IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CIVIL APPEAL NO. ABU 016 OF 2020
[Suva Civil Action No. HBC 50 of 2020]

BETWEEN	:	**1. MUKESH CHAND** **2. ARUN CHAND** ***Appellants***
AND	:	**iTAUKEI LAND TRUST BOARD** ***Respondent***
Coram	:	**Qetaki, RJA**
Counsel	:	**Mr. V. Maharaj for the Appellants**
	:	**Ms. K. Nauwakarawa for the Respondent**
Date of Hearing	:	**23 January 2026**
Date of Ruling	:	**12 March 2026**

RULING

(A). BACKGROUND

[1] This appeal was set for hearing before the Full Court on 08 May 2025. On commencement of the hearing the Court raised a Preliminary issue with regard to jurisdiction having found that the appellants have not sought and obtained leave of the Court pursuant to section 12 (2) (f) of the Court of Appeal Act.

[2] The Full Court has no jurisdiction to deal with the appeal without grant of leave to the appellants, and it directed the appellants to apply for leave to appeal.

[3] On 3rd June 2025 the appellants filed a Summons to Seek Leave for Abridgement of Time to Seek Leave to Appeal, seeking the following Orders: -

1) *That the Appellants be granted **Leave To Appeal** against the Ruling of the High Court dated 25th February, 2020 in HBC 50 of 2020 being an Interlocutory Order refusing injunction.*

2) *That **the time for applying for leave to Appeal** be **abridged** and the Appellants be granted an enlargement of time to apply for such leave retrospectively;*

3) ***An Order** that Notice of Appeal already filed be deemed valid upon the grant of leave.*

4) *Any further Order that this Honourable Court may deem fit and expedient.*

[4] The application is made pursuant to section 17 of the Court of Appeal Act and upon the inherent jurisdiction of this Court. The Summons itself is confusing in the Order it seeks from the Court. In the 2nd Order being sought it refers to *"That the time for applying for leave to Appeal **to be abridged** and the Appellants **be granted an enlargement of time** to apply for leave retrospectively"*. Whatever it is the Court is treating the Summons as an application seeking an Order for enlargement of time to seek leave to appeal.

[5] The application was fixed for hearing on 23rd January 2026. Mr Maharaj, Counsel for the appellants was present at the hearing, but Counsel for the respondent was not present in Court. There was no prior notification of her absence, and she did not arrange for a Legal Practitioner to stand in for her at the hearing.

[6] Counsel for the appellants (Mr. Maharaj) submits that the appellants will rely on the Affidavit in Support of the Summons sworn by Mr Mukesh Chand, the first named appellant, for and on behalf of both the appellants, and the appellants' Written Submissions filed on 03 June, 2025 and 17 September, 2025 respectively. The respondent had on 04 August, 2025 filed an Affidavit In Opposition sworn by Mr Semi Senikuraciri, Legal Assistant, and a Written Submissions Of The Respondent In Opposition To Summons For Leave To Appeal Out Of Time, filed on 07 October, 2025. These were all carefully studied, analysed and assessed and evaluated by the Court.

(B). GROUNDS OF APPEAL

[7] The grounds of appeal are as follows:

Ground 1

The learned Judge erred in law and fact when he summarily determined and rejected the Appellant's legitimate expectation for renewal or issuance of a new lease when there was evidence that the head of Mataqali of the subject land received from the Appellant goodwill money and over 60%of the beneficiaries of the Mataqali agreed to the issue of the lease to the Defendant/Respondent.

Ground 2

The learned trial Judge erred in law and in fact when he accepted Affidavit evidence of the Respondent as a fact which was disputed by the appellants that there was another landowning unit other than the one who received the goodwill money at the instigation of the respondents' employee without the knowledge of the respondent.

Ground 3

The learned Judge erred in law and in fact in holding that an employee of the respondent employed as an Estate Assistant at the material time had no authority to create a tenancy nor can he purport to bind the respondent and wrongly rejected the notion of Vicarious liability on the part of the respondent.

Ground 4

The learned Judge erred in law and in fact in misinterpreting section 4 of the Agricultural Landlord and Tenant Act (ALTA) in holding that the respondent had taken steps to evict the appellants/plaintiffs in the Magistrate's Court and the High Court when:

a) Both the Magistrate and High Court Actions had been dismissed with costs and effectively, therefore, there was no Court Order which required the appellants to give vacant possession of the subject land.

b) Wrongly constructed or implied that the notices given by the respondent on 10th January 2013, 25th June, 2013, and 6th December,2017 as having same authority as Court Order for the appellants to give up vacant possession.

c) Failure to hold that the appellants /plaintiffs had adduced sufficient evidence in their Affidavit which pointed towards a presumption of tenancy under section 4 or section 5 of both of ALTA and in the circumstances further erred in his failure to extend the interim injunction allowing the plaintiffs (appellants) sufficient time to make an application for Tenancy before the Agricultural Tribunal.

d) Erred in law in holding that there was no arbitrary eviction thereby implying that the respondent could forcefully evict the plaintiffs from the subject land without an order of the Court.

Ground 5

Erred in law in disregarding the appellant's claim made in their Statement of Claim of violation of appellant's rights guaranteed under the Constitution of Fiji not to be arbitrarily evicted from their property without an order of the Court.

Ground 6

Erred in law and in fact when the learned Judge finally determined the issue which was in contention that the appellants have not shown any legal rights to remain in possession of when such an issue should have been decided at the substantive hearing.

Ground 7

The learned Judge erred in law and in fact in not applying the principles of **American Cyanamid** in:

(a) Failing to hold there was a serious issue to be tried.

(b) Failing to apply the test enunciated in the case of **Allend & Others v Jambo Holdings Ltd** (1980) 2 All ER 502, in relation to undertaking of damages and not acknowledging that

there was no objection taken by the respondents in relation to inadequacy of undertaking of damages.

Ground 8

Erred in law in failing to hold that the interest of Rohit Dass by the purported agreement to lease given by the respondent is subject to the interest and statutory rights by way of presumption of tenancy under ALTA of the appellants.

Ground 9

Erred in law in dissolving the interim injunctions in all the circumstances.

(C). THE LAW

[8] Section 12(2)(f) of the Court of Appeal Act states:

> *"(2) No appeal shall lie-*
>
> *(a)……..*
>
> *……..*
>
> *(f) without leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the High Court, except in the following cases; (i) to (v) (*none of which apply in this case).

[9] Sections 16 and 17 in Part ……. of the Court of Appeal Act provide as follows:

> *"16. Subject to the provisions of section 17, the Court of Appeal shall not entertain any appeal made under the provisions of this Part unless the appellant has fulfilled all the conditions of appeal as prescribed by rules of Court.*
>
> *"17. Notwithstanding anything hereinbefore contained, the Court of Appeal may entertain an appeal made under the provisions of this Part on any terms which it thinks just".*

(D). APPELLANT'S CASE

Affidavit of Mukesh Chand for Appellants

[10] I substantially reproduce the contents of the Affidavit below:

> *"3) The Appellants were at all material times in peaceful occupation, possession and cultivation of agricultural land described as VUNIDOGO*

No.4/3/1715 more particularly described in Instrument of Tenancy (IOT) having an area of 7.6890 hectares.

4) We are bona fide farmers and have cultivated this land for several years. We also have a house on the subject land in which we reside. The house is worth over $80,000.00.

5) We have applied for statutory tenancy under ***s: 3 and s: 4 of the Agricultural Landlord and Tenant Act ("ALTA")*** *which is presently pending before the Agricultural Tribunal.*

6) On 25th February, 2020 we sought an Ex-Parte injunction before the High Court to Restrain the Respondent from forcefully evicting us which was subsequently dismissed by Justice Mutunayagam.

7) As soon as the injunction was dissolved the Respondent immediately attempted to move into our property without waiting for our right to appeal.

8) Therefore, to avoid further damages to our crop and property, our Solicitors hurriedly field an application for ***Stay*** *pending appeal before this Honourable Court on 27th February, 2020 which was also dismissed on 27th February 2023 with costs following an Inter-Parte Hearing*

9) Following the dismissal of Stay by the High Court pending appeal, there was further threat by the Defendant, its agents or servants, to have us removed from the property.

10) Our Solicitors then applied for ***Stay*** *pending appeal before the Honourable Court and on 12th September, 2023 the then President of the Court of Appeal, Honourable Justice Gunaratne granted the Stay with summarily assessed costs in our favour in the sum of $2000.00.His Lordship also identified one of important constitutional issue that the full Court needed to determine at the full Hearing of the Appeal.*

11) At no point in any of these proceedings, before the High Court or during the Stay application before this Court was the issue of failure to obtain leave by the Appellants was raised by the Presiding Judges or the Respondent.

12) The issue of Leave to Appeal was first raised by the Court only at the commencement of the full Court Hearing where it was suggested that the Court lacked jurisdiction in the absence of Leave to Appeal an Interlocutory Order pursuant to s:12(2)(f) of the Court of Appeal Act.

13) It would appear that with the impending threat to forcefully evict us from our property following the two decisions against us by the High Court our Counsel, we are advised, had overlooked to seek Leave to Appeal from the High Court or this Court.

14) We respectfully submit that this matter has proceeded in good faith and with full knowledge and implied acquiescence of the Respondent and the Court that the needed for Leave was not apparent to us as lay litigants relying on Counsel and the procedural history.

> *15) We now seek an Order for enlargement of time and for the Honourable Court to grant Leave to Appeal out of time under s: 17 of the Court of Appeal Act which vests the Court with discretionary powers to act in the* ***INTEREST OF JUSTICE.***
>
> *16) The proposed appeal raises serious questions of law and fact including the right to peaceful occupation under ALTA pending Tenancy Application, and the propriety of refusing equitable relief in circumstances involving long standing possession of land use for agricultural purposes. Our Counsel will also rely on his Written Submissions already filed in support of this application.*
>
> *17) The appeal has substantial merit and there is no prejudice to the Respondent especially given the prior grant of a Stay by this Honourable Court."*

Reasons and Length of delay

[11] The appellants submit that their failure to obtain leave was never raised in earlier proceedings before the High Court or during the Stay proceeding in this Court by the respondent or the Presiding Judge - paragraph 11 of the Affidavit In Support.

[12] The appellants submit that the leave issue was raised for the first time in the Full Court at the hearing as a preliminary point, when it was suggested that the Court lacked jurisdiction to hear the matter in the absence of grant of leave to appeal an Interlocutory Order, pursuant to section 12(2) (f) of the Court of Appeal Act- paragraph 12 of the Affidavit In Support.

[13] The appellant submits that this matter had proceeded in good faith and with the full knowledge and implied acquiescence of the respondent and the Court. The need for leave was not apparent to the appellants as lay litigants relying on Counsel and the procedural history of the case – paragraph 14 of the Affidavit In Support.

[14] The appellants submit that they are now seeking an Order for enlargement of time and for this Court to grant leave to appeal out of time in accordance with section 17 of the Court of Appeal Act, which vests the Court with discretion to act in the interest of justice – paragraph 15 of the Affidavit.

Ground of Merit

[15] The appellants submit that the appeal raise serious questions of law and fact including the right to peaceful occupation under ALTA pending Tenancy Application, and the

propriety of refusing equitable relief in circumstances involving long standing possession of land use for agricultural purpose – paragraph 16 of the Affidavit.

[16] On grounds 1 and 2, the appellants submit that the learned High Court Judge was mistaken in dissolving the ex-parte injunction earlier granted in favour of the appellants as: Firstly, the respondent did not dispute the fact that the requirement for 60% of approval by the landowners was achieved by the appellant, and the approval was vetted. Secondly, the learned Judge "unduly and wrongly in our view placed lot of reliance on the name of the Mataqali when the respondent itself created confusion by using different names in different documents filed in the proceedings". The appellants submit that there is no dispute as to the particular land in question in this case, and if indeed there was a mistake, this matter being an interlocutory matter, can be corrected by the appellants amending their Statement of Claim.

[17] The appellants submit that the learned Judge was mistaken in holding that an Estate Assistant has no authority to create a tenancy nor can he purport to represent the Board: **Usebia Ciba & Others v Bale Francis** ABU No.107/2020 where the Court of Appeal disagreed with the findings of the High Court and found the respondents liable for the damages caused to the appellants based on the principle of *"non-delegable duty"*.

[18] The appellants submit that the learned Judge was mistaken in failing to appreciate that the land in question is agricultural land and therefore is subject to the provisions of the ALTA. The learned Judge failed to appreciate that the appellants had filed a reference in the Agricultural Tribunal seeking a declaration of tenancy in accordance with sections 4 and 5 of the relevant Act. The learned Judge had misinterpreted the effect of the Notices sent by the respondent on 10/ 01 /2013, 25/06/2013 and 06/12/2013 to the appellants as being equivalent to a Court Order, He ignored the pending substantive action HBC 50/2020 and more importantly the Tribunal Action.

[19] The appellants submit that , there are a number of High Court and Court of Appeal decisions which state that where a matter under consideration is to do with an agricultural land from which possession is sought, the occupant can demonstrate that he or she has a reference pending determination for a declaration of tenancy, then the hearing and determination of the tribunal reference should take precedence over any

other proceedings: **Chandra Wati v Gurdin** Civil Appeal 34/80, **Pratap v Lal** (2008) FJCA 38,ABU0072 of 2005, **Dharam Lingam Reddy v Ponsami and Valiamma** Civil Appeal No, 42/81.

[20] The appellants submit that their constitutional right under section 39(1) of the Constitution was violated, and the respondent had trespassed into the appellants' farm and destroyed the crops and was using intimidatory tactics to drive the appellants forcefully out of their property which necessitated the taking of an ex-parte application for an interim injunction.

[21] The appellants submit that the learned Judge in earlier refusing a Stay proceeding, had misunderstood or misapplied the effect of the decision in **Soma Raju v Bhajan,** Civil Appeal 48 of 1976, which had established that where an occupier of land becomes a tenant and the land is transferred to a third party, that assignee takes subject to the statutory right of the tenant. The learned trial Judge either ignored or failed to apply the above principle when he held (paragraph 18 of impugned judgment), "since the land had been leased to Rohit Dass, the appellants had no right to remain on the land whereas the correct position, is Rohit Dass took the lease subject to statutory tenancy to which the appellants may be entitled to if the Tribunal makes a determination in favour of the appellants".

[22] The appellants submit that the learned Judge was mistaken in law when he dissolved the injunction when there was clear evidence of serious issued that had to be tried. The balance of convenience was clearly in favour of the appellants: **Allen v Jambo Holdings Ltd** (1980) 2 All ER 502.

[23] That the balance of convenience was clearly in favour of the appellants. There was no Court Order which gave the authority to the respondent to forcefully evict the appellants from their farm without a proper adjudication by the Tribunal or a Court of Law.

Prejudice

[24] The appellants submit that the appeal has substantial merit and there is no prejudice to the respondent especially given the prior grant of Stay – paragraph 17 of the Affidavit.

(E). RESPONDENTS CASE

Delay

[25] The respondent submits that the appellants excuse for the delay in obtaining leave to appeal cannot be sustained. It is no excuse that the Appellants took the wrong course of action in respect of the appeal simply due to their lawyer's oversight – paragraph 16 of the Affidavit of Semi Senikuraciri the first-named appellant ("the Affidavit")

[26] The respondents submits that failure of the Court and the respondent to alert the appellants on non-compliance with statutory requirements does not negate the fact that the Appellant themselves, through their lawyers, were required to comply with the requirements of the Court of Appeal Act and Court of Appeal Rules. The Act is clear that the leave of the Court of Appeal is required for appeals made against an Interlocutory Order of the High Court - *paragraph* 17 of the Affidavit.

[27] The respondent maintains and submits that on the grounds of the twin criteria of: (i) the length of delay and (ii) the reasons adduced for the delay, taken together with the prejudice criterion, should be taken into account. The excuses for delay by the Appellants urging that firstly it was never raised by the Judges and the respondent and secondly it was overlooked should not be entertained – paragraph 20 of Affidavit.

[28] The respondent submits that the failure of the appellants in seeking leave of the Court as required under statute is the fault of the Solicitors acting for the appellants and there are legal implications as relevant authorities show.

Ground of Merit

[29] The respondent submits that if the court is to consider the length of delay, which is three years, where the Appellant was to seek leave of the court, and the excuse for the delay which was that neither the Judge nor the respondent raised it and it was overlooked by the Appellants counsel should not be urged, it is no excuse that lawyers are remiss in their duties to comply with the law.

[30] The respondent maintains and submits that the appellants have been living on part of the land for a considerable time without the consent or the permission of the board they have no legal title to be in occupation and are illegally occupying the land. The

Appellant does not have prospect of success if leave to appeal notwithstanding the lapse of time, is granted – paragraph 21 of the Affidavit.

[31] The respondent submits that the matter before this Court is an appeal against the decision of the High Court on the dissolution of the interim injunction.

[32] When deciding whether to grant an application for an interlocutory injunction, courts in Fiji have adopted the guidelines set out in the celebrated decision of the House of Lords in **American Cyanamid v Ethicon Ltd** [1975] AC 395, See also **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** Civil Appeal ABU0011 of 2004S.As a general rule, the Court must have regard to the following criteria: (a) Is there a serious question to be tried?(b) Are damages an adequate remedy? (c) If the answer to (b) is in the negative then where does the *"balance of convenience"* lie ?

[33] The respondent submits that the High Court was correct in holding that there was no serious issue to be tried when it stated that the appellants have not shown any legal right to remain in possession of the subject land. The facts of the case show that the appellants came onto and remained on the land, presumably upon the consent of the tenant. The instrument of tenancy expired on 31 December 2011. Further, the respondent submits as follows:

> *"[16] Even prior to the expiry of the tenancy, the Board as early as 26 October, 2009 had advised the Appellants that the Board had considered their request for renewal and advised that the Board would not be renewing the instrument of tenancy for a further period and that the land would be subject to a residential subdivision when the lease expires. The letter was signed by the Manager of the Central Eastern Division, Mr. Solomoni Nata.*
>
> *[17] The evidence shows that despite knowing the Board's position that it would not be renewing the instrument of tenancy, the Appellants purported to take action between November-December,2010 to have the instrument of tenancy transferred to the Appellants. Note that none of the Transmission by Death documents, application for transfer of lease or application for consent to assign were signed by the tenant, or duly registered.*
>
> *[18] Moreover, despite knowing the Board's position that the term of the instrument of tenancy would not be renewed or that no new lease for agricultural purpose would be issued in respect of the subject land, the Appellants allege that they received from members of the landowning unit a number of signatures purporting to be consenting to the issuance of a new lease or renewal of the existing instrument of tenancy to the*

Appellants. The consent forms are readily available to the public (including applicants and landowners) and the signatures are not verified to confirm their veracity, let alone to confirm that the 60% majority was obtained.

[19] The Board's position as stated in its Affidavit of Opposition (see page 129 of the Record) is that the signatures for the purported consents were from another landowning unit Mataqali Naitasiri who had no authority to deal with the subject land. Compare this with the name of the landowning unit as stated in the Instrument of Tenancy (see page 44 of the Instrument of Tenancy).

[20] …., no lease over Itaukei land can be issued unless the provision of section 7 and section 9 of the Itaukei land trust Act 1940 are complied with……"

[34] The respondent relies on **Nalukuya v Itaukei Land Trust Board** [2021] FJHC 138 per Stuart J, on the application of section 9 (Conditions *to be observed prior to land being dealt with by way of lease or licence*) of the Act.

[35] The respondent's other submissions on the decision to dissolve the injunction are set out in paragraphs 22 to 32 of the respondent's written submissions and which are briefly captured below.

[36] The respondent submits that the High Court was correct in fact and in law in its finding that there was no serious issue to be tried. As such, the High Court was correct in ordering the dissolution of the interim injunction.

[37] The respondents' submissions on this aspect is supported by relevant cases including **American Cyanamid** (supra) per Lord Diplock, **Natural Waters of Viti Ltd** (supra), **Honeymoon Island (Fiji) Ltd v Follies International Ltd** [2008] FJCA 36, **Garden Cottage Foods Ltd v Milk Marketing Board** [1983] 2 All ER 770 at page 772 per Lord Diplock, **Digicel (Fiji) Ltd v Fiji Rugby Union** [2016] FJSC 40 and **Air Pacific Ltd v Air Fiji Ltd** [2006] FJCA 63

[38] The respondent submits that the learned Judge had given his mind to the question of the adequacy of damages and the undertaking as to damages at paragraphs 16,17 and 18 of his ruling (see page 38 of Record), and had exercised his discretion against the appellants. That even if the Court was to find the appellants had raised some serious issues to be tried, a proper consideration of the adequacy of damages and the balance of convenience would make it apparent that the High Court's decision to dissolve the injunction was the correct one. For the above reasons, grounds 7 and 9 must fail.

[39] The respondent submits that Grounds 1, 2 and 3 and Grounds 4, 5, 6 and 8 relate to the issue whether there are serious issues to be tried.

[40] The respondent submits that the appeal is one made against the decision of the High Court ordering a dissolution of an interim injunction, and with the exception of Grounds 7 and 9, a consideration of all other grounds of appeal goes to the issue of whether there is a serious issue to be tried. Even if the Court finds that Grounds 1, 2, 3,4,5,6 and 8 are made out and the appeal grounds succeed, these only go to the question of whether there is a serious issue to be tried.

[41] And further, the respondent submits that, if the Court were to consider whether to overturn the High Court's decision, it would still need to satisfy itself that second and third limbs of the ***American Cyanamid test*** have been made out in favour of the appellant. Finally, the respondent submits that, this is a case where damages are an adequate remedy. A balance of convenience lies in favour of not granting the injunction due to the paucity of any evidence of financial standing of the appellants.

Prejudice

[42] The appellant submits that it will be prejudiced if leave were to be granted as a lease was issued of the subject land, and developments on the land will be delayed due to the appellants application. Given that the appellants continue to be in occupation of the property in question, if granted this application is prejudicial to the Respondent – paragraph 20 of Affidavit.

[43] The respondent maintains and submits that the appeal has no merits. The lower courts have ruled on the legality of the case and it will be prejudicial to the respondent should leave to appeal be granted as the appellants have continued living on the said land and the reasons urged by the appellants for the delay and the lapse in time to file the same the respondent is of the firm view that the application for enlargement of time for leave to appeal must fail – paragraph 22 of Affidavit.

[44] Lastly, the respondent submits that it is safe to say that litigation must have an end. The orders in this case were given more than 3 years ago and the applicants and their lawyers had more than ample time to seek leave to appeal.

None was filed. With respect the interests of justice in this case favour the refusal of an extension of time and leave to appeal- paragraph 23 of Affidavit.

(F). DISCUSSION & ANALYSIS

[45] In applications of this kind there are five factors that appellate courts have to consider to ensure a principled approach to the exercise of judicial discretion. Those factors are:

(i) The reason for the failure to file within time.

(ii) The length of the delay.

(iii) Whether there is a ground of merit justifying the appellate Court's consideration.

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

(v) If time is enlarged, will the respondent be unfairly prejudiced. See **Native Land Trust Board v Khan** [2013] FJSC 1; CAV0002.2013 (15 March 2013), **McCaig v Manu** [2012] FJSC 18; CBV0002.2012 (27 August 2012).

The above factors have been addressed by both the appellants and the respondent which I will now consider, discuss and analyse, before I address the *"Interests of Justice "* issue and related matters in the context of an application for enlargement of time and section 17of the Court of Appeal Act.

(i) and (ii) - Reasons and length of delay

[46] There was a substantial delay of three years, before the application for enlargement of time was filed. On this aspect, paragraphs 16 and 17 of the Affidavit of Mr Semi Senikuraciri, Legal Assistant with the respondent states:

"16. As to paragraph 11 of the Supporting Affidavit the Appellants have urged that as a excuse for delay was the issue of failure to obtain leave never raised by the Presiding Judge or the Respondent. I am advised by our Legal Officer Ms. Keresi Nauwakarawa and believe that party litigants through their lawyers must advise themselves as to what procedure to

follow. In accordance with the law parties through their lawyers must advise themselves. It is no excuse that the Appellants took the wrong course of action in respect of the appeal simply due to their, lawyer's oversight.

17. As to paragraph 12 of the Supporting Affidavit the Appellant raised the issue of Leave to Appeal was first raised at the commencement of the court hearing where it was suggested that the court lacked jurisdiction in the absence of Leave to Appeal an Interlocutory Order pursuant to section 26(2).Any application to the Court of Appeal for leave to appeal (whether made before or after the expiration of time of appealing) shall be made on notice to the party or parties affected. The failure of the Court and the Respondent to alert as the non-compliance with statutory requirements does not negate the fact that the Appellants themselves, through their lawyers, were required to comply with the requirements of the Court of Appeal Act and Court of Appeal Rules. The Act is clear that the leave of the Court of Appeal is required for appeals made against an interlocutory order of the High Court.

[47] The reasons for the delay cited in the Affidavit of Mr Mukesh Chand is neither satisfactory and nor acceptable. That is : (i) the failure to obtain leave by the appellants was not raised at any time by the Presiding Judges or the Respondent during any of the proceedings before the High Court or the Stay proceeding before this Court, and (ii) secondly, leave to appeal was not raised earlier enough, and was first raised by the Court only at the commencement of the full hearing (on 8th May 2025), when it was suggested that the Court lacked jurisdiction in the absence of leave to appeal on Interlocutory order pursuant to section 12 (2) (f) of the Court of Appeal Act.

[48] It is the duty of the appellants and their Solicitors to conduct the appeal in compliance with the relevant provisions of the Court of Appeal Act. The appellants point to the respondent and the Court and not themselves and their Solicitors for the delay. The duty and accountability of the Legal firm and counsel are well set out in the following cases cited by the respondents: **Vanualevu Hardware (Fiji) Ltd v Labasa Town Council** [2022] FJCA 59, and cases cited therein

[49] The respondent had challenged the reasons for the delay advanced by the appellant and submits that the delay is substantial and has affected its plan to proceed with the development works on the land. I am not convinced that the two reasons advanced by the appellants as the excuses and reasons for the delay (in Affidavit of Mukesh Chand and in the written submission) on behalf of the appellants are to be worthy of acceptance under the circumstances. That being the case, the next step is to consider whether there is a ground of merit, which is arguable or reasonably arguable.

[50] The length of the delay is approximately three years. This is a significant delay, and if the delay is not adequately explained or justified, the Court should consider factors (iii) and (iv). I have considered the reasons of the delay, not the cause of the delay and I am not persuaded that the reasons are sound or can be justified.

(iii) and (iv) - Ground of merit? Whether there has been substantial delay - appeal will probably succeed?

[51] In Part (C) "Analysis "of the appellants Written Submissions the appellants state as follows:

> *"We submit that there are number of factors in this case which favours grant of leave to the Appellants in the "interest of justice" and these factors are: -*
>
> *a) The failure to obtain prior leave was not deliberate or intentional on the part of the Appellants. It appears to be a genuine oversight on the part of the Solicitors of the Appellants.*
>
> *b) The above oversight was compounded by the fact that the Respondent had not taken any objection at any stage of the proceedings on the issue of absence of leave until the point was taken by this Court.*
>
> *c) The appeal raises important issues of law such as interpretation of s:4 and s:5 of the Agricultural Landlord and Tenant Act (for more particulars see Appellants' Written Submissions in support of the Appeal filed on 01st April,2025).*
>
> *d) Whether the proceedings in the High Court should have been stayed or adjourned ,2023 pending the outcome of the Appellant's reference at the Agricultural Tribunal C & CED 01/20(see also Ground 4 of the Written Submissions of the Appellants.)*
>
> *e) His Lordship Justice Gunaratne in granting stay of the impugned judgment on 12th September,2023 identified 3 important issues for determination by the full Court raised in the Appellant's appeal….. "*

Grounds 1 and 2

[52] Having considered the submissions of both the appellants and the respondents, the judgment of the High Court and the relevant law, I find that the appellants *legitimate expectations for renewal of* lease, is misplaced. It is the Board as constituted, and not the agent or the members of the landowning unit (Mataqali in this case) or *Turaga Ni*

Yavusa that determines the approval for a lease. There are internal procedures that govern the processing of lease applications up to approval, and it has not been argued by the appellants that what the appellants have done are in accordance with the policy and procedures of the respondent.

[53] In any event, there are other issues, including the respondent's contention that the identity of the land and the landowning unit were not correct. There is the question also on the payment of "goodwill" directly to the *Turaga ni Yavusa* for the members of the landowning unit. "Ownership" of lands is protected under the Constitution and the registration of landowner and their land are under the supervision of the Native Lands Commission (NLC) , which determines and registers *itaukei* land ownership and in accordance with the Itaukei Lands Act. The NLC also adjudicate over any dispute affecting ownership and title over *itaukei* lands. The grounds have no merit.

Ground 3

[54] Based on the available record and submissions, and the law, the ground is misconceived, and the High Court was correct on this point. The legality of the appellant' conduct assisted by an employee of the respondent is in question, that is the payment of money as goodwill in order to obtain the consent of the members of the landowning unit. It is not evident whether the matter was reported to the Police for criminal investigation and for laying of charges if warranted after the investigation. It is also not clear from the respondent whether the Assistant Estate Officer was subject to disciplinary action.

[55] Vicarious liability arises where an employee, having followed all the procedures and instructions, fell short of the duty of care attached to his or her role, and had caused damage to a third party. Or, when an employee, does not act appropriately or in breach of the terms and conditions of employment, with the full knowledge of the employer, as in **Usebia Ciba and Others** (supra) .The facts and circumstances giving rise to this matter, in this appeal, are quite different and as such the concept of *"non- delegable duty* " applicable in that case cannot be applied here. This ground has no merit.

Ground 4 & 9

[56] These grounds are addressed below at paragraph [61] to [67] below.

Ground 5

[57] Section 39(1) of the Constitution protects a citizen from arbitrary evictions, by asserting freedom from arbitrary eviction. It provides that no law may permit arbitrary eviction. Whether the appellants have actually been evicted from the subject land is not established, what the facts suggest is there has been attempts by the respondent to forcefully enter the land occupied and cultivated by the appellants. The constitution of Fiji, in sections 45 established the Human Rights and Anti-Discrimination Commission, its role and functions and also established in section 44 the mechanism for enforcement in situations where a citizen's right and freedom is under threat or violated. There is nothing in the record before this Court that the appellants had lodged complaints of contravention of their rights under the Constitution to the said Commission. This ground lacks merit.

Ground 6

[58] In considering the issues before the High Court, it is important for the Court to have some idea or perspective of where the appellants are placed as far as their perceived, presumed or actual rights on the subject land. That is important, On the facts, the appellants are persuing two options for the purpose of obtaining a tenancy from the respondent. On the one hand, the appellants are asserting their legitimate expectations to be issued with a new lease after having been assisted or advised to pay goodwill to the landowners in consideration for their signature indicating their "consent" to the appellants leasing their land, and on the other hand, the appellants are asserting that they have a tenancy by virtue of applying to the Agricultural Tribunal under sections 4 and 5 of the ALTA for declaration of tenancy. The presumption of tenancy under section 4 is rebuttable, and there are materials in the pleadings for which the respondent may use for that purpose. The trial Judge would have the respondent's submissions as in this case, alleging that the lease has expired, if so, what right, apart from the section 4 presumption, does the appellants stand on? This ground has no merit.

Ground 7

[59] The learned trial Judge had in my view reached the correct conclusion based on the facts and circumstances of the case. There are no serious issues to be tried as for

grounds 1, 2, 3, 5, 6, 7 and 8. On the undertaking of damages, the appellants are not in a position, given the enormity of the project being planned and implemented by the lessee through approval of the respondent are financially exacting and costly. As argued by the respondent, even if the Court finds that grounds 1, 2, 3, 4, 5, 7, and 8 are made out and the appeal grounds succeed, they only go to whether there is a serious issue to be tried. If the Court were to consider whether to overturn the High Court's decision, it would still need to satisfy the second and third limbs of the test in **American Cyanamid** in favour of the appellant. That is: Are damages an adequate remedy? If the answer is in the negative, then where does the balance of convenience lie? The respondent submits that this is a case where damages are an adequate remedy. I agree. A balance of convenience lies in favour of not granting the injunction due to the paucity of any evidence of financial standing of the appellants. This ground has no merit.

Ground 8

[60] The ground is two pronged. It disputes the completeness of the Development Lease granted to Rohit Dass as to assert that the lease is subject to his right acquired merely by filing a section 4 application in the tribunal. Again, the section 4 presumption of tenancy is rebuttable by the respondent. The ground lacks merit.

Grounds 4 and 9

[61] Section 4 of ALTA on "Presumption of tenancies "provides as follows:

> *"4(1) Where a person is in occupation of, and is cultivating, an agricultural holding and such occupation and cultivation has continued before or after 29 December 1967 for a period of not less than 3 years and the landlord has taken no steps to evict him or her, the onus shall be on the landlord to prove that such occupation was without his or her consent and, if the landlord fails to satisfy such onus of proof, a tenancy shall be presumed to exist under the provisions of this Act, provided that any such steps taken between 20 June 1966 and 29 December 1967, shall be no bar to the operation of this subsection.*
>
> *(2) Where a payment in money or in kind to a landlord by a person occupying any of the land of such landlord is proved, such payment shall, in the absence of proof to the contrary, be presumed to be rent."*

[62] Section 5 of ALTA on "Application to declare existence of tenancy" provides as follows:

> *"5(1) A person who maintains that he or she is a tenant and whose landlord refuses to accept him or her as such may apply to a tribunal for a declaration that he or she is a tenant and, if the tribunal makes such a declaration, the tenancy shall be deemed to have commenced when the tenant first occupied the land, provided the rent shall only be recoverable where the tribunal is satisfied that it is just and reasonable so to order."*

[63] It is open to the landlord to rebut the presumption of tenancy in section 4 of the ALTA. I agree with the finding in paragraph 13 of the decision of the High Court to the effect that the defendant/respondent has taken steps to evict the plaintiffs in the Magistrate' and High Court based on the evidence before me. There is nothing in section 4, requiring the production of an eviction Order, in order to rebut the presumption. The landlord through evidence adduced, has taken steps to evict the occupier who is cultivating the land, and that the occupation and cultivation is without the landlord' consent.

[64] The defendant/ respondent also issued notices of unlawful occupation on both plaintiffs/appellants on 10th January,2013,25th June,2013 and 6th December 2017, stating that they hold no title or consent from the Board to be in occupation.

[65] The tribunal may deny the applicant by refusing to make a declaration, if the landlord or owner has satisfied the burden of proof on the balance of probabilities. Given the facts and circumstances of this case and its history, is not a reasonable for the appellants to expect that a declaration of tenancy will be made in their favour.

[66] In the context of section 4 of ALTA, whatever evidence there are that supports the presumption of tenancy, may be rebutted in accordance with the requirements of the section.

[67] On the contention that the Courts should await the deliberation and decision of the tribunal on the application made by the appellants to the Agricultural Tribunal under section 4 and 5 of the ALTA, I wish to make two points. Firstly, the established authorities cited by the appellants are acknowledged. However, each case has to be decided based on the facts and circumstances of the case. Secondly, none of the authorities had considered the application of section 62 of the Agricultural Landlord and Tenant Act in a conflict of adjudication in grievances or disputes involving agricultural holdings. Section 62, seems to confer jurisdiction or permit or does not prohibit or discourage the adjudication of disputes on matters covered under the Act

to other forums especially to the appellate Courts. It questions, in my view, why, it is the appellate Courts that has to defer to and await the decision of the tribunal, rather than dealing with them as appropriate as the tribunal is statutorily directed under section 62, on how it should approach the decisions so made by appellate Courts. The grounds have no merit.

(v) - Prejudice

[68] The appellants submit that, the respondent will not suffer prejudice if the appellants' application for enlargement of time is granted as the appellants had already been granted a Stay by this Court.

[69] The respondent in its written submissions submits that:

> *"34. TLTB will be severely prejudiced if the proceedings for Leave to Appeal out of Time was to continue. In this case, if this was to proceed and, say the Appellants were to be granted the leave of the Court. The Appellants have been living on part of the land for a considerable time without the consent or the permission of the Board who represent the Land-Owning Unit the lessors of the subject land. The Appellants have been living on the subject land to which they have legal title to be in occupation and since the expiry of the lease to Indar Prasad and subsequently to Rohit Dass are illegally occupying the land.*
>
> *35. ……The Mataqali has been deprived of the land being utilised to its highest and best use with returns to the Mataqali as it has been the subject of this case before the High Court……."*

[70] Further, in my considered view, the application if granted would greatly prejudice the respondent. The is a statutory Trustee under the Itaukei Lands Trust Act vested with the control and management of *itaukei* lands for the benefit of their owners.

[71] The respondent had commenced to subdivide the subject land for the benefit of the members of the landowning unit.

[72] The respondent had taken steps to resume vacant possession of the land. The result is costly both to the respondent and the landowning unit. The benefits that will accrue to the respondent and its beneficiaries if development were to proceed as planned will not be realised and impeded should the appellants continue to remain in occupation of the land.

The Interest of Justice

[73] The appellants referred to a number of cases which support the contention that the application made under section 17 of the Court of Appeal Act ought to be granted, In the first example, In **R.B.Patel v Bajpai & Co.LTD** (1987) 33 FLR 92 where no prior leave was obtained in an appeal against an interlocutory Ruling and the Respondent took an objection on the ground that the appeal was a nullity and the Court lacked jurisdiction to entertain the appeal. The Court observed:

> *"It is clear that s: 17 is paramount and its purpose is to do justice where strict compliance with the Rules would deny it."*

[74] Leave was also granted by this Court in **Attorney General of Fiji v Ram Kumari & Another (2015 FJCA 139; ABU 065 of 2012 (02 October 2015)** - which dealt with a similar situation to the current case, in that, there was an appeal against an interlocutory Ruling where prior leave had not been sought or obtained. Notwithstanding absence of prior leave, the Court nevertheless entertained the appeal "*in the interests of justice* "as it took the view that the issues raised in the appeal was of public interest citing **Patel v Bajpai** (supra) in support.

[75] Also in **The Labour Officer for And On Behalf of Andrew Redfern v Wyndham Vacation Resorts (Fiji) Limited** (Civil Application N0.095 of 2023 (29th May, 2025) where the Court struck out the appeal on the ground of failure to obtain leave to appeal from the impugned Interlocutory Ruling of the High Court. It is submitted that this case can be distinguished on its facts from the present case, in that in Redfern (supra) no application had been made to obtain leave despite the opportunity offered by the appellant to apply for leave. In the present case the appellants have taken the advice of the Court and are seeking leave to appeal in the exercise of its discretionary power under Rule 17.

[76] What is in "*the interests of justice*" must be determined after the Court has considered the facts and circumstances of the case, the submissions by the parties and the relevant laws including case law. It is important to emphasise that having considered all the factors, in assessing whether the application for enlargement of time should be granted, the question of whether the respondent will be prejudiced by the grant of the

application, is viewed by this Court as important in deciding whether to allow or disallow the application before it.

[77] The appellants have clearly stated that the respondent will not suffer any prejudice, especially as there is a Stay Order in place (per Guneratne, P) as from 12 Septemder,2023 as follows:

> *"1. The appellants' application for "a stay of the impugned Ruling dated 26 February, 2020" is allowed, pending the hearing and determination of the appellants appeal by the full Court……"*

[78] The appellants submit the Stay Order as a factor which favours the appellants in the granting of leave "*in the interests of justice".* With the greatest respect, I have read the decision and , hold serious reservations with the decision in the following areas- paragraph [4] "Established areas" – paragraph [3] (a), (b), (c), and (d) as they assume to be "established " the very issues that needed to be resolved .Paragraph [4] "Disputed Issues" which are: (a) Whether the appellants have ceased to be in occupation the land in question, and (b) The appellants when they claimed and got the initial tenancy whether they had procured the same in respect of the " *the appropriate land unit"* and through a proper authority under the Respondent Body.

[79] Also, in paragraph [10] of the decision it is stated:

> *"[10] Apart from the grounds of appeal urged by the appellants, particularly the questions I have referred to in paragraph [6] above, I wish to raise for consideration by the full Court when hearing the appeal, as a matter of public issue, whether "policy where-ever it comes from could over-ride the existing statutory regime" or whether, that could be done only by Parliament (the Supreme Legislature) by amending the existing legislative (viz: the provisions off the ALTA) and not by executive fiat."*

[80] The questions posed in paragraph [6] are:

> *"(a) In the context of the impacting statutory provisions, whether the High Court had addressed the concept of "**presumption of tenancy**" as against "the alleged unlawful occupation".*
>
> *(b) The respondent being no doubt a statutory authority, on the basis of a changed zoning policy from 'agricultural tenancies" to "**residential property**", whether the High Court had addressed the appellants' "**legitimate expectations**" to have continued as a "**farmer on agricultural land the initial basis on which they entered into occupation.**"*

[81] The concerns and questions are intended for the Full Court to address; however, I have covered some of these issues in this discussion and analysis which may have served to clarify some of the issues raised. On the rezoning question, the respondent's submissions is that the lease was to expire, and the respondent had indicated that it will not renew the tenancy by issuing a new lease. It took steps, unsuccessful they may be, to remove the occupiers from the land. Re-zonig is a policy decision open to the landlord to apply for with the Director of Town and Country Planning under the Subdivision of Lands Act 1937, an Act of Parliament. A tenant may also apply for rezoning, if required, while his or her tenancy subsits.

[82] The appellants' awareness that the lease will not be renewed makes logical the appellant's attempt and act, with the assistance of the respondent's employee, to gather the consents of the landowners (although alleged to be from a different landowning unit (Mataqali) not associated with subject land) and to pay the goodwill, with the view to lodge a fresh lease application to the respondent for its approval. Why, apply to the Agricultural Tribunal under sections 4 and 5 of the Agricultural Landlord and Tenant Act? Is it due to the fact that the appellants are convinced that the respondents will not extend or renew the expired lease or issue a fresh lease altogether? It would appear that the facts upon which the Stay was determined were not established facts.

[83] If anything is established, it is the prejudice to the respondent which flows on to the landowners (Mataqali members), if the application for enlargement of time is allowed.

(G). CONCLUSION

[84] In the circumstances, I hold that, the reasons for the delay were unacceptable and the delay was substantial; there is no ground of merit attached to the appellants grounds of appeal and the respondent is likely to be severely prejudiced should this Court grant the application before it. I have considered all the materials before me, the law and the submissions of the appellants and the respondent, the prejudice that the respondent will suffer if the application is granted, and my reservations on the Stay Order in favour of the appellants. Taking all these into account, I am satisfied and hold that the appellants' application for enlargement of time for leave to appeal is declined.

Orders of the Court

1. *The Application for enlargement of time is refused.*
2. *The appellants to pay $2000.00 costs to the respondent within 21 days.*

Hon. Justice Alipate Qetaki
RESIDENT JUSTICE OF APPEAL

Solicitors
Vijay Maharaj Lawyers for the Appellants
iTLTB Legal Department for the Respondent