

IN THE HIGH COURT OF FIJI
AT SUVA
EMPLOYMENT JURISDICTION

ERCA No.6 of 2025

BETWEEN : **SAILOSI MADAKILIVA & OTHERS**

APPELLANT

AND : **WATER AUTHORITY OF FIJI**

RESPONDENT

Coram : **Banuve, J**

Counsels : **National Union of Workers for the Appellant.**
R. Patel Lawyers for the Respondent.

Date of Hearing : **5 February 2026**

Date of Ruling : **25 February 2026**

RULING

A. Notice of Motion

1. A Notice of Motion (For Enlargement of Time to File Notice of Intention to Appeal and Grounds of Appeal Out of Time) with a Supporting Affidavit deposited by the Appellant, was filed on 7 July 2025 against the decision of the Employment Tribunal in ERT Grievance No. 26-175 of 2021 dated 11 July 2024 - *Sailosi Madakiliva & Others v Water Authority of Fiji*.
2. A Supplementary Affidavit in Support was deposited by Shiu Lingam and filed on 22 January 2026.
3. An Affidavit was filed by the Respondent on 29 January 2026 deposited by its Chief Legal and Procurement Officer in which opposes the issues raised in the Supplementary Affidavit of the Applicant on the following grounds;
 - a. *The **PELI Cama** decision had come in favor of WAF.*
 - b. *Whilst Mr Channan was committed to an amicable settlement it was all dependent on budget availability by the Government of Fiji.*
 - c. *Mr Channan wanted the **Cama** matter in the High Court to proceed on a parallel basis, with any settlement talks the Union was having with Government and there was no evidence to state that Government had agreed to pay compensation as a basis for abandoning Court proceedings.*
 - d. *The WAF Budget for FY25 did not include any allocation for compensation.*
4. The Court is grateful for the submissions made by the parties in support of their respective positions.

B. Analysis

5. The Applicant in this instance seeks leave to appeal out of time pursuant to section 242 (1) of the *Employment Relations Act 2007*.

6. The time limit for lodging an appeal from the Employment Relations Tribunal to the Court prescribed by section 242 (2) of the *Employment Relations Act 2007*, is 28 days from the date the Appellant received the decision.
7. The Court is mindful however that given the decision of the Tribunal of 11 July 2024 in striking out ERT Grievance No 26-175 is an interlocutory one, section 243 of the Act requires the Appellant to seek leave to appeal within from the Court within 14 days of the decision of the Tribunal, a period which would have expired in August 2025, over 1 year and 5 months or so, ago. Section 242(5)(e) appears to vest a discretion on the Appellant to seek leave to appeal either from the Tribunal *or* the Court from any interlocutory decision.¹This is an issue that will be revisited.
8. The Court of Appeal in *Datt v Datt* [2011] FJCA 33 confirmed that the Court is generally concerned with four issues in applications of this kind;
 - (i) *the length of the delay;*
 - (ii) *the reasons for the delay;*
 - (iii) *the chances of the proposed appeal succeeding. And*
 - (iv) *prejudice to the Defendant.*
9. The Court may consider whether the appeal raises (i) issues of general importance, (2) important questions of law and (3) issues that in the interest of justice should be considered by the Full Court.
10. The reasons for the substantive delay in filing the Notice and Grounds of Appeal, for which enlargement of time is sought, are set out in the paragraph 5 of the Appellant's Affidavit in Support of Notice of Motion filed on 7 July 2025;
 - (a) Whilst Employment Grievance No 25-175 was on foot, the Union was actively engaged in good faith negotiations with the Fiji Government specifically the Honorable Minister for Finance, Mr Biman Prasad and the Senior Management of the Respondent with a view to achieving an amicable out of court settlement of the Water Authority of Fiji employment grievances.

¹ A similar discretion is vested on an Appellant seeking leave to appeal pursuant to section 12(2)(f) of the ***Court of Appeal Act [Cap 12]***

- (b) That an agreement was reached with the Honorable Minister of Finance in excess of 3 weeks prior to the 2024 Budget announcement and the Employer was made aware of this Agreement.
 - (c) The Honorable Minister of Finance announced the settlement of the WAF employment grievances in his Budget Address in Parliament on 28th June 2024. Annexed hereto and marked "AT-1" is a copy of the budget address highlighting this settlement.
 - (d) The Interlocutory Ruling in Employment Grievance No 26-275 was delivered on 11th July 2024 and was not contested by the Union due to the announcement in the 2024 budget address, which had actually resolved the WAF employment grievances, and the Union had undertaken to withdraw all WAF grievances, so that these workers can obtain justice.
 - (e) The proposed Appeal possesses substantial and arguable grounds demonstrating a real prospect of success on its merits.
 - (f) The proposed Grounds of Appeal will clearly distinguish that Employment Grievance No 26-175 from the issues presently before the Employment Court in ERCA Appeal No. 1 of 2023 listed before His Lordship Justice Tuilevuka, thereby demonstrating the unique nature and necessity of the instant appeal.
11. The delay in this regard is a period of some 1 year and 5 months, and is significant. The Appellant explains that the delay was caused by its involvement in negotiations with Government, on the resolution of outstanding employment grievances of its WAF Members which it wanted accounted for in the 2024 National Budget Address. The WAF management were aware of the negotiations.
 12. The Appellant were not concerned with actively contesting ERT Grievance No 26-275 against the Respondent, because of its involvement in settling the dispute directly with Government, transpiring in the Minister of Finance announcing in the 2024 Budget Address that Government has *'also agreed to settle the dispute between employees and Water Authority of Fiji'*.
 13. If the delay is substantial and the reason provided by the Appellant is not wholly excusable, it would be necessary for the Appellant to show *'special circumstance'*

for the Court to exercise the discretionary balance in its favor (clarified as the 'chances of the appeal succeeding)' if time is extended and the appeal proceeds. *Tevita Fa v Tradewinds Marine Ltd & Anor* - ABU 40 of 1994 (unreported) as discussed in *Datt v Datt* [2011] FJCA 33.

14. The Appellant must establish that his grounds raise more than just a reasonable chance of success to enable the Court to conclude that leave should be granted.²
15. The proposed grounds of appeal for which leave to appeal is attached as Annexure 'AT-2' to the Appellant's Affidavit in Support of Notice of Motion filed on 7 July 2026. The Appellant seeks an order that the decision of the Learned Tribunal/Resident Magistrate on 11th July 2024 be adopted under section 242(7)(a) of the *Employment Relations Act* 2007 upon the following grounds;
 1. *That the Learned Tribunal erred in fact and law in paragraph 1 of her Ruling by failing to list the 383 employment grievances in Employment Grievance No 26-175 in a timely manner and to have them dealt with expeditiously.*
 2. *That the Learned Tribunal erred in fact and in law in Paragraph 2 of her Ruling by failing to consider the Appellant's position on determining Employment Grievance Number 26-175 on papers, and further, by not providing proper Notice of the same to the Appellant.*
 3. *That the Learned Tribunal erred in fact and in law in Paragraph 3 of her Ruling by determining that the Epeli Cama case was a test case when, in fact, it was not.*
 4. *That the Learned Tribunal erred in fact and in law in Paragraph 3 of her Ruling by striking out Employment Grievance No 26-275 despite having considered that the matter was appeal, thereby rendering the issue of res judicata immaterial to the striking out of the entire proceeding.*
 5. *That the Learned Tribunal erred in law in Paragraph 5 of her Ruling by failing to act fairly and in overall interest of justice.*

² Datt v Datt

6. *That the Learned Tribunal erred in fact and in law in Paragraphs 6,7 and 8 of her Ruling by wrongly applying the principle of res judicata to Employment Grievance No 26-175 whilst being aware that an appeal was on foot (ERCA No 1 of 2023)*
 7. *That the Learned Tribunal erred in fact and in law in Paragraphs 9 and 10 of her Ruling by determining that the Employment Grievance No 26-175 were identical in facts to the case of Epeli Cama, upon which the Learned Tribunal relied.*
 8. *Any other orders the court deems fit.*
16. Many of the grounds of appeal raised (Grounds 1-3, 5, 7) are difficult to sustain against the 'strike out' decision handed down by the Tribunal on 11 July 2024, given that the Appellant was not present during the hearing on 6 June 2024, to assist the Tribunal in understanding its grievances, as pressed by the Respondent in submissions.
 17. Moreover, the Court would suggest that based on the proposed grounds of appeal, it would be better for the Appellant to pursue redress directly for its grievances by prosecuting the *Epeli Cama* appeal (ERCA No 1 of 2023), that is currently before the High Court in Lautoka.
 18. It is necessary for guidance perhaps to review the grounds for which the Learned Tribunal struck off ERT Grievance No 26-175 of 2021. In paragraphs 6 and 7 of the ruling;
 6. *I will now proceed to consider whether the principle of res judicata applies. In R (Coke-Wallis) v Institute of Chartered Accountants in England and Wales [2011] 2 AC 146 at paragraph 34, the Supreme Court of England noted that the following elements must be satisfied for a plea of res judicata to succeed in the context of two successive decisions of an administrative tribunal:-*
 - (i) *The initial decision, was judicial in the relevant sense;*
 - (ii) *It was in fact pronounced;*
 - (iii) *The tribunal had jurisdiction over the parties and the subject matter;*
 - (iv) *The decision was (a) final; and (b) on the merits;*
 - (v) *It determined a question or questions raised in the later litigation; and*
 - (vi) *The parties are the same or their privies, or the earlier decision was in rem.*

7. *In the circumstances of these cases there is no difficulty with regard to the first four elements. With regard to the sixth element, the worker may be different for each case, however, they are all represented by the Union. It is not in dispute that these grievances were part of the 2019 WAF termination and share identical facts.*

*Was the decision of the Employment Relations Tribunal in Epeli Cama v WAF- ERT No 116 of 2019 **final** despite it being appealed on the merits before the Employment Relations Court in Epeli Cama v WAF-ERCA 01 of 2023?*

19. The recital by the Employment Relations Tribunal of the elements identified by the Supreme Court of England in *R (Coke –Wallis)* to establish a plea of *res judicata* cannot be faulted. Its finding on the fourth element that the *Epeli Cama* decision was final, needs some discussion, given the acknowledgment in paragraph 3 that the ‘*Union has appealed this decision (ERCA Appeal No 1 of 2023. The appeal is pending determination*’.

20. Could a decision be binding despite it being on appeal? The editors of the reference ‘Spencer Bower and Handley Res Judicata Lexis Nexis (Butterworths) (2009) clarify the position;

“A judgment can be final, although it may be reversed or varied by an appellate court, and is under appeal when set up as res judicata.³.....Finality is not affected although execution has been stayed or levied”

21. In short, the decision of the Tribunal is final until and unless it is set aside on appeal. The principle of *re judicata* applies to decisions of inferior courts when they have jurisdiction and decide an issue directly in question *Wakefield Corporation v Cooke [1904] AC 31, 36.*

22. The Court would have to rule also, that the threshold requirement for establishing ‘special circumstance’ (more than a reasonable prospect of the appeal succeeding) identified by the Court of Appeal in *Datt* has not been met, to warrant the Court exercising its discretion to grant an extension of time, in its favor.

³ paragraph 5.19 also **Minott (1999) 168 DLR (4th) 270 Ont CA, 283 per Laskin JA**

23. Further, there is a procedural hurdle that the Appellant has not addressed. The Tribunal's decision to strike off ERT Grievance No 26-275 of 2021 is an interlocutory one, meaning that leave has to be first obtained in order for it to be appealed. Pursuant to section 242(5)(e)(i) of the *Employment Relations Act 2007*, leave to appeal may be sought either from the Tribunal or this Court. In this instance, *leave to appeal* is not being sought, rather *leave for enlargement of time* to file a Notice of Appeal, is being sought. In short, the prayer sought by the Appellant in the Notice of Motion would not enable it to obtain the relief sought to review the decision of the Tribunal of 11 July 2024.
24. Finally, the Respondent in its affidavit of 29 January 2026 in response to the Appellant states that in any event *the WAF Budget for FY25 did not include any allocation for compensation*. There are certain issues to note, firstly, the Respondent ought to have been more supportive of the efforts made by the NUW to resolve the grievances of the WAF employees with Government, given it benefitted both parties, secondly, the fact that provision was not made in the National Budget or in the appropriation instrument, ought not to have been raised by the Respondent as justification for Government to disregard any understanding reached with the National Union of Workers, in pre-budget consultations. Provided, there is a *pre-existing* legal obligation for payment, under contract, for example, a Court could direct that Government to make provision for its payment,⁴ regardless of the lack of appropriation in the Budget. This is not an issue which arises in this matter, but is raised here for future reference.

FINDINGS:

1. **The prayers sought in the Notion of Motion (For Enlargement of Time to file Notice of Intention to Appeal and Grounds of Appeal Out of Time) are refused and dismissed.**
2. **Parties to bear their own costs.**

⁴ **NSW v Bardolph** [1933-1934] High Court of Australia 455



Savenaca Banuve
Savenaca Banuve
Judge

Dated at Suva this 25th day of February, 2026.