

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 14 of 2024

BETWEEN : **ILAISA NAKIATAGOVAKI & VASIMACI
LACABUKA aka VASIMACI NAKIATAGOVAKI**
Plaintiffs

AND : **HOUSING AUTHORITY OF FIJI**
Defendant

Counsel : **Mr B Ram & Ms L Prasad for the Plaintiffs**
Mr V Kapadia for the Defendant

Hearing : **29 November 2024**

Judgment : **5 September 2025**

JUDGMENT

[1] The plaintiffs sold a Housing Authority Sub-Lease in 2023 and incurred a penalty of \$24,005.04 from the Housing Authority of Fiji (the **Housing Authority**)¹ for failing to construct a residential dwelling within two years. The Housing Authority refused to provide its consent to the transfer to the purchaser unless the penalty fee was paid by the plaintiffs.

¹ The Defendant.

[2] The plaintiffs duly paid the penalty fee so that the transfer could be effected but subsequently filed these proceedings seeking recovery of the payment.

Background

[3] The property in question is Housing Authority Sub-Lease 267639, Lot 38 on DP4686, in the Province and Tikina of Naitasiri, having an area of 19.3 purchases, (the **property**).

[4] The Sub-Lease commenced on 8 May 1979 for a 92-year period. The original lessee was Manik Chand, who received the Sub-Lease in consideration for the amount of \$2,450. Clause 2 of the Sub-Lease provided that the Sub-Lease was not permitted to be transferred to another lessee unless the Housing Authority provided its consent to the transfer. Clause 5 also provided:

The lessee shall within two years from the date of the commencement of this lease erect on the demised land to the satisfaction of the lessor a building for residential purposes in accordance with the provisions of all relevant Acts Ordinances, Regulations and By-laws, then in force.

[5] The property has been transferred several times since 1979. In 2020, the property was transferred to the plaintiffs on a mortgagee sale. They purchased the property for the amount of \$70,000. The Mortgagee Sale Offer from the Housing Authority to the plaintiffs dated 27 January 2020,² advised that the property was sold to the plaintiffs on an ‘*as-is-where-is basis*’ subject to nine terms and conditions specified in the letter. These terms included the sale price of \$70,000, a \$500 deposit, and liability for the reasonable legal costs associated with the transfer. Term number 6 provided:

The Authority shall apportion the city rates, ground rent owed in respect of this property up to the date of settlement and you will be responsible for payment of these outgoings thereafter.

² Annexure A to the Affidavit in Reply by the first named plaintiff executed on 2 April 2024.

[6] The plaintiffs became the registered owner of the Sub-Lease on 23 September 2020. The first named plaintiff deposed in his affidavit executed on 26 January 2024, that the plaintiffs struggled financially during the COVID-19 period. This is supported by further details and payslips supplied in the affidavit in reply. As a result of their financial circumstances, they decided in 2022 to sell the property and entered into a Sale and Purchase Agreement to sell the property for the amount of \$120,000.³

[7] As per clause 2 of the Sub-Lease, the plaintiffs were required to obtain the consent of the Housing Authority to the transfer to the new purchaser. The plaintiffs' then solicitors sought this approval in February 2023. The Housing Authority replied on 27 February 2023, advising:⁴

*That we note that the lessee's/owner's to date has failed to comply with his lease conditions by not developing the land with an approved building structure with consideration of the Authority as landlord. That in consideration of the above property being transferred by way of sale, the Authority is applying the **penalty fee levy** for payment by the lessee/vendor.*

[8] The Housing Authority agreed to provide consent on condition that the plaintiffs paid a \$12,000 penalty fee on settlement. On receipt of this advice, there were email communications between the Housing Authority and the plaintiffs over the penalty fee. In an email dated 1 March 2023, the plaintiffs sought clarification as to the provision in their agreement with the Housing Authority that required the plaintiffs to pay a penalty fee. In a further email from the plaintiffs on 6 March 2023, they inquired:⁵

The questions we raised with him [an employee of Housing Authority] is why wasn't this penalties (sic) were discussed or raised in the offer letter and agreement that we have with housing authority...

³ The Sale and Purchase Agreement is Annexure C of the first named plaintiff's affidavit dated 26 January 2024.

⁴ Annexure D of the Affidavit in Opposition by Rinesh Kumar executed on 14 March 2024.

⁵ Annexure C to the Affidavit in Reply by the first named plaintiff executed on 2 April 2024.

- [9] The Housing Authority were unmoved and wrote formally to the plaintiffs on 20 March 2023 to confirm that approval for the consent was subject to payment of the penalty fee of \$12,000 being made on the settlement date. The Housing Authority advised that its conditional approval was valid for three months.
- [10] There appears to have been delays by the purchaser with the sale and the settlement did not occur within the three-month period stipulated in Housing Authority's letter of 20 March 2023. In the meantime, there was a change to the penalty regime as gazetted on 2 June 2023. In accordance with s 30(h) of the Housing Act 1955, the Minister for Housing made changes to the penalty fees, increasing penalties on lessees who failed to build within two years from the grant of a lease for residential leases '*to \$5,000 or 20% of the sale price, (whichever is greater)*'.
- [11] On 4 October 2023, the plaintiffs' solicitors wrote to the Housing Authority seeking an extension of its consent to the transfer. The Housing Authority responded on 12 October 2023, agreeing to the consent subject to payment of penalty fees of \$24,005.04, being the higher rate as gazetted on 2 June 2023. The plaintiffs paid the penalty fee on 17 November 2023⁶ and the property was transferred to the new purchaser.

Present proceedings

- [12] The plaintiffs filed an Originating Summons on 29 January 2024 along with a supporting affidavit from the first named plaintiff. The orders sought in the summons are that the amount of \$24,005.04 or \$12,005.04 be refunded to the plaintiffs, along with costs and interest.
- [13] The Housing Authority filed an affidavit in opposition on 15 March 2024 and the first named plaintiff filed an affidavit in reply on 10 April 2024.

⁶ Annexure K of affidavit of Mr Kumar dated 14 March 2024.

Position of the parties

- [14] The plaintiffs are critical of the fact that the Housing Authority did not inform it of the penalty fee when it purchased the property in 2020. They are also critical of the increased penalty fee being imposed on them where the conditional consent had been provided by Housing Authority before the increase had been gazetted.
- [15] For its part, the Housing Authority argues that the matter is straightforward. It says that clause 5 of the Sub-Lease requires the lessee to erect a residential dwelling within a two-year period and as no dwelling has been erected the Housing Authority is empowered to impose the penalty fee of 20% of the sale price or \$5,000, whichever is the greater. The defendant relies on the decisions of *MY Transport Co. (Fiji) Ltd v Housing Authority* [2002] FJHC 246 (22 February 2002) and *Raj v Kumar* [2020] FJHC 204 (10 March 2020).

Decision

- [16] The question for determination is whether the Housing Authority was empowered to impose a penalty on the plaintiffs and, if so, whether the higher rates gazetted on 2 June 2023 applied.
- [17] The Housing Authority relies on clause 5 of the Sub-Lease for its power to impose the penalty fee. I am satisfied, however, that this provision, by itself, did not permit the Housing Authority to impose any penalty fee on the plaintiffs. The obligation under clause 5 is to erect a dwelling ‘*within two years from the date of the commencement of this lease*’. The lease commenced on 8 May 1979. The two-year period ended in 1981, about 40 years before the property was transferred to the plaintiffs. They cannot be liable for a breach that occurred well before they became lessee. In order for the plaintiffs to be liable for the earlier breach, or to take on any obligation to erect a dwelling, the Housing Authority was required to inform the plaintiffs of the same when the plaintiffs purchased the property in 2020. The Housing Authority did not. There are no such conditions

stipulated by the Housing Authority in its offer letter of 27 January 2020. The suggestion that the fact that the property was sold on an ‘as is where is basis’ imposed these conditions on the plaintiffs has no merit. In order to inflict the plaintiffs with such an onerous obligation required the Housing Authority to expressly state the condition and identify the period within which the plaintiffs were required to comply.

[18] The Housing Authority also argues that the plaintiffs are liable to pay the penalty fee because it undertook to pay the same, and did pay the same, before the Housing Authority provided its consent at the time of the transfer in 2023. This is not a lawful basis to claim payments from a party, ie withholding its consent unless and until it receives payment of a penalty fee that it has no legal basis to impose. In any event, it is clear from the email communications from the plaintiffs to the Housing Authority in 2023 that they did not accept they were liable to pay any penalty.

[19] As for the two decisions relied on by the Housing Authority, neither decision assists the Housing Authority. In *MY Transport Co. (Fiji) Ltd v Housing Authority* the High Court found that the dispute between the parties was to be determined on the terms in the Sale and Purchase Agreement. In that case, the Director of Lands imposed a penalty fee of \$30,000 as a condition of its consent to transfer the property from the Housing Authority to MY Transport Co. (Fiji) Limited. The question in that case was which party was responsible for payment of the penalty. The High Court determined that the answer lay in the contractual terms, determining that Housing Authority was required to pay the penalty.

[20] The decision of *Raj v Kumar* supports the plaintiffs. In that case, the Housing Authority expressly imposed a condition on the purchaser before he purchased the lease ‘*to provide an undertaking that he would fully comply with Clause 5 of the lease conditions within two (2) years, from the date of registration of transfer to him*’. The purchaser in that case was informed before purchasing the lease that he took on the obligation under clause 5 and that the period of the obligation was two years from the date of the transfer. There is

no evidence provided in the present case that a similar condition was imposed on the plaintiffs before they purchased the property.


Orders

[21] There was no lawful basis for the Housing Authority to impose any penalty fee on the plaintiffs when they sold the property in 2023. As such, the plaintiffs succeed with their originating summons.

[22] My orders are as follows:

- i. The defendant is to pay the amount of \$24,005.04 to the plaintiffs within one month.
- ii. The plaintiffs are entitled to costs summarily assessed in the amount of \$2,500.00 to be paid by the defendant within one month.




D. K. L. Tuiqereqere
JUDGE

Solicitors:

Benjamin Ram Lawyers for the Plaintiffs

Kapadia Lawyers for the Defendant