

**BETWEEN:** KENNETH KALOMTAK  
ISABEL TOKA  
*Claimants*

**AND:** MICHEL KALPOI  
LINDA KALPOI  
*First Defendants*

**AND:** MANUEL KALUAT  
*Second Defendant*

**Coram:** Justice Oliver A. Saksak

**Counsel:** Mr Henzler Vira for the Claimants  
Mr Andrew Bal for the First Defendants  
Mr Roger Tevi for the Second Defendant

**Date of Hearing:** 13<sup>th</sup> September 2023

**Date of Judgment:** 31<sup>st</sup> May 2024

---

**JUDGMENT**

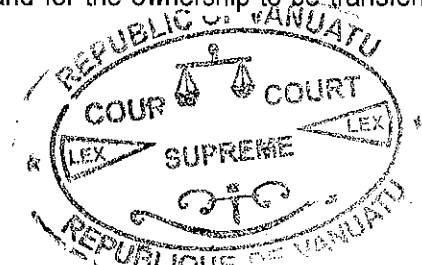
---

**Introduction**

1. This is a claim for damages for breach of agreement.
2. Kenneth Kalomtak is the maternal uncle of Isabel Toka. They claim jointly against the First and Second Defendants seeking orders for specific performance and damages for breach of an agreement in relation to a Bus Reg. No. 17659 ( the Bus).

**Background Facts**

3. The First Defendants obtained a loan from the Credit Corporation Ltd to purchase a Toyota Bus Reg. No. 17659. The details of the loan agreement have not been disclosed into evidence by the First Defendants.
4. The First Defendants fell into a arrears in repayments of the loan and therefore entered into an agreement with Kenneth Kalomtak to pay off the loan and for the ownership to be transferred into his name. The agreement reads:



" Purchase Agreement For Bus Reg. 17659 Between Michel Kalpoi ( Seller) & Kenneth Kalomtak ( Buyer).

Date: 22/08/2018

I Michel Kalpoi as the listed client of Credit Corp for the Toyota Bus Reg. 17659 on this date received a total amount of VT 800,000 from Mr Kenneth Kalomtak for the purchase of rights of ownership to the Toyota bus mentioned. The bus is currently in a 123,000 monthly repayment plan that will be taken over by Mr Kenneth Kalomtak until it is completed then the ownership will be transferred to Mr Kalomtak from Credit Corporation Vanuatu. The following agreement also comes with Ramada Resort Staff contract currently under Michel Kalpoi valued at VT 168,000 monthly valid until 1<sup>st</sup> March 2019.

Michel Kalpoi ( signed) (seller)

Kenneth Kalomtak ( signed) ( Buyer)

Linda Kalpoi ( signed) ( Witness)"

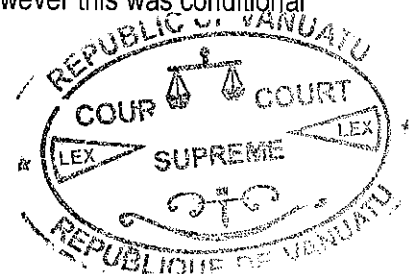
5. Pursuant to the agreement the claimant Kenneth Kalomtak with the help of his niece Isabel Toka made payments completing the First Defendant's loan.
6. Despite completing the First Defendant's Loan from the Credit Corporation, the vehicle was transferred instead to the Second Defendant who acted on instructions and apprehended the vehicle and claiming possession of it.

### The Issues

7. From those facts the issues are-
  - a) Was there a breach of agreement?
  - b) Who breached the agreement?
  - c) Was the sale to the Second Defendant valid and proper?
  - d) Is there any entitlement to damages? If so, who is entitled to damages in this case?

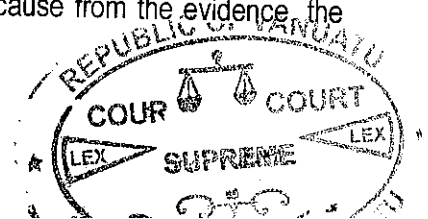
### Discussion

8. I consider the first and second issues together. These are whether there was a breach and who was responsible for the breach?
9. The agreement dated 22<sup>nd</sup> August 2018 is a common ground. It is a sale and purchase agreement between Michel Kalpoi as the seller, and Kenneth Kalomtak as buyer.
10. Pursuant to the agreement Kenneth Kalomtak made an upfront payment of VT 800,000. He had essentially purchased the right of transfer of the Bus in issue. However this was conditional



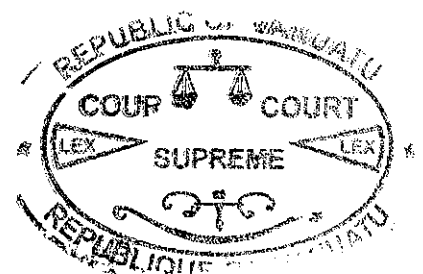
on Mr Kalomtak completing loan repayments with the Credit Corporation payable at VT 123,000 per month.

11. The arrangement of repayments of loan included the Ramada Staff contract between Ramada Resort and Mr Kalpoi valued at VT 168,000 per month which was valid only until 1<sup>st</sup> March 2019.
12. From Lawrence Toka's evidence by sworn statement as the driver of the disputed Bus for Mr Kalpoi in the first instance, and for Mr Kalomtak pursuant to the agreement, he gave daily earnings from the Bus to Mr Kalomtak for the purpose of paying the loans at the Credit Corporation.
13. Further from the evidence of Mr Kalpoi, the monthly payments of VT 168,000 made by Ramada Resort through cheques were handed over to Mr Kalomtak for the purpose of paying off the loans.
14. From the Purchase Register Details provided by Ramada Resort annexed to the Ramada Resort Staff Contract, from 3<sup>rd</sup> September 2018 to 11<sup>th</sup> February 2019 there was a total of 13 payments of VT 126,000. There is no evidence by Mr Kalomtak that he received this amount and if he did, there is no evidence this amount was paid by him to Credit Corporation as loan repayments.
15. By 6<sup>th</sup> July 2021 according to Isabel Toka's evidence Mr Kalomtak had not made any loan repayments as he had agreed with Mr Kalpoi, so much so that he requested financial assistance from his niece Ms Toka to pay off the balance of VT 473,338 and another VT 5,000 being for the purchase of the ownership Book (the Red Book). He was given another VT 100,000 in cash by Mr Toka and Ms Toka in 2 lots of VT 50,000.
16. By that action Mr Kalomtak was attempting to enter into an illegal transaction of transferring ownership of the vehicle he did not possess in the first place.
17. From those evidence, it is clear to me that Mr Kalomtak had breached his agreement with Mr Kalpoi. His attempt and purported transfer of the Bus to Isabel Toka was an illegal act therefore no sale could have been made by him to his niece Ms Toka because from the evidence, the



Red Book shows the Bus was still in the name of Linda and Michel Kalpoi as at 29<sup>th</sup> November 2020. At no point in time was he registered as owner of the Bus to allow him to sell it to Ms Toka. His attempted sale to Ms Toka was done in breach of his agreement with the First Defendants.

18. I now consider the third issue of whether the sale to the Second Defendant was a valid sale?
19. The evidence of the Second Defendant Mr Kaluat is that when the claimant failed to complete the loan repayments for the Bus he approached the First Defendants expressing his interest to buy the Bus at VT 1,200,000. This was accepted and having paid the amount the ownership was transferred into his children's names on 22<sup>nd</sup> July 2011. That was a valid transfer.
20. Finally the issue of damages. The Second Defendant counter-claims against the claimants for loss of income at VT 8,000 per day from 1<sup>st</sup> February 2022 when the bus was seized by the Police until this day. The total sum claimed is VT 5,896,000 with 5% interest of VT 589,600 and costs at VT 150,000.
21. The bus was seized following an application made by the claimants on 27<sup>th</sup> November 2021.
22. The Court heard the application *ex parte* on 15<sup>th</sup> December 2021 and authorized the Police to arrest and detain the bus. The Court granted liberty to the defendants to apply on 48 hours' notice to be heard in relation to the orders.
23. There is nothing on file to show the defendants had applied following the liberty clause. It was only on 15<sup>th</sup> February 2022 that the Second Defendant filed an application to set aside the *ex parte* orders, more than a month later. And from the records it appears the Second Defendant has not prosecuted the application
24. On 11<sup>th</sup> March 2022 the Second Defendant filed his defence and counter-claim.
25. From his own evidence, the Second Defendant had ownership of the bus from 22<sup>nd</sup> July 2021. He could have filed his application to set aside the orders from 22<sup>nd</sup> July 2021 but he failed to do so.

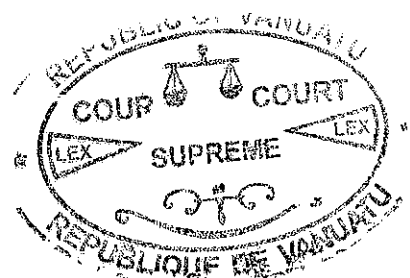


26. I accept the Second Defendant is entitled to damages for the detention of the Bus, but it will not be in the amount he claims at VT 5,896,000. The amount will be reduced to the sum of VT 1,176,000 as per paragraph 5 of his sworn statement dated 28<sup>th</sup> June 2022.
27. The claimant Mr Kalomtak is bound by his undertaking as to damages dated 22<sup>nd</sup> November 2021 to pay these damages.

### **Conclusions**

28. From the analysis of the evidence before me, I find as follows:-

- a) That there was an agreement between Mr Kalomtak, claimant and Mr Kalpoi, first defendant.
- b) That Mr Kalomatak breached that agreement.
- c) That there is no damages available to the First Defendant as he has had a double benefit for the Bus in the aggregate sum of VT 2,583,338 comprised of the VT 1,383,338 paid by the claimants plus the VT 1,200,000 paid by the Second Defendant.
- d) That the sale by First Defendant to the Second Defendant was valid.
- e) That the Second Defendant is entitled to some damages for the detention of the Bus by the Police pursuant to the Court orders issued exparte, But the quantum of damages shall be VT 1,176,000.
- f) That the claimant, Mr Kalomtak only is liable to pay VT 1,176,000 to the Second Defendant.



**The Result**

29. The claims by the Claimants are dismissed. The Second Defendant is successful on his counter-claim against Mr Kenneth Kalomtak for damages but only in the sum of VT 1,176,000. Interest is declined.
30. The First and Second Defendants are entitled to their costs of and incidental to the proceeding on the standard basis as agreed, or be taxed.
31. The ex parte orders of 13<sup>th</sup> December 2021 is hereby vacated. The Police are directed to release the bus forthwith to the Second Defendant, if it has not already been released.
32. That is the judgment of the Court.

**DATED at Port Vila this 31<sup>st</sup> May 2024**

**BY THE COURT**

**Hon. Oliver A Saksak**

**Judge**

