



**Kihara v Taibjee & Bhalla Advocates LLP & 2 others (Civil Case E360 of 2020)
[2025] KEHC 15565 (KLR) (Commercial and Tax) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15565 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E360 OF 2020
PM MULWA, J
OCTOBER 30, 2025**

BETWEEN

CAROLINE WAIRIMU KIHARA PLAINTIFF

AND

TAIBJEE & BHALLA ADVOCATES LLP 1ST DEFENDANT

MADHAV BHALLA 2ND DEFENDANT

EIGHTY- EIGHT NAIROBI LIMITED 3RD DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of a plaint dated 25th August 2020, seeking judgment against the Defendants jointly for:
 - i. Kshs 191,550/=
 - ii. General damages of Kshs 1,000,000/=
 - iii. Exemplary damages of Kshs 1,000,000/= against the 3rd Defendant
 - iv. Aggravated damages of Kshs 1,000,000/=
 - v. Interest on the above
 - vi. Costs of the suit
 - vii. Any other further relief this honourable court may deem fit.
2. The Plaintiff's case is that by a letter of offer dated 3rd September 2018, she entered into a business relationship with the 3rd Defendant for the purchase of an executive one-bedroom apartment, Unit No.



1711, in the proposed “88 Nairobi” development to be constructed on Land Reference No. 209/3006, Upper Hill, Nairobi. The agreed purchase price was Kshs. 12,770,000/=.

3. The Plaintiff was to pay a 10% deposit of the purchase price (which she did), less the reservation fees, to the 1st Defendant to hold on stakeholder terms pending execution of the sale agreement. On 1st September 2018, the Plaintiff paid Kshs. 100,000/= as booking fees to the 3rd Defendant.
4. She avers that during due diligence and negotiation of the sale agreement, her advocates noted several irregularities in the documents furnished by the 3rd Defendant, including: The change of user for the property had expired before construction commenced, the 3rd Defendant was constructing more units than those approved by NEMA, the 3rd Defendant had defaulted in repaying its loan to financiers; and there was an unexplained delay in commencing construction.
5. As a result, the Plaintiff opted to withdraw from the transaction and, by her advocate’s letter dated 20th February 2020, issued a notice of withdrawal and demanded a full refund of the sums paid.
6. However, the 3rd Defendant deducted Kshs. 191,550/= as cancellation fees and refunded only Kshs. 1,085,400/= to the Plaintiff. She contends that the deduction was unlawful, malicious, and without a contractual basis. The Plaintiff further alleges that the letter of offer contained no clause permitting such forfeiture, and that the 3rd Defendant was itself in breach for failing to present the sale agreement within the stipulated twenty-one (21) days.
7. The Defendants filed a joint statement of defence dated 19th October 2020, denying all allegations. The 3rd Defendant averred that the letter of offer did indeed contain a reservation clause providing that 15% of the deposit would be forfeited to the vendor in the event of withdrawal by the purchaser. It was their position that the refund of Kshs. 1,085,400/= was in accordance with the agreed terms.
8. Before the commencement of trial, the suit against the 1st and 2nd Defendants was struck out by a ruling delivered on 28th September 2021, leaving the 3rd Defendant as the sole remaining Defendant.
9. At the hearing, the Plaintiff testified as PW1, adopting her witness statement dated 5th August 2020 and producing her bundle of documents dated 25th August 2020. The 3rd Defendant called one witness (DW1), who adopted their written statement and produced the defence documents.
10. At the close of the pleading’s parties filed written submissions. From the pleadings, evidence, and submissions, the issues for determination are:
 - i. Whether the 3rd Defendant was in breach of the terms of the letter of offer;
 - ii. Whether the deduction of Kshs. 191,550/= as cancellation fees was lawful; and
 - iii. Whether the Plaintiff is entitled to the reliefs sought.

SUBDIVISION - Whether the 3rd Defendant breached the terms of offer

11. It is not in dispute that the Plaintiff entered into a letter of offer with the 3rd Defendant for the purchase of Apartment No. 1711. The Plaintiff paid Kshs. 1,177,000/= being a deposit of 10% of the purchase price less reservation fees. The key question is whether the 3rd Defendant failed to meet its obligations under that letter.
12. The Plaintiff’s uncontroverted evidence was that the 3rd Defendant failed to provide valid regulatory approvals and to commence construction as promised. The Defendant did not produce any credible evidence demonstrating compliance with the conditions of the project or the renewal of approvals. On the contrary, the Defendant admitted that there had been delays and financial challenges affecting the project.



13. The Court finds that these circumstances amounted to material non-performance by the 3rd Defendant, thereby justifying the Plaintiff's withdrawal. The letter of offer contemplated that the sale agreement would be executed within 21 days, this did not occur. Accordingly, the 3rd Defendant was the first in breach.

Was the deduction of Kshs.191,550/= as cancellation fees lawful?

14. The Plaintiff maintains that there was no contractual provision permitting forfeiture. The 3rd Defendant contends that the letter of offer contained a reservation clause allowing forfeiture of 15% of the deposit upon withdrawal by the purchaser.
15. Upon perusal of the letter of offer annexed to the Plaintiff's bundle, Clause 13 provides that:

“In case of default or withdrawal by the purchaser after execution of the agreement for sale, the purchaser shall forfeit 20% of the sale price by way of agreed liquidated and ascertained damages.”
14. It is undisputed that no agreement for sale was ever executed. The language of Clause 13 restricts the forfeiture to a situation arising after execution of the sale agreement. The 3rd Defendant did not draw the Court's attention to any other clause in the letter of offer expressly permitting forfeiture of 15% upon withdrawal prior to execution. The alleged “15% reservation clause” was not proved through the production of a signed document containing such a term.
17. While the Plaintiff did execute the letter of offer, thereby signifying an intention to be bound by its terms and conditions, I am of the view that in the absence of an executed agreement for sale meant that the alleged forfeiture clause could not be triggered, and the deduction lacked contractual foundation. For a forfeiture to be valid, it must be expressly stipulated in the contract and applicable to the relevant stage of the transaction, which the 3rd Defendant has failed to demonstrate.
18. Where a forfeiture clause is expressly conditional upon execution of a sale agreement, and no such agreement is executed, the clause cannot be invoked, and any deduction from the purchaser's deposit at the pre-agreement stage is without contractual basis. Equity will not permit a party in breach to benefit from its own non-performance. Where one party's failure to meet contractual obligations compels the other to withdraw, the defaulting party cannot invoke forfeiture clauses.
19. The court will not interfere where parties have contracted on an arms-length basis. However, by its equitable jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where, having agreed to certain terms and conditions, it thereafter imposes additional terms upon the other party. Equity can intervene to relieve that party of such conditions. (See Kenya Commercial Finance Company Ltd v Ngeny & Another [2002] 1KLR).
20. It is trite law that parties to a contract are bound by the terms of their contract and that a court of law cannot rewrite an agreement between parties. It is not for the Court to rewrite a contract for the parties. (See Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited 2014 eKLR and National Bank of Kenya Ltd v Pipeplastic Sankolit (K) Ltd. Civil Appeal No 95 of 1999).



21. In the present case, I find that the deduction of Kshs. 191,550/= from the Plaintiff's deposit was not supported by the contractual terms binding the parties and was therefore unlawful. The Plaintiff is therefore entitled to a refund of the said amount.
22. The Court finds that the forfeiture clause in Clause 13 of the letter of offer was expressly limited to situations arising after execution of an agreement for sale. No such agreement was executed, and the 3rd Defendant failed to prove the existence of any other contractual term authorizing forfeiture at the pre-agreement stage. The deduction of Kshs. 191,550/= from the Plaintiff's deposit was therefore without a contractual basis and is refundable to the Plaintiff.

Whether the Plaintiff is entitled to the reliefs sought

17. Having found that the 3rd Defendant was in breach of its obligations and that the deduction was unlawful, the Plaintiff is entitled to a refund of Kshs. 191,550/= with interest at court rates from the date of filing suit until payment in full.
18. On the claim for general damages, the Court is guided by the principle that damages for breach of contract are intended to place the injured party in the position they would have been in had the contract been performed, but not to punish the defaulting party. There was no evidence of actual loss beyond the withheld amount. The Court therefore declines to award general damages.
19. Similarly, the claims for exemplary and aggravated damages are not sustainable in a contractual dispute unless there is proof of malice, fraud, or oppressive conduct. While the Defendant's conduct was unprofessional, it does not reach the threshold warranting punitive damages.
20. In the circumstances, the Plaintiff succeeds partially on her claim.
21. Accordingly, judgment is entered for the Plaintiff against the 3rd Defendant as follows:
 - i. Refund of Kshs. 191,550/= being unlawfully deducted as cancellation fees.
 - ii. Interest on (i) at court rates from the date of filing suit until payment in full.
 - iii. Costs of the suit to the Plaintiff.
 - iv. All other prayers are declined.

JUDGMENT delivered virtually, dated and signed at NAIROBI.

This 30th day of October 2025.

P.M. MULWA

JUDGE

In the presence of:

Mr. Kimatta for Plaintiff

Mr. Kiragu h/b for Ms. Onyango for 3rd Defendant

Court Assistant: Carlos

