay & Associates who shall hold it as stakeholder until the contract becomes unconditional or is avoided or cancelled;
 - Clause 6(5) – Upon payment of the balance of the purchase price, the Vendor shall concurrently hand to the Purchaser a registerable transfer of lease (in triplicate); and
 - Clauses 6(7) – Purchaser responsible for stamping and registering transfer after sale.
59. The execution clause contains the recognised signatures of Mr and Mrs Murumo.
60. The S&P Agreement contained two other signatures. There was a circle-like signature next to where Karl Kalsev as vendor should sign. He was adamant that he did not sign the S&P Agreement. There was another signature of the "Witness". Alick Kalsev was present for the signing of the S&P Agreement but could not recall whose were the circle-like and "Witness" signatures. He said it was not him. He was given time but did not identify who did the two unidentified signatures.
61. In both the execution clause and in the S&P Agreement heading, Alick Kalsev was recorded as "Representing" Karl Kalsev. Karl Kalsev denied giving any such authority to Alick Kalsev.



62. Given my analysis above of what evidence was accepted and what was not, I accept as proved by Karl Kalsev's evidence that he did not sign the S&P Agreement.
63. Karl Kalsev also denied giving any authority to Alick Kalsev to "represent" him in the S&P Agreement. There was no evidence or known authority otherwise for Alick Kalsev to represent Karl Kalsev other than Alick Kalsev's own assertion. Accordingly, I also accept as proved through Karl Kalsev's evidence that he did not give any authority to Alick Kalsev to represent him in the S&P Agreement.
64. In the circumstances, the S&P Agreement was not validly executed as it was never signed by the Vendor Karl Kalsev and therefore there was never any legally enforceable contract.
65. The transfer of lease document [**Exhibit C4**] provided as follows:
- The consideration for the transfer is stated as VT1,000,000;
 - It is dated 20 December 2016. It was signed, witnessed, stamped for stamp duty and registered by the Director of Lands all on that same day;
 - Alick Kalsev purported to witness all signatures; and
 - Eric Amos, Commissioner of Oaths, purported to certify appearance by the various signatories when none of them actually signed in his presence.
66. Karl Kalsev was steadfast in his evidence that he never signed this transfer. I find as proved that Karl Kalsev did not sign the transfer of the lease.
67. Alick Kalsev confirmed that Mr Amos only affixed his stamp/signature after the signing but did not witness the signatories signing before him as was stated on the transfer.
68. The consent to transfer document [**Exhibit C5**] provided as follows:
- The consideration for the transfer is stated as VT1,000,000;
 - It is dated 20 December 2016. It was signed, witnessed and registered by the Director of Lands all on that same day;
 - David Alikau admitted signing this document but only because he was shown Karl Kalsev's signature and understood that Karl Kalsev had already signed the document; and
 - Eric Amos, Commissioner of Oaths, purported to certify appearance by the various signatories when none of them actually signed in his presence.
69. Karl Kalsev was steadfast in his evidence that he never signed the consent to transfer. I find as proved that Karl Kalsev did not sign the consent to transfer.

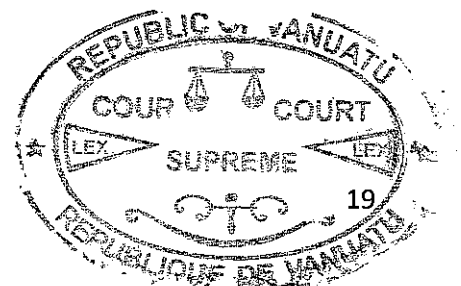
70. Accordingly, both the transfer of lease and consent to transfer documents were fraudulent documents as neither was signed by Karl Kalsev.
71. Both the transfer of lease and consent to transfer documents were also fraudulent because they provided for transfer consideration of VT1,000,000 which was a grossly understated transfer value of one third of the real value. This defrauded the Government of stamp duty and registration fees, and is contrary to ss 11 and 47 of the *Stamp Duties Act* and para. 109(2)(a) of the Act, which prescribe criminal offences for such act. The understatement of the consideration in a registered dealing was held in *Monvoisin v Mormor* [2019] VUCA 6 to constitute fraud or mistake and thus the registration was cancelled and the land leases register rectified accordingly.
72. It is common ground that that Mr Rambay prepared both the transfer of lease and consent to transfer documents. On Mr Rambay's own evidence, he proposed and the chiefs agreed through Alick Kalsev that they proceed with complete registration of the title (with stated transfer value of VT1,000,000) so that the deposit monies would be released to them and the balance of the purchase price would be paid afterwards when released from Mrs Murumo's loan from the NBV. The understatement of the consideration on the registered transfer of lease and consent to transfer defrauded the Government of lawful revenue.
73. Accordingly, I find it proved on the balance of probabilities that the registration of the transfer of the lease to Mr and Mrs Murumo was fraudulently made or obtained.
74. The question then is whether or not Mr and Mrs Murumo knew of the understated transfer value stated in the lease transfer document? By Mrs Murumo's own evidence, she and her husband knew that the lease transfer document stated a transfer value of VT1,000,000 whereas the actual purchase price in the S&P Agreement is VT3,000,000, and that they have not yet paid the balance of the purchase price. Further, that she and her husband paid the VT1,000,000 deposit after they had signed both the S&P Agreement and the transfer of lease.
75. Accordingly, I find it proved that Mr and Mrs Murumo had knowledge of the fraud involved in the registration of the transfer of the lease to them. Even if I am wrong as to that, I consider it also proved on the evidence that Mr and Mrs Murumo substantially contributed to the fraudulent registration of the transfer of the lease to them as they signed the lease transfer document which stated VT1,000,000 transfer value when they knew the correct transfer price from the S&P Agreement. They then submitted that false transfer and false consent for stamping and registering and paid Mr Rambay for that task to be completed. On their own evidence, they substantially contributed to the fraudulent registration: *Orah v Butlin* [2020] VUCA 30.
76. For the reasons given, I cannot accept that Mr and Mrs Murumo were *bona fide* purchasers for value and reject the submissions to that effect. Orders will be made

that the registration of the transfer of the lease to them be cancelled and the register be rectified accordingly.

77. As to the other relief sought, it is clear from clause 2 of the S&P Agreement that Mr Rambay should have held the VT1,000,000 deposit monies paid until completion. Instead, he ignored the terms of the contract requiring him to hold those monies until completion. Even worse, he arranged the stamping and registration of the transfer to the benefit of the purchasers even before completion occurred. In accord with the terms of the contract, completion was never achieved and no money should have been disbursed and no transfer as yet be stamped and registered.
78. Accordingly, whilst it is strictly a matter between the First and Second Defendants, I consider that on the evidence, the Court can and should make an order that Mr Rambay pay VT1,000,000 to Mr and Mrs Murumo as liquidated damages. Such order will avoid the need for Mr and Mrs Murumo to take subsequent action against Mr Rambay and they will be able to move directly to enforcement of their VT1,000,000 debt as needed.
79. Mr and Mrs Murumo also paid land lease rents but they have received consideration for the money by their occupation and enjoyment of the land. I consider that they could not be said to be out-of-pocket in respect of those payments.
80. Turning now to the quantum of damages sought against Mr Rambay following the default judgment, there is no evidence that the community as the beneficial owner of the lease has authorised the loans that Mr Milfirer gave to the Claimants for which interest is now claimed nor that the proceeds of land sale would go towards repaying those loans. There is also no evidence of an agreement between the Claimants and Mr Rambay that the proceeds of sale would be used to repay those loans. Accordingly, I reject Mr Morrison's submission that the loan interest is a foreseeable loss flowing from Mr Rambay's unauthorised sale of the lease and decline to order damages consequent to the default judgment. I note also that only Mr Alikau gave evidence as to his loan principal and interest; there was no similar evidence from Karl Kalsev.

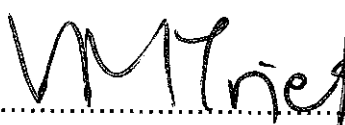
I. Result and Decision

81. Judgment is entered for the Claimants and it is ordered as follows:
- a) That the Sale and Purchase Agreement entered with the First Defendants in relation to lease title no. 12/0244/009 is declared null and void *ab initio*;
 - b) That the Second Defendant pay VT1,000,000 to the First Defendants as liquidated damages (the 'judgment debt');



- c) That the consent to transfer and the transfer of lease title no. 12/0244/009 to the First Defendants are declared to have been signed in a fraudulent manner and are null and void;
 - d) That the registration of the consent to transfer and of the transfer of lease title no. 12/0244/009 to the First Defendants was made or obtained fraudulently;
 - e) That the First Defendants are not *bona fide* purchasers for value as they knew of and/or substantially contributed to the fraud by which the registration of the transfer of lease title no. 12/0244/009 to them was made or obtained;
 - f) That the Third Defendant is therefore ordered pursuant to s. 100 of the *Land Leases Act* to rectify the land leases register by cancelling forthwith the registration of the transfer of lease title no. 12/0244/009 in favour of the First Defendants; and
 - g) That the Third Defendant is ordered pursuant to s. 99 of the *Land Leases Act* to forthwith reinstate the First Claimant as the lessee of lease title no. 12/0244/009.
82. There is no order for damages against the Second Defendant consequent to the default judgment entered against him.
83. Costs are to follow the event. The Defendants are to pay the Claimants' costs as agreed or as taxed by the Master and once set, paid within 28 days.
- J. Enforcement
84. Pursuant to rule 14.3(1) of the *Civil Procedure Rules*, this matter is listed for Conference **at 4pm on 9 November 2023**, to ensure the judgment has been executed or for the judgment debtor to explain how it is intended to pay the judgment debt. For that purpose, this judgment must be personally served on the Second Defendant and proof of service filed.
85. The First Defendants are to file and serve application for third party disclosure **by 4pm on 20 October 2023**.

DATED at Lakatoro, Malekula this 9th day of October 2023
BY THE COURT


Justice Viran Molisa Trief

