



REPUBLIC OF KENYA



Center Point Solution Limited & another v Muruga Investment Limited & another (Civil Case 252 of 2017) [2025] KEHC 6405 (KLR) (Commercial and Tax) (16 May 2025) (Judgment)

Neutral citation: [2025] KEHC 6405 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 252 OF 2017
FG MUGAMBI, J
MAY 16, 2025**

BETWEEN

CENTER POINT SOLUTION LIMITED 1ST PLAINTIFF

GILLIANA INTERNATIONAL LIMITED 2ND PLAINTIFF

AND

MURUGA INVESTMENT LIMITED 1ST DEFENDANT

BEN THE AGENT CONSULTANCY LTD 2ND DEFENDANT

JUDGMENT

1. The plaintiffs instituted this suit against the defendants vide a plaint dated 28th August 2018 seeking judgment against the defendants for:
 - a. A declaration that the conducts/decisions of the defendants withdrawing the Offer to Lease despite part performance and leasing the suit premises to another party were unlawful and a breach of contract between the plaintiffs' and the defendants;
 - b. General damages for breach of contract;
 - c. General damages for loss of business and income/earnings;
 - d. General damages for inconvenience;
 - e. Special damages in the sum of Kshs. 9,285.000/= being the security deposit for rent and three (3) months' advance rent incurred by the plaintiffs including agency and legal fees;
 - f. Special damages in the sum of \$14,910.00 being shipping costs incurred by the plaintiffs towards setting up their restaurant and/or catering establishment;



- g. Interests on (a), (b), (c), (d) and (e) at court rates;
 - h. The costs of this suit together with interest thereon at court rates from the date of filing the suit until payment in full; and
 - i. Such other and further reliefs that this Honourable Court may deem just and fit to grant.
2. The plaintiffs' case is that, pursuant to Letters of Offer dated 30th November 2015, the parties entered into an agreement with the 2nd defendant, both on their own behalf and as the duly authorized agent of the 1st defendant. The agreement was for the lease of approximately 2,500 and 8,500 square feet (later reassessed to 8,627 square feet), respectively, located on the Ground Floor of Block A, Ciata Mall. The plaintiffs' intention was to establish and operate a high-end restaurant and catering business under the name and style of Fika Group Hotels Limited.
 3. The plaintiffs contend that they paid a total sum of Kshs. 8,550,000/= as security deposit for rent, Kshs. 535,000/= as agency fees to the 2nd defendant and Kshs. 200,000/= as legal fees to the 1st defendant's advocates. These payments, they aver, constituted part performance of the agreement.
 4. The plaintiffs further assert that the agreement contained an express term granting them exclusivity to operate a restaurant and/or catering establishment within the leased premises. However, contrary to this term, the 1st defendant is said to have granted rights to a competing business to operate a similar establishment within the same premises, thereby breaching the exclusivity clause.
 5. Upon raising the issue of breach, the plaintiffs claim that the 1st defendant wrongfully withdrew the offer to lease without notice, despite the plaintiffs' part performance, and subsequently barred the plaintiffs and their agents from accessing the premises without justification.
 6. In opposition to the suit, the 1st defendant filed a statement of defence dated 27th September 2018. The 1st defendant denies the existence of any valid agreement to lease the Ground Floor of Block A at Ciata Mall to the plaintiffs. While acknowledging the issuance and acceptance of letters of offer by the plaintiffs on 16th December 2015, the 1st defendant avers that the same were expressly stated to be "subject to contract" and contingent upon several conditions, including payment of a total consideration of Kshs. 9,153,000/= within 14 days, execution of a formal lease agreement, and agreement on the lease commencement date.
 7. It is the 1st defendant's position that the plaintiffs failed to remit the full consideration within the stipulated period, instead making partial and delayed payments. At the time of filing the suit, the plaintiffs are said to have owed a balance of Kshs. 603,000/=. The 1st defendant further denies that any exclusivity was granted to the plaintiffs to operate a restaurant or catering business on the premises. It asserts that the plaintiffs embarked on extravagant expenditures such as the alleged purchase of equipment worth USD 14,910 without first meeting the fundamental preconditions under the offer letters.
 8. Upon forming the view that the plaintiffs were either unwilling or unable to fulfil the terms, the 1st defendant issued a termination letter dated 22nd April 2017. It denies any breach of the agreement and contends that the plaintiffs are not entitled to the remedies of specific performance or damages as claimed.
 9. Additionally, the 1st defendant lodged a counterclaim, stating that it incurred losses as a result of undertaking preparatory works at the premises in reliance on the plaintiffs' representations, including custom architectural modifications. Following termination of the offer, the defendant was compelled to incur further expenses to renovate and reconfigure the premises to their original state. The claimed



losses of Kshs. 2,073,851.30 are particularized as follows: walling expenses – Kshs. 811,370.70; aluminium fittings – Kshs. 698,606.25; installation of new doors – Kshs. 341,676.00; and consultancy fees (12%) – Kshs. 222,198.35.

10. The 1st defendant accordingly prays for judgment in the sum of Kshs. 2,073,851.30, together with interest and costs of the suit and the counterclaim.
11. The 2nd defendant filed a statement of defence dated 11th December 2018. In response to paragraph 4 of the Amended Plaintiff, the 2nd defendant admits that it acted as an agent of the 1st defendant, but denies having any contractual authority to bind itself or the 1st defendant to the plaintiffs or to enter into any lease agreement in its own capacity. It does not admit the existence of any binding agreement to lease space at Ciata Mall to the plaintiffs.
12. The 2nd defendant also denies any exclusivity arrangement, granted to the plaintiffs to operate a restaurant or catering business on the premises, asserting that no such term was ever discussed, agreed upon, or reduced into writing. It maintains that exclusivity would have been commercially impractical. While acknowledging that certain financial transactions took place during its engagement with the plaintiffs, the 2nd defendant disputes the plaintiffs' assertions regarding the purpose of those payments.
13. The 2nd defendant further denies the existence of any legally enforceable lease agreement, maintaining that any payments made by the plaintiffs were merely in anticipation of a potential arrangement, and not in furtherance of a concluded contract. It admits that indeed a draft lease was prepared, but never finalized or executed, and reiterates that it lacked authority to create any binding contractual obligations on behalf of the 1st defendant.
14. In response to paragraphs 12 and 13 of the Amended Plaintiff, the 2nd defendant asserts that any losses allegedly suffered by the plaintiffs were self-inflicted and not attributable to any act or omission on its part. It denies all allegations of breach, including the particulars of special damages claimed. The 2nd defendant maintains that no cause of action has been disclosed against it and that the plaintiffs acted prematurely and presumptuously in assuming the existence of a binding agreement where none existed. It asserts that the plaintiffs were merely responding to an invitation to treat, which does not give rise to an enforceable legal obligation, and consequently denies any liability for the claims made.
15. At the hearing, the plaintiff called one witness. PW1, Diana Wacheke Wainaina, adopted her witness statements dated 16th June 2017 and 6th May 2019 as her evidence-in-chief. She also produced the plaintiff's bundle of documents dated 16th June 2017, 28th August 2018, and 9th August 2021, which were marked as Plaintiff Exhibits 1, 2, and 3, respectively.
16. During cross-examination, PW1 confirmed that a prior Ruling by Hon. Ngetich, J. had determined that the letter of offer did not crystallize into a formal lease agreement. She further acknowledged that no appeal had been lodged against that Ruling. She admitted that payment was made after the withdrawal of the offer but maintained that the withdrawal was premature. It was her understanding that payment was to be effected within 14 days. PW1 also confirmed that the contract was between the plaintiffs and the 1st defendant, but asserted that the 2nd defendant acted on behalf of the 1st defendant and received agency fees. She testified that the payments were made to the 1st defendant.
17. The defence called two witnesses. DW1, Gregory Mbugua, adopted his witness statement dated 12th June 2019 as his evidence-in-chief. In cross-examination, he testified that under Clause 6 of the letter of offer, rent was to commence upon issuance of the certificate of occupation, and that rent for the first year was payable in advance, prior to the commencement date. He stated that the lease commencement date was fixed and not subject to change, and that it had been communicated as 10th June 2017.



18. He acknowledged having undertaken to refund the sums paid by the plaintiffs within 30 days but admitted that he had not done so. He confirmed filing a counterclaim seeking reimbursement for additional works he allegedly carried out at the plaintiffs' request.
19. Upon re-examination, DW1 testified that the claimed special damages of Kshs. 9,285,000/= had not been paid. He disclaimed any liability for shipping costs and clarified that he was not affiliated with the firm of KKK Advocates. Referring to Clause 33(a) of the letter of offer, he asserted that the plaintiffs were obligated to pay Kshs. 6,885,000/= within 14 days from 30th November 2015, yet had only paid Kshs. 1,050,000/= within the stipulated period. He reiterated that this Court had previously held that the letters of offer did not crystallize into formal leases, and maintained that the plaintiffs were not tenants, having failed to comply with the conditions set out in the letters of offer.
20. DW2, Benson Mathenge, adopted his witness statement dated 30th October 2020 and produced his bundle of documents of the same date, which were marked as exhibits. In cross-examination, he testified that he prepared and issued separate letters of offer to each plaintiff. He confirmed that a total of Kshs. 8,550,000/= was paid to the 1st defendant, and that he personally received Kshs. 535,000/= as agency fees. He explained that under Clause 5, the lease commencement date was tied to the date of handover for fit-out purposes.
21. He further stated that the plaintiffs had discretion to extend the lease commencement date, and had indeed extended it from 30th May 2016 to 26th May 2017 for a period of nine months. He stated that rent was payable in advance and attributed delays to the 1st defendant.
22. The parties filed their respective written submissions, wherein they reiterated the facts as pleaded and highlighted the evidence adduced in support of their respective positions.

Analysis and Determination

23. I have carefully considered the submissions alongside the pleadings and evidence as well as the authorities cited. The issues for determination are as follows:
 - a. Whether a binding agreement existed between the plaintiffs and the defendants;
 - b. Whether the parties breached any contractual obligations;
 - c. Whether the plaintiffs are entitled to the reliefs sought, including special damages; and
 - d. Whether the 1st defendant is entitled to the counterclaim

Whether a binding agreement existed between the plaintiffs and the defendants and whether there was breach thereof:

24. In the case of *William Muthee Muthami v Bank of Baroda* [2014] eKLR, the Court of Appeal succinctly articulated the fundamental principles governing the formation of a contract as follows:

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”
25. It is not in dispute that letters of offer dated 30th November 2015 were issued and executed between the plaintiffs and the defendants. The plaintiffs rely on these letters as constituting a valid and binding agreement. They assert that their performance, including payment of Kshs. 8,550,000/= as security



deposit and advance rent, agency fees of Kshs. 535,000/=, and legal fees of Kshs. 200,000/=, amounted to part performance sufficient to crystallize a contractual relationship.

26. I have examined the letter of offer dated 30th November 2015. It provided that the plaintiffs were to lease approximately 2,500 and 8,500 square feet (subject to revision), respectively, on the Ground Floor of Block A, Ciata Mall. Under its terms, the plaintiffs were required to pay a security deposit equivalent to three months' rent and a further three months' advance rent, amounting to a total consideration of Kshs. 9,153,000/=, payable within fourteen (14) days from the date of the offer.
27. The letter further stipulated that possession of the premises would be granted on the lease commencement date, subject to the lessee having executed the letter of offer and made all requisite payments. The terms in the letters of offer were set to be expressly "subject to contract".
28. In *East African Fine Spinners Limited (in receivership) & 3 others V Bedi Investments Limited*, [1994] eKLR, Gicheru JA, quoting Lord Westbury LC in *Chinnock V The Marchioness of Ely*, 4 De G J & S 638 at 646, stated:

"As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials which this court requires to make a legally binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."
29. He also adopted the reasoning of Jessel MR in *Winn V Bull*, [1877] 7 Ch D 29 at 31–32:

"Where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and dependent upon a formal contract being prepared. ..."
30. Further, the *Halsbury's Laws of England* (4th Ed., Vol. 9(1) at para 265) notes that:

"Where an agreement is made 'subject to contract', even a signed written offer cannot be accepted so as to conclude a binding contract, the reason being that the offeror clearly does not intend to be bound at this stage."
31. Applying these principles to the present case, the use of the phrase "subject to contract" signifies that the parties did not intend to be immediately bound by the terms of the letter of offer. Accordingly, despite the clear identification of the premises, the payment of consideration, and the stipulated conditions for possession, a contractual relationship would not be deemed to have been created until a formal lease agreement was executed.
32. At most, the letter dated 30th November 2015 constituted an offer by the lessor to lease specific portions of the property. The offer was contingent upon the plaintiffs executing the letter of offer and making the specified payments within fourteen (14) days. The specified consideration of Kshs. 9,153,000/= as security deposit and advance rent alone could however not establish a binding contract if the agreement still remained subject to further contractual formalities.
33. Although the letters of offer were signed and payments were made by the plaintiffs, no formal lease agreement was ever executed. This position is reinforced by the evidence of PW1, who confirmed during cross-examination that this court, Ngetich, J had previously ruled that the letters of offer did not crystallize into a lease. No appeal was preferred against that ruling, which remains binding. In the



- circumstances, the court finds that the letters of offer did not create a binding lease. The inclusion of the term “subject to contract” was not a mere formality but clearly indicated the parties’ intention that a binding lease would only arise upon execution of a formal agreement, which did not materialize.
34. On the issue of breach, the plaintiffs raised two central complaints: first, the alleged breach of an exclusivity clause, and second, the purported premature termination of the lease arrangements.
35. With regard to exclusivity, the plaintiffs contended that the letters of offer included an express term granting them exclusive rights to operate a restaurant and/or catering establishment within the leased premises. They argue that this term was material to their decision to enter into the arrangement and that the 1st defendant breached it by allowing a competing business to operate in the same block.
36. The defendants have denied the existence of any exclusivity clause. The 1st defendant stated that no such term was agreed upon or incorporated into the letters of offer. The 2nd defendant similarly denied making any such representation and argued that an exclusivity commitment would have been commercially impracticable.
37. The plaintiffs relied on Clause 13 of the letters of offer, which provided in part:
- “ 13. User: The premises is to be used for the sole purpose of providing a high end restaurant/café/food court)...Change of user will not be allowed during the term of the lease.”
38. I have considered the language and intent of Clause 13. It is evident that the provision is directed solely at regulating the permitted use of the plaintiffs’ own leased premises. It restricts the plaintiffs from changing the business use from a café/food court to any other activity. However, it does not impose any restriction on the landlord from leasing other spaces to similar businesses. In this regard, Clause 13 does not confer exclusivity. Accordingly, I find no breach proved on this issue.
39. On the issue of premature termination, the plaintiffs alleged that the 1st defendant unlawfully terminated the agreement despite part performance through payment and preparations for occupation. They argued that the termination letter dated 22nd April 2017 was unjustified and that delays were occasioned by the defendants’ failure to issue a formal lease.
40. The defendants maintained that the plaintiffs had failed to fulfil the condition requiring payment of the full sum of Kshs. 9,153,000/= within fourteen days of the offer date. They stated that by the time of termination, only partial payment had been made and, therefore, they were entitled to withdraw the offer.
41. The evidence shows that the plaintiffs paid a substantial amount, Kshs. 8,550,000/= but did not settle the entire sum. They attributed the shortfall to VAT, asserting that the defendants failed to issue ETR receipts. However, Clause 11 of the letter of offer places the obligation of paying VAT and any applicable taxes solely upon the plaintiffs. The clause does not condition such payment on the prior issuance of ETR receipts, nor did the plaintiffs provide evidence that such a request was made within the contractually stipulated period.
42. In the circumstances, I am satisfied that the plaintiffs failed to meet the payment condition in full and within the timelines required. The defendants were therefore entitled to terminate the offer. I find no basis to hold that the termination was unlawful or unjustified.



Whether the plaintiffs are entitled to the reliefs sought:

43. The plaintiffs sought general damages for loss of business allegedly suffered due to breach of contract. However, it is trite law that general damages are not awardable in cases of breach of contract. This principle was reiterated by the Court of Appeal in *Securicor Courier (K) Ltd V Benson David Onyango & Another*, [2008] eKLR, where it was held that:

“General damages are not awardable for breach of contract. The remedy for breach of contract is confined to such damages as may fairly and reasonably be considered as arising naturally from the breach or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract.”
44. In this case, the plaintiffs also sought special damages in the sum of Kshs. 9,285,000/=, being the security deposit, three months’ advance rent, agency fees, and legal fees. The court finds that the defendants acknowledged receipt of these sums and undertook to refund them upon termination of the agreement through the letters of 22nd and 25th April 2017. No refund was made, and in the absence of any justification for retaining the monies, the plaintiffs are entitled to restitution of the same.
45. This claim for special damages was specifically pleaded and supported by documentary evidence, including payment receipts and acknowledgments. The court is therefore satisfied that the plaintiffs have established their claim for special damages in the amount of Kshs. 9,285,000/=.
46. The plaintiffs further sought special damages of USD 14,910, being alleged shipping costs incurred in the process of setting up their intended restaurant and/or catering establishment. However, this claim was not supported by evidence linking the expenditure directly to the defendants, nor was there proof that the defendants were aware of or authorized the incurring of such costs. Consequently, this claim is not proved and must fail.

Whether the 1st defendant is entitled to the counterclaim:

47. The 1st defendant counterclaimed for a sum of Kshs. 2,073,851.30, allegedly incurred in undertaking renovations to accommodate the plaintiffs’ requested architectural designs, as well as in restoring the premises to their original condition following the plaintiffs’ default. It contended that these expenses were incurred in reliance on the plaintiffs’ commitment to the lease arrangement.
48. The plaintiffs disputed the counterclaim, asserting that they did not authorize the alleged modifications and bore no responsibility for the costs incurred. Upon review of the evidence presented, the court finds that while the 1st defendant may have incurred certain expenses in anticipation of the lease, there is insufficient proof that these expenditures were specifically instructed or approved by the plaintiffs. No clear contractual or documentary evidence was adduced to establish a binding obligation on the part of the plaintiffs to reimburse the said amounts.
49. Accordingly, the court finds that the 1st defendant has failed to prove its counterclaim to the required standard. The counterclaim is therefore dismissed.

Disposition

50. In conclusion, the plaintiff’s suit is partly successful to the following extent:
 - i. Judgment be and is hereby entered in favour of the plaintiffs against the defendants for the sum of Kshs. 9,285,000/= with interest at court rates from the date of filing this suit until payment in full.



- ii. The plaintiffs' claim for special damages of USD 14,910 and general damages for breach of contract, loss of income and inconvenience are hereby dismissed.
- iii. The counterclaim by the 1st defendant is hereby dismissed with costs.
- iv. In light of the partial success of the plaintiffs' claim, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16TH DAY OF MAY 2025.

F. MUGAMBI

JUDGE

