



Odero v Mugoiri House Limited; Mugoiri House Limited (Plaintiff to the Counterclaim); Odero (Defendant to the Counterclaim) (Civil Case E596 of 2023) [2025] KEHC 12776 (KLR) (Commercial and Tax) (18 September 2025) (Judgment)

Neutral citation: [2025] KEHC 12776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E596 OF 2023
BK NJOROGE, J
SEPTEMBER 18, 2025**

BETWEEN

MAURICE ONYANGO ODERO PLAINTIFF

AND

MUGOIRI HOUSE LIMITED DEFENDANT

AND

MUGOIRI HOUSE LIMITED PLAINTIFF TO THE COUNTERCLAIM

AND

MAURICE ONYANGO ODERO DEFENDANT TO THE COUNTERCLAIM

JUDGMENT

1. This judgement arises from a suit filed by the Plaintiff against the Defendant claiming a refund of purchase price for failed consideration. The Defendant has Counterclaimed for forfeiture of the same amount claimed.

Background Facts

2. By a Plaint dated 30th November 2023, the Plaintiff averred that on or about 26th September 2018, the parties entered into an agreement whereby the Defendant would sell to the Plaintiff an office space measuring 2,965 square feet situated on 7th Floor LR 209/2042 in Westlands known as “The Westery” Nairobi for the price of Kshs.22, 520, 000.
3. Subsequently, the Plaintiff paid a total of Kshs.22, 520, 000 to the Defendant in several instalments from 1st October 2018 to 21st October 2019.



4. It was agreed between the parties at inception that the said agreement would be superseded by a formal sale agreement from the Defendant, which agreement has never been executed.
5. Further, the Plaintiff stated that despite having paid the sum of Kshs.22, 520, 000 the Defendant did not transfer the said property to his name. In addition, due to the Defendant's failure to present a formal sale agreement and hand over possession of the agreed office space to the Plaintiff, the latter has suffered loss and damage as the value of the suit premises has depreciated considerably.
6. It was the Plaintiff's averment that it had demanded a refund of the purchase price paid, but the Defendant failed to do so. In the premises, the Plaintiff prays for an order that the Defendant forthwith refund him the said sum of Kshs.22, 520, 000 plus interest at Court rates from the dates of payment until payment in full
7. The Plaintiff prayed for the following orders
 - a. The said sum of Kshs.22, 520, 000
 - b. Interest thereon from the dates of payment until payment in full at court rates
 - c. Costs of the suit.
8. In response to the Plaint, the Defendant filed an Amended Defence and Counterclaim dated 29th August 2024. The Defendant (being the Plaintiff in the Counterclaim) pleaded that the Plaintiff agreed to buy from the Defendant an office space measuring approximately 2,964.18 square feet for the sum of Kshs.44, 080, 000. Further, it was a term of the letter of offer that the Plaintiff was to pay a commitment fee of Kshs.10, 000, 000 upon signing the letter of offer and the balance of Kshs.34, 080, 000 would be paid within 180 days from the date of offer. Under the terms of the agreement, the Plaintiff made payments of Kshs.22, 520, 000 as at 21st October 2019.
9. The Defendant added that contrary to the averments by the Plaintiff, the Plaintiff failed to complete the transaction and therefore there was no basis for the Plaintiff to demand that the Defendant transfer the property to the Plaintiff.
10. By way of a Reply to Amended Defence and Defence to Counterclaim, the Plaintiff acknowledged that there was an agreement between the parties where the Plaintiff agreed to buy and the Defendant agreed to sell an office space measuring approximately 2,964.18 square feet for the sum of Kshs.44, 080, 000. Further, it was term of the letter of offer that the Plaintiff was to pay a commitment fee of Kshs.10, 000, 000 upon signing the letter of offer and the balance of Kshs.34, 080, 000 would be paid within 180 days from the date of offer.
11. The Defendant argued that the Plaintiff was in breach of the agreement and such breach occasioned loss and damage.
12. The Defendant prays that judgment be entered against the Plaintiff as pleaded in the Counterclaim as follows;
 - a. Sum of Kshs.22, 156, 237.20 being the loss of rental revenue
 - b. Sum of Kshs.4, 408, 000 being 10% of the purchase price
 - c. Set off Kshs.3, 603, 200 being VAT paid out of the deposits made by the Defendant.
 - d. Interest on a and b above at court rates until payment in full
 - e. Costs of the suit.



Issues for determination

13. The Court has considered the Plaintiff's Claim as well as the Defendant's Counterclaim. The Court has also considered the Plaintiff's submissions filed. The Court takes note that though the Defendant referred to submissions dated 2/05/2025 none were uploaded on the CTS. No physical copies were availed to Court despite the orders made on 19.03.2025. However, the Court takes note of the oral submissions by Miss Nkatha Counsel for the Defendant made on 18/06/2025. The Court has also taken note of the evidence presented. The Court frames the following issues for determination;
- i. Whether there existed a valid and enforceable contract between the Plaintiff and the Defendant.
 - ii. Whether there was breach of the said contract.
 - iii. What relief if any is the aggrieved party entitled to.

Analysis

14. The Court notes that this case is to be determined on the basis of two rival claims. Each party holds its own ground that it is the other side that breached the agreement and thus should suffer the consequences.
15. It was the Plaintiff's case that there was no formal sale agreement between the parties. As stipulated in Clause 8 of the offer letter, the Defendant, having received the Plaintiff's deposit of Ksh.25,520,000 did not transfer the office space to the Plaintiff. That therefore there was therefore a total failure of consideration and the said sum of Ksh. 25,520,000 should be refunded to the Plaintiff with interest.
16. In contrast, the Defendant argued that there was a letter of offer as well as an agreement for sale which the Plaintiff failed to execute. Thus, the Plaintiff failed to complete the transaction and there was therefore no basis for the Plaintiff to demand the transfer of the property.

Whether there existed a valid and enforceable contract between the Plaintiff and the Defendant.

17. Was there a valid and enforceable contract between the Plaintiff and the Defendant? 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.”

18. It is undisputed that there was a letter of offer dated 26th September 2018 for the sale of office space in Westlands, Nairobi by the Defendant to the Plaintiff for the Sum of Ksh. 44,080,000/ of which the Plaintiff paid a sum of KSh22,520,000.
19. From the evidence that was presented to the Court, there was indeed a letter of offer and which was subject to a sale agreement being issued by the Defendant's advocates. Paragraph 7 and 8 of the letter of offer reads;
7. transaction documents

The Vendor's advocates will prepare the sale agreements for the respective units, will undertake the requisite conveyances procedures and documentation to effect the registration of interest(s) in favour of such purchaser/acquirer of interest in the property, subscription of shares in



the management company and such other documents or procedures necessary to facilitate or complete such transactions as may arise in the course of this transaction or immediately after.

8. supremacy of the sale agreement

The sale agreement mentioned above, when executed, will supersede this letter of offer and will be binding on both parties. The sale agreement will be issued simultaneously within 7 days of acceptance of this letter of offer by the purchaser.

20. The Defendant at paragraph 5 of its Defence admitted that it was a term of the letter of offer that a sale agreement would be issued by the Defendant's Advocates. However, the Defendant went on to state that its advocates forwarded the agreement for sale to the Plaintiff who refused, failed and/or ignored to execute the agreement for sale.
21. To support this argument the Defendant produced an email conversation dated 20th August 2019 in which the Defendant alleged to have attached the draft sale agreement. The Plaintiff denied ever having received the sale agreement. At this point the Defendant has not brought the said agreement or even a copy of it to the Court to confirm its position that indeed the sale agreement existed.
22. What then is the legal effect of a letter of offer that is expressly stated to be subject to a future formal contract which ultimately does not materialize? The Court of Appeal [Gicheru JA, Kwach JA, and Muli JA] in *East African Fine Spinners Limited (in receivership) & 3 others v Bedi Investments Limited* [1994] eKLR. Expressing himself on this question, Gicheru JA adopted the following words of Lord Westbury LC in *Chinnock v The Marchioness of Ely* 4 DE G J&S 638 at 646:

“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.”

Gicheru JA further adopted the following words of Jessel, MR in *Winn v Bull* [1877] 7 Ch D 29 at pages 31 and 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 is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail.”

Lastly, Gicheru JA adopted the following words of Sir Raymond Evershed MR in *Bennet, Walden & Co v Wood* [1950] 2 All ER 134 at page 137: “Parties contracting in particular words must be assumed to intend the ordinary meaning of those words. Applying the proper test of construction, viz, what is the ordinary, straightforward, meaning of the language, it seems to me reasonably clear that the answer here is that by “offer” is meant a firm offer. In the ordinary sense of the term in business matters an offer is something which by acceptance creates a bargain. An offer subject to contract lacks that essential characteristic, for its acceptance does not create a contract.”



23. On his part, Kwach JA rendered himself on this question in the following words:

“The sale was by its express terms subject to contract and until that contract had been executed there was no contract between the parties which could be enforced by an order of specific performance or mandatory injunction.”

Kwach JA adopted the following principle outlined by Banker LJ in *Keppel v Wheeler & another* [1927] 1 KB 577: “ I pause here to state plainly what is now well established that where a person accepts an offer subject to contract, it means that the matter remains in negotiation until a formal contract is settled and the formal contracts are exchanged.”

24. This Court reiterates the above holding and states the letter of offer dated 26th September 2018 was subject to a formal contract by way of an agreement for sale. The anticipated formal contract by way of an agreement for sale never crystallized; therefore, there is no binding contract in the absence of the anticipated formal contract by way of agreement for sale.
25. The letter of offer being subject to the preparation and execution of the sale agreement meant that the parties remained in negotiations pending settlement of terms and execution of the formal contract by way of an agreement for sale.
26. In light of the above, the court concludes that the letter of offer did not constitute a binding and enforceable contract pursuant to which the Defendant is liable to forfeit the sum of Kshs.22, 520, 000.

ii) Whether there was breach of the said contract.

27. The finding by this Court is that there was no formal contract capable of being breached in light of the findings as to issue (i) above.

What relief if any is the aggrieved party entitled to.

28. The Plaintiff has proved that he is entitled to the amount prayed for in the Plaint. Interest is awarded at Court rates from the date of filing suit until payment in full. The costs of the suit are awarded to the successful Plaintiff.
29. The Counterclaim fails. Notably, the Defendant’s Counterclaim was based on the letter of offer, which was subject to execution of a sale agreement. Having determined that the letter of offer was not binding as the agreement for sale never crystallized, the Counterclaim by the Defendant is hereby dismissed with cost

Determination

30. Judgement is hereby entered in favour of the Plaintiff as against the Defendant as follows;
- a) The sum of Kenya Shillings Twenty-Two Million Five Hundred and Twenty (Kshs.22, 520, 000/=).
 - b) Interest thereon at Court rates from the date of filing suit until payment in full.
 - c) The Costs of the suit together with interest at Court rates from the date of Judgement until payment in full.
 - d) The Defendant’s Counterclaim is dismissed with costs.
31. It is so ordered.



DATED, SIGNED AND DELIVERED AT MILIMANI THIS 18TH DAY OF SEPTEMBER, 2025.

NJOROGE BENJAMIN. K

JUDGE

In the presence of: -

Mr. Kabaru for the Plaintiff

Miss Nkatha for the Defendant

Mr. Wabwire - Court Assistant.

