

**MARLON KUVE -V- HERRICK RAGOSO** (representing Zerolyn Viuru, Milton Tona, Teddie Alu and Lorraine Boso), **BAVA ISLAND DEVELOPMENT COMPANY LIMITED AND HAPPY ISLET LOGGING COMPANY LIMITED**

HIGH COURT OF SOLOMON ISLANDS  
(F. O. KABUI, J.).

Civil Case No. 232 of 1999

Date of Hearing: 16<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup>, 19<sup>th</sup>, 22<sup>nd</sup>, 23<sup>rd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, 30<sup>th</sup>, 31<sup>st</sup>, July & 7<sup>th</sup> October 2002

Date of Judgment: 25<sup>th</sup> October 2002

*Mrs. A. N. Tongarutu for the Plaintiff*

*Mr A. Nori for the Defendants*

**JUDGMENT**

**Kabui, J.** The Plaintiff by a Writ of Summons and Statement of Claim filed on 6<sup>th</sup> July 1999 seeks the following relief-

- (1) A Declaration that the said land is held on trust for and on behalf of all members of Bava tribe and that the property which is subject to said trust is the property of all members of said tribe equally between them;
- (2) An order removing the First Defendants as trustees of the said land together with an order that the Plaintiff, chiefs Seseu and Lioleli and Martha Ruma Wycliff or some other fit and proper persons be appointed as trustee of the trust in the place of the First Defendants;
- (3) An injunction restraining the First, Second and Third Defendants from making payment of any monies whatsoever obtained from the realization of property the subject of said trust to the First Defendants whether in their personal capacity or as members of Bava tribe or to any other person other than the persons appointed pursuant to the order sought pursuant to paragraph (2) hereof, to be held by such trustees on trust for all members of said tribe;
- (4) An account of all monies received by and due to the trust in respect of the realization of trust property;
- (5) An account of all monies due to the trust in respect of the losses due to the matters complained of;
- (6) All other necessary accounts, directions and enquiries;
- (7) An order for the payment to the trust of the money found due on the taking of the said accounts;

- (8) Further, or in the alternative, damages for breach of trust;
- (9) Interest;
- (10) Costs;
- (11) Such further or other relief as this Court thinks just.

### **The Background**

In the old Government map the island off the coast of Vela La Vella in the Western Province was known as Baga Island. It is now known as Mbava Island. In the early 1900, Joseph Binskin occupied the Island under two certificates of occupation issued by the then High Commissioner of the Western Pacific under the Waste Lands Regulations then in force in the Protectorate. It was later discovered that the Island was not wasteland but owned by the totou Mbava of which Baija and Joni were representatives. Baija and Joni sold the Island to the then Government of the Protectorate for the sum of 100 in 1925. The Island became Government land since then. The wish of the Mbava tribe for the return of the Island had been in their minds for years. The wish was officially expressed in public in about 1985 when Ezekiel Alebua as Deputy Prime Minister visited Kolokolo village on Vela La Vella. At a public demonstration show, Martha Ruma Wycliff made a speech in which she demanded the return of Mbava Island to its original owners in custom. Ezekiel Alebua then promised that he would see to it that the Island be returned to its original owners in custom in accordance with the wish of the Mbava people. By letter dated 6<sup>th</sup> March 1987, the then Commissioner of Lands confirmed his willingness to transfer the perpetual title to selected trustees of the Mbava tribe on certain conditions. On 30<sup>th</sup> April 1987 at a meeting at Kuava village on Vella La Vella, five persons signed on behalf of the Mbava tribe a transfer document headed "**TRASFER OF AN ESTATE OR LEASE**". The space for the Commissioner to sign was left unsigned by the Commissioner of Lands. Those who signed were the Plaintiff, Jonathan Liokeli, William Seseu, Jack KadeKade and Martha Ruma Wycliff on behalf of the Mbava tribe. The lands officer at Gizo Mr. Naghe was present at the signing ceremony. He signed as the Commissioner for Oaths. He took with him to Gizo the signed document and the sum of \$2000 being the consideration for the transfer and \$ 25.00 being the registration fee. He later issued the receipt for the sum of \$2025.00 at Gizo. He also forwarded the signed transfer document by post to Honiara for the Commissioner of Lands to countersign to complete the transfer of title. The fate of that transfer document was never known again. The Commissioner of Lands had never countersigned or even if he had, the trustees who signed at Kuava village were not aware that he ever did. At a Meeting at Kuava village on 16<sup>th</sup> December 1987, Seth Lekelalu told the Meeting that the transfer document signed on 30<sup>th</sup> April 1987 had never reached the Commissioner of Lands. He promised the Meeting that he would do all he could to locate that transfer document. He requested Mr. Liligeto who was also at that Meeting to assist him to follow up that transfer document and to do what he could to fulfill the wish of the members of the Mbava tribe to which Mr. Liligeto agreed. Upon arriving in Honiara, a Meeting was convened on 26<sup>th</sup> January 1988 whereat it was agreed that due to political uncertainty over the future of Seth Lekelalu as a Government Minister and the fact that the then Commissioner of Lands, Gordon Rence, was resigning, new trustees should be appointed from the members of the Mbava tribe residing in Honiara. It was also agreed that the transfer of title to the Honiara trustees was to be on condition that the title once transferred was to be re-transferred to succeeding trustees to be appointed by members of the Mbava tribe residing on Vella La Vella. The re-transfer of title was to be done within one month from the date of the first transfer of title. This condition was repeated in a statutory declaration made on 5<sup>th</sup> February 1988 before a Commissioner for Oaths. The transfer of title was effected on that same day of February 1988 in the joint names of Herrick Ragoso, Zerolyn Viuru, Milton Tona, Teddie Alu and Lorraine Boso for the members of the

Mbava tribe. Parcel Number 079-00-4 still remains registered in their joint names to date. It has never been transferred to anyone since.

### **The issues to be determined by this Court**

The issues to be determined can be ascertained from the nature of each relief being sought in the Statement of Claim. There is in fact only one issue which if determined one way or the other will determine the fate of the other issues that are consequential in nature. In order to create a complete picture of what the Plaintiff has in mind in terms of the major relief being sought, the main issues to be determined are as follows-

1. **whether or not Parcel Number 079-006-4 is a trust property for all the members of the Mbava tribe equally between them, and if so,**
2. **whether the 1<sup>st</sup> Defendants should be removed and be replaced with the Plaintiff, Seseu, Liokeli and Marther Ruma Wycliffe or some fit and proper persons as trustees.**

Unfortunately, Seseu and Lokeli had since died.

### **Time Limitation against the Plaintiff**

It is I think convenient to deal with the issue of time limitation first for obvious reason. If I find that the Plaintiff was out of time at the time he filed this action, then this Court can consider no action. This issue was raised in the pleading by the 1<sup>st</sup> Defendants and subsequently argued by their Counsel, Mr. Nori, as one of his points in his submission. In the Amended Statement of Defence, filed on 10<sup>th</sup> July 2002, the Defendants alleged that the claim by the Plaintiff for the removal of the 1<sup>st</sup> Defendants as trustees and an order for the appointment of the Plaintiff with Chiefs Seseu, Liokeli and Martha Ruma Wycliffe or some fit and proper persons in their place was statute barred. Section 5 of the Limitation Act (Cap. 18), ("**the Act,**") stipulates that the time limit for any action or arbitration is 6 years from the date on which the cause of action accrued. The evidence is that Mr. Watt, the former Public Solicitor at Gizo, filed the Writ of Summons on 6<sup>th</sup> July 1999 to commence this action. A Writ of Summons and a Statement of Claim had in fact been filed in the High Court in April 1991 but had not been served due to oversight by Solicitors of the Public Solicitor's Office at Gizo. The Plaintiff said in evidence that a further delay was caused by Mr. Lavery of the Public Solicitor in Gizo. He said in evidence that he came to know about the fact that he had been replaced as a trustee in 1988. The fact was that title was transferred to the 1<sup>st</sup> Defendants on 5<sup>th</sup> February 1988. He took action and filed a Writ and a Statement of Claim in April 1991. He also lodged a caveat on 31<sup>st</sup> January 1991. The fact that his case never got off the ground was the fault of his Solicitor at Gizo. It was not his fault. There was a delay of 8 years by successive Solicitors at Gizo. In terms of section 24 of the Act, no such delay of whatever nature can be tolerated on the ground of subsequent inability or disability to bring an action within the prescribed time limit. There is however section 39 of the Act that allows the Court to condone delays in bringing an action in the name of equity. The cause of action here was the transfer of title in Parcel Number 079-006-4 to the 1<sup>st</sup> Defendants as trustees for the Mbava tribe on 5<sup>th</sup> February 1988 in place of the Plaintiff and others whom he represents as Plaintiff appointed by the Mbava tribe. The letter by Mr. Lavery dated 26<sup>th</sup> October 1992 addressed to Mr. Radclyffe in Honiara (Exhibit 15) does explain the reason for the initial delay in proceeding with the Plaintiff's action. The reason was that Mr. Hardiker who filed the first Writ left in May 1991. The file was left simply filed away in the Gizo Office. In 1992, the Plaintiff called at Gizo to ask about the progress of his case. Mr. Lavery took up the case again and nothing more was heard of it until 1999. There is no evidence to suggest that the Plaintiff had called again at Gizo to find out about his case and its progress. According

to the evidence in this case, the Plaintiff had been sidelined as far back as 1988. The reason was obvious. The 1<sup>st</sup> Defendants had taken control of the affairs of the Mbava tribe regarding Mbava Island. There had been numerous meetings of the members of Mbava tribe in terms of effecting reconciliation between themselves excluding the Plaintiff. It must be noted that this dispute is between the members of the same tribe disputing who should hold title to Mbava Island. There are two camps opposing each other on this point. Of the 5 original trustees, only Martha Ruma Wycliffe and the Plaintiff remain in the Plaintiff's camp. Chiefs Seseu and Liokeli had died. Jack Kadekade had defected to the 1<sup>st</sup> Defendants' camp. Attempts by the 1<sup>st</sup> Defendants to win Martha Ruma Wycliffe over to their camp has failed. The descendants of late Chiefs Seseu and Liokeli are however in the Plaintiff's camp. There was however a stalemate. So the case was again taken up in 1999. This is however not to say that the case had been dropped and then picked up again by the Plaintiff. No evidence had been led to explain why there was delay on the part of the Public Solicitors at Gizo for about 8 years. There is no evidence to suggest that the Plaintiff had given up his intention to sue the 1<sup>st</sup> Defendants in the High Court. I have had regard to the matters set out in section 39(1)(a), (b), (c), (d), (e) and (f) of the Act including all the facts of this case in making up my mind to act under this section. In so acting, I direct that section 5 of the Act shall not apply to the cause of action in this case. (See **Eric Fiebig as (Administrator of the Estate of Norleen Fiebig deceased) v. Solomon Airlines Limited**)<sup>1</sup> Even if I am wrong in my view, the proviso to section 17 of the Act appears to be applicable to this cause of action. That is, the fact that the 1<sup>st</sup> Defendants are the holders of the title to Parcel Number 079-006-4 is a continuing fact and being so is deemed to accrue on each day that fact continues as a wrong in the eyes of the Plaintiff. (See **Wilson Liligeto, D. Tigulu, A. Redley, M. Enoch, and K. Roga v. Commissioner of Lands, George Hilly and the Registrar of Titles**)<sup>2</sup>. The cause of action in this case is therefore not statute barred as alleged by the 1<sup>st</sup> Defendants.

### **Does the Plaintiff have standing to complain against the 1<sup>st</sup> Defendants?**

The next issue raised by Mr. Nori was the Plaintiff's right of action to sue the 1<sup>st</sup> Defendants. This is questioning the standing of the Plaintiff in custom to be appointed a trustee. This issue of standing was raised in the Defendants' defence filed on 20<sup>th</sup> September 1999. The Plaintiff claims he is a member of the Mbava tribe. This claim is clear in paragraph 1 of the Statement of Claim and from his evidence in Court. It was not disputed in Court that the Plaintiff is the descendent of a woman from Santa Ysabel who had been adopted by custom into the Mbava tribe many years ago during the headhunting days. There was also no dispute over the fact that that adoption act or ceremony had indeed taken place. What is in dispute is whether or not that adoption by custom had made that woman from Santa Ysabel a member of the Mbava tribe so that the Plaintiff being her descendant is also a member of the Mbava tribe. If the adoption was valid by custom, then obviously that woman from Santa Ysabel became a member of the Mbava tribe through the Mbava branch who adopted her. If not, the position is obviously different. The Defendants in their defence said that the Plaintiff was a member of the Barekasa tribe and therefore did not qualify to be a trustee for the members of the Mbava tribe. Unfortunately, I cannot decide the dispute over the alleged membership of the Plaintiff in the Mbava tribe. It is a customary law point affecting rights to customary land that can only be decided by the Chiefs or the Local Court or the Customary Land Appeal Court whichever the case may be. (See **Gandy Simbe's Civil Appeal Case**)<sup>3</sup> as applied in later cases in this jurisdiction). There is however a fact that must not be overlooked by this Court. The Plaintiff was backed by Martha Ruma Wycliffe, Jack KadeKade, and the late Seseu and Liokeli although Jack KadeKade later withdrew his support from the Plaintiff. There is no dispute over the fact that Martha Ruma Wycliffe is a member of the Mbava tribe. There is also no dispute over the fact that the late Seseu and Liokeli were members of the Mbava tribe and were Chiefs when alive. Although the Plaintiff is not cited in the Writ of

<sup>1</sup> Civil Case No. 374 of 1995

<sup>2</sup> Civil Case No. 166 of 1997

<sup>3</sup> Civil Appeal Case No. 8 of 1997

Summons and the Statement of Claim as representing Martha Ruma Wycliffe and the late Seseu and Liokeli, this can be implied. He was one of the first trustees who were never trustees because the first transfer document had gone missing. Even if he is not a member of the Mbava tribe, he can be a spokesman for Martha Ruma Wycliffe and for the descendants of Seseu and Liokeli. He said in evidence that Chief Seseu and Chief Liokeli had asked him to assist them to get back Mbava Island from the Government. He became the spokesman for the Mbava tribe. He was given that authority by them to speak for them. He lives in Leona village where Seseu and Liokeli lived. This fact was demonstrated by his appointment as one of the first trustees on 30<sup>th</sup> April 1987 at Kuava village. Whilst his connection with Mbava tribe may only be subordinate to that of Seseu, Liokeli and Martha Ruma Wycliffe, there is evidence to show that he represented the grandsons etc. of intermarriages in the Mbava tribe. The Plaintiff's position in this regard was explained by himself in Court and supported by Martha Ruma Wycliffe. That was the other reason for his appointment as one of the first trustees. However, whatever the reasons for his appointment as a spokesman or how valid they were, Martha Ruma Wycliffe and the late Seseu and Liokeli should not be silenced simply because they had a spokesman whom the Defendants regarded as an outsider of the Mbava tribe. Martha Ruma Wycliffe and the living descendants of the late Seseu and Liokeli cannot be gagged from being heard. They are not busybodies meddling in other people's business. They are truly the sons and daughters of the Mbava tribe. They must be heard even if it means speaking through another person as their spokesman whom they trust as being able to represent them in Court. This sort of arrangement is not uncommon as it is acceptable by the Courts in this country. The hearing of customary land disputes in the lower Courts as well as in the High Court bears witness to this practice. The Plaintiff therefore has locus standi through Martha Ruma Wycliffe and the late Seseu and Liokeli as being their lawful representative spokesman or agent for that matter.

#### **Is Parcel Number 079-006-4 a trust property?**

The transfer of perpetual estate in the above Parcel N. 079-006-4 by the Commissioner of Lands to the 1<sup>st</sup> Defendants was executed on 5<sup>th</sup> February 1988. It was registered in the names of the 1<sup>st</sup> Defendants that same day. The consideration for the transfer was the sum of \$2,000.00. The Plaintiff's caveat dated 31<sup>st</sup> January 1991 came too late. The 1<sup>st</sup> Defendants were registered as joint owners. Parcel Number 079-006-4 is not the subject of Part IV of the Land and Titles Act (Cap. 133), "**the Act**," and so section 46 of the Act does not apply for obvious reasons. That is, Parcel Number 079-006-4 is not the result of a land settlement scheme under the Act involving a conversion of customary land into registered title. The need for compliance with section 195(3) does not therefore arise for that reason. Paragraph 2 of the statutory declaration (Exhibit 24) is therefore misleading by claiming statutory trust under section 195(1) of the Act. Whilst section 195(1) of the Act does speak in terms of a registered interest in land being vested in 5 persons as joint owners if there are more than 5 persons on the statutory trusts, it however restricts that rule to dispositions. Section 2(1) of the Act defines "**disposition**" as meaning any act inter vivos by an owner whereby his rights in or over the land comprised in his interest are affected, but does not include an agreement to transfer, lease or charge. I do not therefore think that section 195(1) of the Act above applies because the transfer of title in Parcel Number 079-006-4 was by transfer agreement. Section 200(1) of the Act however does stipulate that where a registered interest in land is owned jointly the joint owners shall hold on the statutory trusts. "**Statutory trusts**" is defined in section 2(1) as trusts declared by section 214(1) of the Act. Section 214 states,

..."(1) For the purposes of this Act, a registered interest held upon the statutory trust shall be held upon trust to sell the same with power to postpone such sale as the trustees think fit and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale, after payment of all outgoings, upon such trusts, and subject to

such powers and provisions, as may be requisite for giving effect to the rights of the persons beneficially interested in the interest.

(2) An estate or lease held upon the statutory trusts may, subject to the provisions of section 140, be divided by the trustees amongst the beneficiaries under the trust, and on any such division the trustees may provide for the payment either in cash or by way of a charge of equality money.

(3) Any beneficiary under the trust who objects to the exercise or proposed exercise of the powers granted by subsection (2) may, either before such exercise or within six months thereafter, apply to the High Court, which may make such order as it thinks just and may under section 229 order rectification of the land register.

(4) The trust and powers set out in this section shall be deemed to be incorporated in any instrument which operates expressly to vest any registered interest in land in any person upon the statutory trusts or whereby any person expressly declares that he holds upon the statutory trusts any registered interest in land already vested in him”...

So the statutory trusts under this Act are statutory trusts for the sale of the registered interest with incidental powers to deal with the proceeds of sale etc. The section is based on section 35 of the Law of Property Act, 1925 of the United Kingdom. Subsection (1) of section 200 of the Act above is therefore restricted by section 214 (1) of the Act above in that statutory trusts under the Act are trusts for the sale of the registered interest being the subject matter of the trust. There is however, section 212 (1) of the Act, which permits any person to own an interest for his own use and benefit or as a trustee. If, as a trustee, a trust instrument declaring or deeming to declare a trust or a certified copy of it may be deposited with the Registrar but would not form part of the land register as being registered. (See **Iris Deni v. Imaw You**<sup>4</sup>). There is no evidence of such an instrument in this case. I think the Registrar of Titles made a mistake. He must have assumed that section 46 of the Act applied. This assumption on his part was demonstrated by Exhibit 24 being the statutory declaration required by section 46(ii)(C) as read with section 195(3) of the Act. The 1<sup>st</sup> Defendants made a group statutory declaration on the same day the transfer and registration documents were effected. Whilst section 195(3) of the Act does allow more than one Solomon Islander to hold interest in land as joint owners, it does not make them trustees for others unless joint ownership has been obtained under Part IV of the Act. The term "**group name**" used in section 195(3) above is a reflection of joint ownership acquired under Part IV of the Act. Exhibit 24 speaks for itself in this regard. The 1<sup>st</sup> Defendants obviously assumed that they were trustees under section 46(ii)(A) of the Act and so complied with section 195(3) of the Act accordingly. Compliance with section 195(3) above has no legal basis and so paragraph 3 of Exhibit 24 lacks validity. I disregard it for that reason. The result is that whilst the 1<sup>st</sup> Defendants are the joint owners of Parcel Number 079-006-4, they are not trustees for the members of the Mbava tribe under Part IV of the Act. The claim that they are trustees is an assumption on their part though not necessarily by design. The answer to the Plaintiff's question being issue (1) above is that for the moment Parcel Number 079-006-4 is not a trust property under Part IV of the Act. I am not surprised at this assumption on the part of the Commissioner of Lands and the 1<sup>st</sup> Defendants. The policy of returning alienated lands to the original owners has been an open-ended one in that no legislation has been passed in Parliament to give effect to this policy. It is open-ended in the sense that it allows the Commissioner of Lands and interested parties to assume that statutory trust applies under the Act. The interested parties are left to their own design. Under political pressure always generated by the interested parties, the Commissioner of Lands is often forced to act within the existing provisions of the Act to meet the objective of the interested parties. The Registrar of Titles is no exception to this

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<sup>4</sup> Civil Case No. 59 of 1993

pressure. The Act was not designed to include this policy of recent origin. The Act needs to be amended to provide for this policy of returning registered land to the original owners in custom on trust as an option to section 242 of the Act. This is not an easy task as correctly pointed out by Ward, C. J. in *Tovua, Labu, Anisi, Bosali, and Kona v. Meki, Ilala, Didi, James, Chaku, Pasi, Tawiha, Ocha, and Earthmovers Solomons Ltd.*<sup>5</sup> in relation to logging cases. Section 242 of the Act does enable the Commissioner of Lands to declare any land held in his name to be customary land. This is one way the Commissioner of Lands can act but it leaves the question of the determination of customary ownership to be sorted out by agreement or through the Local Courts system. Critics may however say that any action by the Commissioner of Lands under section 242 above would be a regressive step to take because it would only multiply disputes about ownership in custom and so deters development. They would say passing title on trust is the best way to act like the 1st Defendants assumed it in this case.

### **What then is the position?**

I have already ruled that Parcel Number 079-006-4 is not trust property under and for the purpose of Part IV of the Act. Section 200(1) of the Act does however create statutory trust where a registered interest in land is jointly owned. However, in terms of section 214 of the Act, such statutory trust's sole objective is the sale of the trust property for the benefit of the beneficiaries provided such statutory trust must in the first place have been created by an instrument vesting the registered interest upon the statutory trust or declares any person already vested with the registered interest holding it upon statutory trust. (See s. 200(4) of the Act). The term "**instrument**" as defined by section 2(1) of the Act includes other document but does not include document of title, as this is separately defined in section 2(1) above. Parcel Number 079-006-4 is therefore not trust property upon statutory trust for sale. There is no intention to create a statutory trust although it was incorrectly assumed in this case. I do not think sale is the intention of the members of the Mbava tribe. The Mbava tribe wants the return of possession of Mbava Island. There is no evidence that the 1<sup>st</sup> Defendants are trustees for the sale of a trust property in terms of section 200(4) of the Act above. They do not want Mbava Island to be sold. They want it for themselves for their own purpose for all time. There is no statutory trust in this case for that reason.

### **Is there a fiduciary relationship between the 1<sup>st</sup> Defendants and the members of the Mbava tribe?**

Before I commence discussion on this point, I would first of all bear in mind the words of Daly, C. J. in *Lilo and Another v. Ghomo*<sup>6</sup>. Speaking in the context of the role of Customary Land Appeal Courts, His Lordship at pages 233-234 of His Lordship's judgment, said,

**..."Before I turn to these grounds I must say something generally about the difficulties which have arisen. They arise, in my view, from what is always a problem in dealing with customary land cases in modern Solomon Islands. That problem is can one express customary concepts in the English language? The temptation which we all face, and to which we sometime give in, is to express these concepts in a similar manner to the nearest equivalent concept in the law received by Solomon Islands from elsewhere, that is the rules of common law and equity. The result is sometimes perfectly satisfactory in that the received legal concept and the Solomon Islands custom concept interact to give the expressions a new meaning, which is apt to the Solomon Islands context. It is thus with the use of the word "trustees"**

<sup>5</sup> [1980/81] S.I.L.R.74

<sup>6</sup> [1980/81] S. I. L. R. 229

which has arisen in this case. This word is used in Solomon Islands in the customary land context in a different way to its use in relation to the principles of equity elsewhere. However other concepts of received law have not developed a customary law meaning and the use of expressions, which denote those concepts, can produce difficulties of some complexity. This particularly so when the custom concepts which they are said to represent are themselves under-going modification to fit them to the requirements of a changing Solomon Islands which is now concerned not only with the use of land for subsistence farming but with the sale of timber on land and enclosure of land for cattle and so on”...

There is therefore the need to examine whether or not the existing relationship between the 1<sup>st</sup> Defendants and members of the Mbava tribe does create a trust outside the Act in the context of the existing principles of equity in the received law and any existing concept of trust in custom. There is no argument about the duties of the 1<sup>st</sup> Defendants as joint owners of Parcel Number 079-006-4 towards the members of the Mbava tribe. The 1<sup>st</sup> Defendants hold the land for and on behalf of all the members of the Mbava tribe. There was overwhelming evidence on this fact during the trial. The only point of dispute was the inclusion of the Plaintiff as a trustee. The question is whether or not the Defendants are trustees for the members of the Mbava tribe. In custom, the tribe owns the land and not individual members of the tribe. Mbava Island was once customary land owned by the Mbava tribe but has been transferred back to the same tribe as registered land. The 1<sup>st</sup> Defendants on behalf of all the members of the Mbava tribe are currently holding title to the land. The understanding of the 1<sup>st</sup> Defendants is that they hold title as trustees for the members of the Mbava tribe for the time being until title is transferred to new trustees to be appointed by members of the Mbava tribe. Whilst this is the intention of the 1<sup>st</sup> Defendants, the question still remains whether or not Parcel Number 079-006-4 is subject to trust. If it is then what sort of trust is it? The transfer of title from the Commissioner of Lands was in fact an incident of sale for a modest consideration of \$2,000.00 paid by members of the Mbava tribe. There is no ownership in custom of Parcel Number 079-006-4 for it is registered land but there is in custom a connection in the common membership of the Mbava tribe. The Mbava tribe through the 1<sup>st</sup> Defendants is the ultimate owner in custom of Parcel Number 079-006-4. This is the unchallenged intention of the members of the Mbava tribe. This fact alone would seem to create an implied trust in the 1<sup>st</sup> Defendants to hold the land for the benefit of all the members of the Mbava tribe under the general law of trusts. (See Schedule 3 to the Constitution). The legal owners are the 1<sup>st</sup> Defendants but in equity all the members of the Mbava tribe including the 1<sup>st</sup> Defendants are the beneficiaries and their descendants for all time. Implied or resulting trusts are often about cases where the parties whose claims in the property in dispute were based upon contributions towards the purchase of the property or one of the parties had purchased the property with money advanced by the other party who did not hold title to the property. The most common examples are cases concerning settlement of property in divorce cases or cases where the parties were members of the same family arguing over ownership of property previously acquired by them. Whilst implied trust can be identified in this case, there is a problem. The problem is that in the case of implied trust, there is no expressed disposition of interest involved. The transaction resulting in the dispute is simply examined by the Court on the evidence before it and then declares the situation as one of an implied trust. The property is often sold by Court order if necessary and the proceeds shared as the Court directs. This is not the case here. The Commissioner of Lands sold Parcel Number 079-006-4 to the 1<sup>st</sup> Defendants for \$2000.00. The intention was to return Mbava Island to the original owners in custom. The intention of the 1<sup>st</sup> Defendants is to keep Mbava Island for the Mbava tribe and its future descendants for all time as if Mbava Island were customary land. There is no intention at the moment to sell Mbava Island. The 1<sup>st</sup> Defendants cannot sell Mbava Island unless the members of the Mbava tribe do authorize them to do so. The ownership of the Mbava Island is locked in the Mbava tribe and so its alienation in the future is affected accordingly. However, the fact still remains that Parcel Number 079-006-4 is not customary land. This is its true legal status. The Mbava tribe is not the legal owner though it is the intention of its members. The belief that the 1<sup>st</sup> Defendants are trustees for themselves and for

the members of the Mbava tribe, accepted by all the members of the Mbava tribe including the 1<sup>st</sup> Defendants is one that arises from the knowledge that in custom, they are members of one tribe. Being the members of the Mbava tribe cannot be argued but the concept of being chosen to look after the affairs of the members of the same tribe because there is a fiduciary relationship in terms of being members of the same tribe is not a concept known in customary law. A man's right to occupy customary land and to till it follows his blood-connection (geneology) with that land apart from land acquired by conquest, purchase or reward for the first time. In the case of the latter, the blood-connection repeats itself down the family tree after the date of the event. His rights to land with other members of the same tribe are parallel with each other. The rights are therefore common in community with others. The concept of fiduciary relationship does not exist in customary law. This phenomenon does explain to some extent the tendency in logging cases where the representatives of landholding groups who are called trustees often do not take the interest of the rest of the members of the tribe at heart when distributing royalties. There are of course cases where selfishness or ulterior motive is the order of the day. There are also cases where Chiefs do have some influence in land allocation or distribution of royalties but that practice arises more from respect for the Chiefs than anything else. So, the fact that the 1<sup>st</sup> Defendants and other members of the Mbava tribe are members of that same tribe is not in custom a fact creating a fiduciary relationship between any one of them and any other in the tribe. It is a fact because both parties in this case do not dispute it. I agree with Mr. Nori on this point. That is, the 1<sup>st</sup> Defendants are not trustees in custom for the rest of the members of the Mbava tribe. The 1<sup>st</sup> Defendants, can however be made trustees by the creation of a trust either by deed or by legislation. Having said that, can an implied trust be imputed, nevertheless? I think not. The interest that each surviving member of the Mbava tribe has in Mbava Island is clearly rooted in custom. There is no evidence to show that each member of the tribe had made monetary contributions towards the purchase of Parcel Number 079-006-4 so that each would become a tenant in common in the ownership of Mbava Island. The payment of \$2000 as consideration was not a contribution by all the members of the Mbava tribe. It appeared that the \$2000 came from the members of the Mbava tribe who were living in Honiara at the relevant time. The customary ownership of Mbava Island had been obsolete since 1925. The Mbava tribe has however survived to this day but its ownership of Mbava Island no longer exists today. Ownership in custom can only be resurrected if the Commissioner of Lands declares it to be customary land under section 242 of the Act. Only after such declaration would it be possible to determine ownership in custom. Right now, Mbava tribe does not own Mbava Island by custom nor does it own it under the Act. I think it is not accurate to impute an implied trust, or a resulting trust or a constructive trust in this case. There cannot be an implied trust here because the transfer of title is not a disposition of property but sale of property. Similarly, there cannot be a resulting trust or a constructive trust because the relationship between the members of the Mbava tribe is one that is rooted in custom than anything else. This case is slightly different from **Allardyce Lumber Company Limited, Bisili, Roni, Sakiri, Hiele, Sasae, Poza, Zongahite, Daga, Pato and Zingihite v. Attorney-General, Commissioner of Forest Resources, Premier of Western Province and Paia**<sup>7</sup>. where CJ Ward found that constructive trust did exist on the basis that those who had been determined by the Roviana Area Council as being entitled to grant timber rights were the representatives of the landholding groups in the areas to be logged and so they were responsible for the receipt and distribution of royalties to the owners of the timber rights. I think the Court was correct in its view because the contribution by the landholding groups to the commercial arrangement was their ownership of the timber right in the areas to be logged. It was a contribution to be valued later in the form of royalties, whereas in this case, there is no such contribution by the members of the Mbava tribe. Only membership in custom of the Mbava tribe that does not own Parcel Number 079-006-4 is being alleged as the basis for the claim that a fiduciary relationship has been created. That cannot be the case. That case was cited in **Tovua, Labu, Anisi, Bosali and Kona v. Meki, Ilala, Didi, James, Chaku, Pasi, Tawiha, Ocha and Earthmovers Slomons Limited**

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<sup>7</sup> Civil Case No. 93 of 1989

cited above. Both those cases and **Lilo and Another v. Ghomo** cited above were cited by the Court of Appeal in **Aseri v. Kalena Timber Company Ltd.**<sup>8</sup>. The fact that the 1<sup>st</sup> Defendants do regard themselves as trustees is an assumption based upon the acceptance of common membership in the Mbava tribe than on any deed of trust or by legislation. In the end, I find that Parcel Number 079-006-4 is not trust property at the moment. I therefore cannot grant the declaration sought by the Plaintiff in paragraph (1) in the Statement of Claim. I refuse it. It follows that the orders sought in paragraphs (2) -(11) are also refused. This judgment does not however stop the parties from fulfilling their wish to create a trust for the benefit of themselves as members of the Mbava tribe. This case has only been about whether or not a trust has been created by the relationship between the 1<sup>st</sup> Defendants and the Plaintiff on behalf of those whom he represents on the basis that they are all members of the Mbava tribe. I have decided that no trust exists on that basis at the moment. Actually, no one loses in this case. It only means the parties will have to start again but on a proper legal footing to realize their common wish for Mbava Island. The terms of any new trust instrument will be matters to be decided by the members of the Mbava tribe. Each party will meet their own costs.

**F. O. Kabui**  
**Judge**

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<sup>8</sup> *Civil Appeal No. 164 of 1994*