

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

CIVIL APPEAL NO. ABU 065 of 2023
[In the High Court Suva Case No. HBC 282 of 2021]

BETWEEN : **MITIELI KUBUNAVANUA & SALASEINI KUBUNAVANUA**
Appellants

AND : **KERENI WATI & AKANISI CAGINITOBA**
Respondents

Coram : **Prematilaka, RJA**
Morgan, JA
Clark, JA

Counsel : **Mr. Chandra V. for Appellants**
: **Respondents absent and unrepresented.**

Date of Hearing : **05 February 2026**

Date of Judgment : **27 February 2026**

JUDGMENT

Prematilaka RJA

[1] The respondents (original plaintiffs) brought this action by way of originating summons in terms of Order 113 Rule 1 (O.113, r.1) of the High Court Rules. They sought to recover possession of land occupied by the appellants (original defendants). The 01st appellant has since passed away but the 02nd appellant has reportedly instructed her solicitors to pursue the appeal.

[2] The respondents' position is that the land in question is owned by their Mataqali Naivileweni, (MN) TK known as Register of Native Land (RNL), Vol. 5, Folio 972, Lot 92 on Plan No. M3/4, 12 (part of). Their supporting affidavit averred that they were members of Mataqali Naivileweni (a copy of their VKB was attached). Thus, their

action was a representative action and purportedly authorized by the majority members of their Mataqali.

- [3] According to the respondents, in September 2020 the appellants began to erect a dwelling on the land in question without consent or lawful authority. Consequent to their complaint, iTaukei Land and Trust Board (iTTLTB) inspected the land and demarcated the boundaries and on 09 September 2021, iTTLTB issued a notice of unlawful occupation to the appellants for illegally constructing a concrete dwelling on the land. By letter dated 07 October 2021, iTaukei Lands & Fisheries Commission (TLFC) has confirmed that the sole custodian to the Native Land Lot 92 on Plan No. M3/4, 12 (part of), Register of Native Land (RNL), Vol. 5, Folio 972 is Mataqali Naivileweni.
- [4] On behalf of the appellants, the second appellant in her affidavit in opposition took up the position that the first appellant (father) and she (daughter) were building their home next to their existing home within their village boundary, Nabudrau Village. So, she claimed that the respondents could not claim ownership over their village boundary. The land apparently is not a registered lease nor is it registered under the Land Transfer Act. She further said that she received confirmation by a letter dated 07 February 2022 from TLFC that their residence is located within the Nabudrau Village boundary. The second appellant also stated that the TLFC confirmed that the disputed land was part of their village boundaries. According to the second appellant they had invested approximately \$60,000.00 for the construction of their new home.
- [5] The High Court on 02 June 2023 determined that the respondents were entitled to recover possession of the land owned by their mataqali from the first and second appellants who were also directed to give up their possession of the land concerned on or before 31 July 2023. The appeal is against this judgment.
- [6] In the meantime, the appellants on 06 October 2023 successfully obtained a stay order on the enforcement of the High Court judgment pending appeal.
- [7] It appears that the first three grounds are interconnected. The first ground of appeal raised by the appellants is concerned with the application of sections 4 - 6 of the iTaukei

Lands Act 1905 (iTLC) regarding the ownership of the land the appellants have built their house on; Mataqali Naivileweni or Nabudrau Village. The second and third grounds of appeal deal with two letters issued by TLFC and a notice of unlawful occupation issued by iTLTB. All three letters are relevant to the main issue raised under the first ground of appeal.

- [8] In terms of iTLC, iTaukei Lands Commission (iTLC) is charged with the duty of ascertaining what lands are rightful and hereditary property of iTaukei owners, whether of mataqali or otherwise (section 4). The iTLC has to institute inquiries into the title of lands claimed by mataqali or other divisions and should describe the boundaries and situations of such lands together with the names of members of the land owning unit. Prior to making such inquiries and recording such boundaries, proper notice must be given to all claimants and objectors by the iTLC. There is a right of appeal against the decision of iTLC by an aggrieved party (see section 7).
- [9] TLFC has said in its letter dated 07 October 2021 that Tokatoka Naivileweni (TK231) is the sole custodian to the Native Land known as Lot 92, Plan M/3/4,12 (part of), RNL Volume 5, Folio 972. However, TLFC by way of a subsequent letter dated 07 February 2022 has confirmed *inter alia* that the 01st appellant's residence (02nd appellant is his daughter) is located within the Nabudrau Village Boundary that was demarcated and commissioned by its staff on 30 October 2014 on the agreement of the Land Owning Units. The addresses given in the caption too show that they are living in Nabudrau, Noco, Rewa.
- [10] However, iTLTB had addressed a Notice of Unlawful Occupation dated 09 September 2021 to the 01st appellant and family that they had illegally constructed a concrete dwelling on the land belonging to Mataqali Naivileweni without consent, and ordered them to dismantle the structure and cease any further development thereon within one month or face legal action. iTLTB's decision seems to be based on 'a recent inspection'. The 02nd appellant had responded to this notice on 28 September 2021 by email and referred iTLTB to TLFC's stance, which in response has replied that they will await the confirmation from iTLC now referred to as TLFC. The confirmation referred to therein appears to be the TLFC's position that the appellants' house is built within the new Nabudrau Village Boundary as recorded in paragraph [4] above.

- [11] This Notice of Unlawful Occupation is the document the trial judge relied on to satisfy himself that the appellants were unlawfully occupying the land they had built upon, and on which they had been living for a long time.
- [12] It is clear from the provisions in the iTLA , that the iTLTB has no authority with regard to the ownership or boundary disputes regarding iTaukei lands. iTLTB only controls and administers iTaukei land for the benefit of the iTaukei or iTaukei owners. By virtue of section 6(5) of the iTLA, such disputes must be resolved by iTaukei Lands Commission (previously Native Lands Commission - NLC) which is now known as TLFC.
- [13] iTaukei Fisheries Commission is established under the Fisheries Act 1941 and it deals with customary fishing rights of iTaukei owners. It appears that currently the Commissioner in iTaukei Lands Commission and iTaukei Fisheries Commission is the same. Hence, the name iTaukei Lands and Fisheries Commission (TLFC).
- [14] It is the TLFC which is the statutory body constituted under section 4 of the iTLA (section 4) and section 14 of the Fisheries Act 1941 that adjudicates on disputes regarding land ownership, customary chiefly positions and fishing rights. TLFC is the custodian of various significant registers for the iTaukei which are maintained and updated from time to time. These registers contain vital records which facilitate the resolution of disputes. TLFC's functions include confirmation of traditional landownership and boundaries, visiting un-surveyed iTaukei land based on sworn evidence from TLFC records, surveying of land boundaries and drawing of maps for surveyed land. TLFC should also decide and record the boundaries of the iTaukei lands and the names of the owners.
- [15] Further, a village is any settlement in iTaukei land according to customs, law or declared, approved and published in a newspaper to be a village by iTaukei Affairs Board or any place declared to be a village by the iTaukei Affairs Board in the Gazette under iTaukei Affairs (iTaukei Affairs Board) (Declaration of iTaukei Settlements as iTaukei Villages) By Laws 2010 made under iTaukei Affairs Act, 1944. For this, all settlement boundaries need to be demarcated before they can be declared as iTaukei villages by the iTaukei Affairs Board.

[16] Therefore, logically, the confirmation by TLFC that the 01st appellant's residence is located within the Nabudrau Village Boundary should carry more weight and credibility as opposed to iTLTB's Notice of Unlawful Occupation. It appears from TLFC's letter dated 07 February 2022 that this decision is based on a demarcation done by TLFC on 30 October 2014 on the agreement of the land owning units as permitted by iTaukei Lands Act. It is not clear whether Mataqali Naivileweni was among those land owning units. The scenario that has unfolded appears to be that the land where the appellants' house stands is within the newly demarcated Nabudrau Village Boundary but sits inside the parcel of land belonging to Mataqali Naivileweni as well.

[17] Therefore, the trial judge seems to have erred in relying solely on iTLTB's Notice of Unlawful Occupation dated 09 September 2021 to decide the case in favour of the respondents without having any regard to TLFC's letter dated 07 February 2022.

[18] At the very least, the trial judge should have realised that there was a significant inconsistency between these two documents issued by two statutory bodies and therefore, the issues in the case involved disputed facts; or at least that there is no conclusive evidence that the appellants' house sits exclusively within Mataqali Naivileweni. What is the implication of that?

[19] This action is brought under Or 113 of The High Court Rules which *inter alia* in Rule 1 reads as follows:

“Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this Order.”

[20] Pathik J in **Baiju v Kumar** [1999] FJLawRp 23; [1999] 45 FLR 74 (31 March 1999) remarked:

“This Order does not provide a new remedy, but rather a new procedure for the recovery of possession of land which is in wrongful occupation by trespassers.”

“The application of this Order is narrowly confined to the particular circumstances described in r.1. i.e. to the claim for possession of land which is occupied solely by

a person or persons who entered into or remain in occupation without the licence or consent of the person in possession or of any predecessor of his. The exceptional machinery of this Order is plainly intended to remedy an exceptional mischief of a totally different dimension from that which can be remedied by a claim for the recovery of land by the ordinary procedure by writ followed by judgment in default or under O.14. The Order applies where the occupier has entered into occupation without licence or consent; and this Order also applies to a person who has entered into possession of land with a licence but has remained in occupation without a licence, except perhaps where there has been the grant of a licence for a substantial period and the licensee holds over after the determination of the licence (Bristol Corp. v. Persons Unknown) [1974] 1 W.L.R. 365; [1974] 1 All E.R. 593.”

“this Order would normally apply only in virtually uncontested cases or in clear cases where there is no issue or question to try, i.e. where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation on the land without licence or consent and without any right, title or interest thereto.”

I would say that Order 113 is akin summary procedure under s169 of the Land Transfer Act Cap. 131. It is an effective and speedy relief to property owners in cases where tenants or other persons have no right to continue to stay in possession.

*As can be seen from the evidence before this Court that the defendant maintains that he has the right to stay on the land whereas the plaintiff disputes it. **There are triable issues and these cannot be resolved in a summary manner by affidavit alone.** (emphasis mine)’*

[21] Order 5 Rule 4(1) provides that proceedings may be begun either by writ or by originating summons as the plaintiff considers appropriate. However, as per Order 5 Rule 4 (2)(b) [O.5, r.4 (2)(b)] proceedings in which there is unlikely to be any substantial dispute of fact are appropriate to be begun by originating summons. Of course, ‘appropriate’ means ‘correct’ or ‘suitable’ and does not preclude commencing an action by originating summons where there are disputed facts; it does not say ‘must’¹.

[22] Nevertheless, O.5, r.4 (2)(b) must be read with O.28, r.9 (1) where it states:

‘Where, in the case of a cause or matter begun by originating summons, it appears to the court at any stage of proceedings that the proceedings should for any reason be continued as if the cause or matter had begun by writ, it may order proceedings

¹ Per Pathik J in Dharam Singh & Ors. v Hardayal Singh & Ors. 40 FLR p156 ; Rajendra Prasad Brothers Ltd v FAI Insurances (Fiji) Ltd [2002] FJHC 220; HBC0205r.2001s (9 August 2002)

to continue as if the cause or matter had been so begun, and may, in particular, order that any affidavits shall stand as pleadings with or without liberty to any of the parties to add thereto or to apply for particulars thereof.'

[23] This rule would apply notwithstanding that the cause or matter in question could not have been begun by writ. Thus, it is clear that where a substantial issue of fact is likely to arise on which oral evidence will be required, the ordinary trial procedure is more suitable.

[24] It was held in **Reserve Bank of Fiji v Gallagher** [2006] FJCA 37; ABU0030, ABU0031, ABU0032U.2005S (14 July 2006):

'[59] Order 28 Rule 8 (2) entitles a defendant to an originating summons to file a counter-claim. He must inform the Court of the nature of the counter-claim and the Court will direct how it is to be made....'

'[60] Order 28 Rule 9 empowers the Court, in effect, to convert an originating summons into writ and for the proceedings thereafter to continue as if they had been commenced by way of writ, subject to any direction of the Court. In our view, it would have been better for Madraiwiwi J to have operated under this Rule. We do not share his view that such an approach would have been 'too technical.'

[25] In my view, given the disputed facts involved and lack of clarity and certainty on the crucial issue by two statutory bodies whose positions are not consistent, this is eminently a case where the learned trial judge should have resorted to Order 28 Rule 9. To that extent the impugned judgment cannot be allowed to stand.

[26] I do not intend to deal separately with the fourth ground of appeal, for it is also a matter of fact as to how much the appellants have spent to put up their house on the land in dispute, which too should be subjected to verification by oral and documentary evidence that could be tested in court.

Conduct of respondents' counsel

[27] Before I part with the judgment, I would discuss a matter of utmost importance to all practitioners which the court felt strongly that we should deal with. This is concerned with the conduct of Mr. V. Bukayaro, the respondents' counsel.

- [28] Mr. V. Bukayaro has appeared for the respondents in the High Court. He appeared at the call over on 09 December 2025 in the Court of Appeal. Ms. N. Pratap appeared for the appellants. Both counsel confirmed that they had received certified appeal records. Accordingly, the single judge directed that the appellants' written submissions and respondents' written submissions should be filed by 30 December 2025 and 20 January 2026 respectively with the appellants' reply submissions to be tendered by 27 January 2026, if necessary. The hearing of the appeal was fixed at 2.30pm on 05 February 2026.
- [29] Then, Mr. Bukayaro had sent 'summons for withdrawal of solicitor' signed by him on 05 February supported by his own affidavit under the name of Vilitati Macanawai Bukayaro signed by him on the previous day. These documents had been carried to the Registry by a parson who claimed to be the husband of the 01st respondent by the name of Mr. Jitoko Tukana. He had brought a document containing written submissions for the respondents signed by him. He wished to appear for the respondents and make submissions. When questioned by court at the hearing Mr. Jitoko Tukana was unable to establish his identity other than his word of mouth or produce any power of attorney. Therefore, the court decided not to allow him to make oral submissions and also declined to accept his written submissions. The two respondents were absent and unrepresented.
- [30] When the Registry brought the summons and affidavit of Mr. Bukayaro to the notice of the three justices between 11.00 am to 11.30 am, having considered the summons and gone through the affidavit it was decided in Chambers to reject the application of Mr. Bukayaro to withdraw as Barrister and Solicitor for the respondents. The court considered the fact that the reason given for the withdrawal was non-payment of *full* fees and non-compliance with unspecified instructions by the respondents.
- [31] However, a summons was issued to be heard at 2.30 pm to indicate to Mr. Bukayaro that he should appear in court and also to enable him to appear for the respondents in the appeal. These decisions were communicated to Mr. Bukayaro *via* his mobile phone by Ms. Kajol Kumar, court clerk at 12.25pm.
- [32] However, when the court assembled at 2.30 pm for the hearing, Mr. Bukayaro was absent and the respondents were also absent and unrepresented. Only one Mr. Jitoko Tukana who had brought the summons and affidavit of Mr. Bukayaro purporting to

appear for the respondents was present in court in addition to the appellants' counsel Mr. V. Chandra, who was ready for the hearing. He had filed his written submissions as directed by court and Mr. Bukayaro had not filed respondents' written submissions. By then, Mr. Chandra had received Mr. Bukayaro's summons and affidavit through the Registry. The court proceeded with the hearing of the appeal and reserved its judgment.

[33] Practice Direction No.01 of 06th April 2011 issued by then Chief Justice A.H.C.T. Gates reads as follows:

1. *This Direction applies to counsel appearing in all courts in Fiji including the Court of Appeal and the Supreme Court. It repeats much of the same sentiments as in the Practice Direction published by Nimmo CJ in 1972 [see CPC annotated by Marie Chan 2008 at p 400].*
2. *Occasionally counsel is obliged to withdraw from a case. This may be because instructions have been withdrawn, counsel no longer feels able to represent the client satisfactorily, or considers there to be a conflict of interest, or conflict with his or her duty to the court in continuing to appear for the client, or that counsel is physically incapacitated from appearing. This is not an exhaustive list of instances, for there are likely to be other and proper reasons for seeking withdrawal.*
3. *Where counsel needs to withdraw, it is counsel's duty as a matter of courtesy and good practice to appear on the next listed mention or hearing date and seek leave to withdraw. But application for leave to withdraw need not await the next court date. Counsel may apply before such date by motion and affidavit. The court will then consider whether to grant leave. This may involve a consideration as to whether or not counsel may be able to continue to serve his or her client's best interests if he or she were ordered to continue and if leave were declined: **Ram Sharan v. Kanyawati** [1969] 15 Fiji LR 220 at p 223; **Lockhart-Smith v United Republic** [1965] E.A. 211 at p 265.*
4. *However this Direction is no more than a restatement of earlier practice, with which newer members of an increasing Bar may be unfamiliar. It is framed to avoid the situation where counsel, previously briefed and appearing in a matter, fails to appear on the next occasion thus abandoning his or her client. Procedurally, if there is to be a withdrawal by counsel, it is necessary for that counsel to appear before the court and obtain leave for his or her withdrawal from the case.*
5. *At the interlocutory stages leave may more readily be obtained. At the commencement of a trial or during a trial, leave may not so easily be granted.*

6. In summary the court is unlikely to permit withdrawal:

- (a) *where counsel would be in breach of his or her duty to the client*
- (b) *where, though for valid reasons, the application to withdraw is made at the last minute, which would cause postponement of trial, wasted witness costs whether attending from overseas or locally, or where by the withdrawal a waste of court time and public funds is likely to be occasioned*
- (c) *to enable counsel to undertake an alternative commitment whether of a public or private nature*
- (d) *where counsel's fee in whole or in part has not been paid.*

7. ***If the court refuses to permit withdrawal and counsel nonetheless withdraws, a report may be lodged with the Chief Registrar for consideration of future action under the Legal Practitioners Decree. With a sense of service and duty to the client and to the Court uppermost, no practitioner, it is to be anticipated, would allow such a situation to arise.***

8. *In the case of counsel being hospitalized, another counsel may make the application upon his or her behalf. In certain instances a court may insist on the production of a medical certificate as in Form 62 of the CPC.”*

[34] These Practice Directions have been quoted by the Supreme Court in **Padiyachi v State** [2022] FJSC 24; CAV0010.2019 (28 April 2022) where the reason for the application to withdraw as counsel had been adduced as non-payment of legal fees.

[35] PRACTICE DIRECTION (7 November 1972) issued on withdrawal of counsel by Sir John Nimmo, C.J. reads:

‘There have been instances of counsel withdrawing from the defence of accused persons in breach of their duty of their client or to the Court or without good cause leaving to the last minute an otherwise justifiable application to withdraw, thereby necessitating the unwarranted postponement of cases with the resultant waste of time and public money, which is a cause of concern to the Judiciary and to the Law Society,

After discussion with representatives of the Law Society the Honourable the Chief Justice requires this memorandum to be circulated for the guidance of all concerned.

Once counsel had informed the Court without qualifications that he is appearing for an accused person, he will not withdraw from the defence of his client except with leave of the Court.

The Court will not regard as an adequate ground for leave to withdraw a desire by counsel to undertake a subsequent commitment, whether it be a case in any other Court or whether it be a sitting of Parliament or that his fee has not been paid wholly or in part.

If the Court refuses to grant an application by the counsel to withdraw from a case because the Court considers that grounds on which the application is based are inadequate, and counsel thereafter declines to represent the accused and leaves the Court his conduct should be brought to the attention of the Chief Magistrate or the Chief Registrar as the case may be, to enable a report to be placed before the Counsel of the Law Society for appropriate action to be taken.’

- [36] These Practice Directions are *mutatis mutandis* applicable to criminal and civil cases and original and appellate courts.
- [37] In the circumstances, in my view the last minute application to withdraw as counsel by Mr. Bukayaro on the premise that his fees have not been fully paid by the respondents and his subsequent absence from court at the hearing after being informed of the refusal of his application by the court, has not only breached the Practice Directions aforesaid but may also constitute unsatisfactory professional conduct, professional misconduct or conduct capable of constituting unsatisfactory professional conduct or professional misconduct under the Legal Practitioners Act.
- [38] In the circumstances, as required by the Practice Directions aforesaid this court would report Mr. Bukayaro to the Chief Registrar for consideration of future action under the Legal Practitioners Act.
- [39] Following **Harley v McDonald**², this court said in **Biju Investments Pte Ltd v Transfield Building Solutions (Fiji) Ltd**³:

[41]*If the creditor knows that the debtor company is not insolvent, it is an abuse of the process to use a statutory demand to obtain payment. Should that occur, any creditor that proceeds in that way (and possibly, in a clear case, its legal advisers) may be at risk of a substantial award of costs to mark the abuse of process.*’ (emphasis added)

² [2002] UKPC 40; [2002] 1 NZLR 1 (PC) at paras [45]–[47]

³ [2024] FJCA 133; ABU014.2021 & ABU041.2021 (26 July 2024)

[40] Where a counsel made a last minute application for postponement of the appeal hearing the Court of Appeal in **Creative Distributors Pte Ltd v Autocare (Fiji) Pte Ltd** [2025] FJCA 104; ABU002.2023 (29 May 2025) at [32] – [36] specifically warned practitioners:

*[36] This court is of the view that in the future if a practitioner is to move for an adjournment of a hearing of an appeal or application even for a short date on the basis that he could not get ready for the arguments for the reason that he or she had been retained at the eleventh hour, he or she must not assume that this court would automatically grant an adjournment of the hearing whether the other party consents or otherwise. On the contrary, this court would not be inclined to grant such a request except on an exceptional and unavoidable reason beyond the control of the practitioner. Any such adjournment would significantly shorten the time for the judges to hear, deliberate and prepare the judgments to be delivered at the end of the session thus causing unwarranted inconvenience to them. **Even if the court does grant an adjournment, it would ordinarily be, among other orders, subject to an order for costs to be personally paid by the practitioner making the application. He or she must take personal responsibility for the payment of wasted court costs.** (emphasis added)*

[41] Mr. Bukayaro’s professional conduct falls disappointingly far below that expected of legal practitioners and in particular counsel appearing in appellate courts. Mr. Bukayaro abused the process of court as an officer of court who had an inalienable obligation to assist the court as counsel for the respondents. Further, as a senior practitioner, his conduct was a clear and serious breach of and a failure to fulfil the duty towards this court, arguably bordering on contempt. We are of the view that this is an appropriate case to award costs against Mr. Bukayaro personally in order to serve the public interest in the administration of justice. Therefore, by virtue of the court’s inherent punitive costs jurisdiction, Mr. Bukayaro should personally be ordered to pay costs.

Morgan, JA

[42] I have read and concur with the judgment of Prematilaka, RJA.

Clark, JA

[43] I also agree with the judgment of His Honour Prematilaka, RJA.

Orders of the Court:

1. *Appeal allowed.*
2. *Judgment of the High Court dated 02 June 2023 is set aside.*
3. *Case is remitted to the High Court.*
4. *High Court is directed to take steps in terms of O.28, r.9 with regard to the rest of the proceedings in the case and expeditiously deliver judgment.*
5. *Chief Registrar is hereby notified to consider action against Mr. Vilitati Macanawai Bukayaro, Barrister and Solicitor under the Legal Practitioners Act (LPA).*
6. *Registry is directed to forward a copy of the judgment to the Chief Registrar forthwith.*
7. *Mr. Bukayaro is directed to pay costs of \$3000.00 to the Court of Appeal Registry within 28 days hereof failing which the Registry is directed to bring it to the notice of the Chief Registrar for action under the LPA.*
8. *Registry is directed to inform Mr. Bukayaro of this order and forward a copy of the judgment to him forthwith.*
9. *Registry is directed to remit the case to the High Court forthwith.*
10. *No costs.*



Hon. Mr. Justice Chandana Prematilaka
RESIDENT JUSTICE OF APPEAL



Hon. Mr. Justice Walton Morgan
JUSTICE OF APPEAL



Hon. Madam Justice Karen Clark
JUSTICE OF APPEAL

Solicitors:

Millbrook Hills Law Partners for the Appellants
Respondents absent and unrepresented