Musyoka v Tiara Properties Limited (Environment and Land Case Civil Suit 660 of 2015) [2025] KEELC 793 (KLR) (25 February 2025) (Judgment)

Neutral citation: [2025] KEELC 793 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 660 OF 2015

AY KOROSS, J

FEBRUARY 25, 2025

BETWEEN

SHADRACK MUSYOKA ..... PLAINTIFF

AND

TIARA PROPERTIES LIMITED ..... DEFENDANT

JUDGMENT

Background of the case

1. The dispute between the parties revolves around a letter of offer made by the defendant to the plaintiff on 3/07/2012 over the purchase of an off-plan commercial unit no. 2A11 (suit property) in LR. No. 3734/619 (suit land) located along Mugumo Road, Lavington.

2. In the offer, the defendant was the vendor, and the plaintiff was the purchaser. The plaintiff allegedly complied with the terms of the offer, but the defendant allegedly failed to fulfil them, hence the dispute.

Plaintiff's case and evidence

3. In a plaint dated 9/07/2015, the plaintiff pleaded that as per the planned development, an offer of the suit property was made to him according to the terms and conditions contained therein. He asserted the terms therein were as follows: -

    i. Vendors were Tiara Properties Limited, the defendant herein.

    ii. Description of the property to be purchased was unit no. 2A 11(as per annexed floor plan) with a floor area of 40.40sqm.

    iii. The sale price was Kenya Shillings Eight Million (Kshs. 8,000, 000/-)

    iv. The main title deed was leasehold.

v. Terms of payment were a deposit of 20% of the sale price which was payable to the vendor immediately upon execution of the offer letter and the balance payable on completion.

vi. It was a term of the offer that the vendor's lawyer would prepare the sale agreement and subleases and the purchaser would execute the same within seven (7) days of presentation.

vii. The anticipated completion date was September 2014.

viii. It was a term of the offer letter that the plaintiff was to confirm acceptance of the offer within 14 days of the date of the offer. It was a term of the offer that failure to sign and return the letter with the agreed deposit within 14 days, would lead to an automatic lapse of the offer.

4. He maintained he complied with the terms of the offer by executing it on 4/07/2012 and paying the required deposit of kshs.1,600,000/= (deposit).

5. According to him, by such compliance on his part, it could only be concluded a valid and legally binding contract was created between the parties.

6. Nonetheless, he stated towards the tail end of the construction, the defendant on 2/03/2015 unilaterally terminated the letter offer and sought to refund the deposit which he rejected.

7. Furthermore, he stated, the suit property could now easily fetch a market value of kshs. 17,000,000/- and he had always been willing, ready and able to complete the purchase of the suit property and he had never been in breach in any way whatsoever.

8. He pleaded and particularised special damages made up of kshs 11,176,000/=as follows;

a. Loss of bargain (current market price- purchase price) 17,000,000- 8,000,000/= 9,000,000/=

b. Interest on the deposit at court rates from the date of deposit until the date of refund 12/100×1,600,000×3=Ksh. 576,000.

c. Refund of deposit of kshs. 1,600,000/=

9. In the end, he sought the following reliefs from this court: -

a. An order of specific performance compelling the defendant to execute an agreement for sale and sublease in favour of the plaintiff in respect of the suit property in terms of the letter of offer.

b. A permanent injunction restraining the defendant, its agents, servants and/or employees from selling, disposing, or transferring other than to the plaintiff, the suit property.

c. In the alternative, special damages of kshs. 11,176,000/-

d. Costs of the suit together with interest therein.

e. Any other relief as this Hon. Court may deem fit to grant.

10. The plaintiff testified as PWI and he adopted his witness statement and produced documents in support of his case which were marked as Pex1-8.

11. It was his evidence the letter of offer was subject to contract but he had never signed one. Further, even though the defendant had offered to refund him the deposit in March 2015, he declined it as he wanted to complete the transaction.

12. He was categorical, he knew the property he was purchasing as it was contained in the off-plan that was remitted to him by the vendor when he was submitting the letter of offer to him.

13. He confirmed he did not prepare the valuation report that he had produced before the court as he was not an expert. Nevertheless, the valuer he contracted surveyed the suit land, and the building thereupon which was at the time 90% complete and the valuer valued the suit property based on an external assessment and other parameters.

Defendant's case and evidence.

14. By the law firm of M/s. Majanja Luseno & Co. Advocates who were then on record for the defendant, the defendant which is a limited liability company incorporated in Kenya filed a defence dated 10/08/2015.

15. It is worth noting the defendant is now represented by the law firm of M/s. Kairu Mbuthia Law LLP.

16. It admitted the suit property belonged to it and the letter of offer was issued by it as asserted by the plaintiff. However, it was contended the offer was subject to contract.

17. It was averred such a contract was never executed or did one exist hence the suit property was incapable of transfer. It was emphatic that a letter of offer could not be equated to a contract for sale that was capable of dealing with immovable property.

18. According to it, the intent of the parties was never actualised. However, it was admitted the defendant made attempts to refund the deposit to the plaintiff which he rejected.

19. It was maintained orders of specific performance could not accrue from a letter of offer and stated no reasonable cause of action was shown and the suit as pleaded was vexing and intended to embarrass the defendant.

20. Further, some of the assertions contained in the plaint were denied and the plaintiff was put to strict proof.

21. The defendant's former director Kenneth Philip Luusa testified as DW1 and he adopted his witness statement and produced documents in support of the defendant's case which were marked and produced as Dex1-3.

22. It was his testimony the offer was based on an off-plan concept but unfortunately, upon engagement with the local authorities, the concept was declined and thus, it was forced to materially alter it. He stated it was on this basis, that a refund was made to the plaintiff.

23. He stated the defendant had sourced for investors based on the off-plan concept including the plaintiff. He asserted the suit property and amount payable were defined in the letter of offer and confirmed the deposit thereof was received by the defendant.

24. He testified during the subsistence of the 14 days in the letter of offer, that he was seeking approvals from the relevant body but he stated the off-plan approval was repudiated and another one was approved.

25. He stated he was unsure when the final approval was made but later clarified it took place in 2014. He averred when the relevant body declined the off-plan concept, he informed the plaintiff and when he was requested to substantiate this, he stated he did not have the approved plans in court or that he made such a communication to the plaintiff.

26. He stated the non-approval of the concept led to a refund of the deposit and that construction was completed in 2014 after it had taken them close to 2 years to commence it.

27. He contended the building on the suit land was currently leased to Huawei Technologies at ksh.11, 372,125/- per month.

Parties' submissions

28. As directed by the court, all parties filed written submissions. The plaintiff's counsel on record M/s. Koskey Masese Advocates filed written submissions dated 16/12/2024.

29. In them, the issues the counsel framed for determination were whether there was a binding agreement between parties and whether the plaintiff was entitled to the reliefs sought.

30. The defendant's counsel filed written submissions dated 6/01/2025 and the issues identified for determination were whether there existed a valid agreement between the parties and whether the reliefs sought were merited.

31. Upon identifying and considering the issues for determination, this court will in its analysis and determination consider the respective parties' arguments on the particular issue and also consider provisions of law and authorities they relied upon to advance their arguments as contained in their submissions.

Undisputed facts

32. From the pleadings and evidence, certain undisputed facts arose and it is paramount I summarize them. It was undisputed the defendant is the registered owner of the disputed suit land and based on the off-plan concept, it issued a letter of offer dated 3/07/2012 and in compliance thereof, the plaintiff paid the requisite deposit of kshs. 1,600,000/= on 4/07/2012.

33. It was also undisputed it made an offer to refund the deposit to the plaintiff but this attempt was rejected by the plaintiff.

Issues for determination,

34. I have considered the pleadings, evidence adduced by the parties, as well as rival submissions. Being guided by the provisions of law and judicial precedents that have been well cited, I shall now proceed to consider the merits or otherwise of the plaintiff's claim and conceivably the issues for resolution are;

    I. Whether the letter of offer was valid and enforceable.

    II. What orders should this court issue including an order as to costs?

Analysis, and Determination

35. The issues that were earlier identified as arising for determination are related and shall be handled jointly.

36. On the 1st limb of this issue, the dispute between the parties was whether the letter of offer constituted a contract. It is trite law that for a contract to suffice, 3 essential ingredients must be met which are offer, acceptance and consideration.

37. These ingredients were well summarized by the Court of Appeal decision of William Muthee Muthami v Bank of Baroda [2014] KECA 591 (KLR) in the following manner: -

> " The dispute was essentially grounded on the law of contract. The nature of our civil process is that only a person who has incurred loss as a result of another's action can bring a claim for a legal or equitable remedy. The dispute may involve, as here, private law issues between individuals. 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. It is elementary learning, that as a general rule, according to the common law doctrine of privity of contract, rights and obligations under a contract are only conferred or imposed on the parties to that contract."

38. The parties to the dispute are in concurrence a letter of offer was made to the plaintiff dated 3/05/2012, and the plaintiff complied with the terms thereof by accepting the offer on 4/07/2012 and making payments of kshs. 1,600,000/- on this date.

39. The point of departure between the parties as evidenced in the pleadings and submissions was the meaning of the term "subject to contract" that is contained in the said letter of offer.

40. The plaintiff's counsel argued that on the application of the elements of contracts which are offer, acceptance and consideration as stated in the Court of Appeal decision of Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] KECA 538 (KLR), the letter of offer was a contract which was binding on the parties.

41. To buttress this, counsel relied on a plethora of persuasive decisions and the most significant was the decision of Eldo City Limited v Corn Products Kenya Ltd & another [2013] KEHC 5916 (KLR) where Mabeya J stated as follows:-

> " It is trite law that in deciding disputes, it is the court's duty to give effect to the intention of the parties. The parties' intention is discernible from the documents and conduct of the parties. However, onerous a document or contract may be, the court's duty is to give effect to it. In the case of Smith –vs- Cook (1891) AC 297 at 303 the court held:-
>
> "The duty of the court is to give the natural meaning to the language of the deed unless it involves some manifest absurdity or would be inconsistent with some other provision of the deed and would therefore be contrary to the intention of the parties as appearing upon the face of the deed."

42. The defendant's counsel contrasted this argument and contended the issue of "subject to contract" had been the focus of judicial interpretations and it was now settled law that a letter of offer was not a contract. He argued in this case, the letter for sale or sublease had not crystallized.

43. In making his point, counsel placed reliance on the well-cited Court of Appeal decision of East African Fine Spinners Limited (in receivership) & 3 others v Bedi Investments Limited [1994] KECA 96 (KLR) where it was stated by Gicheru JA (as he then was) thus: -

> " As long ago as 1865 Lord Westbury, LC in Chinnock v The Marchioness of Ely 4 DE G J&S 638 at 646, observed that:
>
> "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."

This observation prompted Jessel, MR in Winn v Bull [1877] 7 Ch D 29 at pages 31 and 32, to conclude that:

"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."

44. In relying on this decision of East African Fine Spinners Limited (Supra) that was determined in 1994, I honestly believe the defendant's counsel overlooked the more recent Supreme Court of Kenya decision of Kenya Railways Corporation & 2 others v Okoiti & 3 others [2023] KESC 38 (KLR).

45. The findings of this decision of Kenya Railways Corporation (Supra) align with the position in the persuasive decision of Eldo City Limited (Supra) that was relied upon by the plaintiff's counsel.

46. Being a decision of a superior court that is higher in hierarchy than this court and the Court of Appeal, the decision of Kenya Railways Corporation (Supra) is binding not only to this court but the Court of Appeal. When considering a memorandum of understanding between parties, the Apex court in Kenya Railways Corporation (Supra) stated as follows: -

> " From the above definition, an MoU is preliminary to a contract and or agreement between parties and is characterized as non-binding and unintended to create any contractual obligations on either party. This does not mean that courts are not faced with the question of establishing the binding nature of an MoU. When that happens, a court considers the wording and the apparent intention of the parties. In stating so, we are persuaded by the findings of HH Humphrey Lloyd QC in ERDC Group v Brunel University [2006] EWHC 687 (TCC) in the following words:
>
> "Letters of intent come in all sorts of forms. Some are merely expressions of hope; others are firmer but make it clear that no legal consequences ensue; others presage a contract and may be tantamount to an agreement 'subject to contract'; others are contracts falling short of the full-blown contract that is contemplated; others are in reality that contract in all but name. There can therefore be no prior assumptions, such as looking to see if words such as 'letter of intent' have or have not been used. The phrase 'letter of intent' is not a term of art. Its meaning and effect depend on the circumstances of each case."

In establishing the intent of the parties, we are further persuaded by the Supreme Court of the United Kingdom in RTS Flexible Systems v Molkerei Alois Muller GmbH & Co KG [2010] UKSC 14 & 38 where it expressed itself as follows:

"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had

agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement." Emphasis added.

47. Now, back to the issue of determination and being guided by Kenya Railways Corporation (Supra) and the elements of a contract, I shall revisit the terms of the letter of offer and also the conduct of the parties.

48. The letter of offer was made by the defendant and by this conduct, the terms thereof were well known to it and there was no evidence of coercion, inducement or whatsoever. The terms thereof as offered to the plaintiff were unambiguous and of particular interest was a clause which stated: -

> " Please note that if you fail to sign and return this letter with the agreed deposit within the 14 days, this offer will automatically lapse."

49. In my humble view and drawing inference from these words, the intention of the parties was at this point when the offer was made on 3/07/2012 non-binding. This court concludes so as the plaintiff was yet to firm up the end of the bargain by paying the deposit of kshs. 1,600,000/= within 14 days from 3/07/2012.

50. However, this position changed as soon as the plaintiff complied with the terms by making payments one day thereafter which was 4/07/2012. By paying the deposit, the letter of offer was confirmed and it became a binding contract between the parties as surmised by William Muthee Muthami (Supra).

51. The projected completion date of the transaction was expected to be September 2014 and as envisaged by the letter of offer, it was expected that before then and as provided for in the letter of offer, the defendant's advocates were to remit the agreement for sale, demand payment of stamp duty, valuation fees, legal fees, utility deposits and service charge deposit but this was not to be.

52. Instead, sometime in 2014, the defendant's representative called the plaintiff and informed him that it was no longer interested in selling the suit property to him and wanted to refund him.

53. Resoundingly in his letter dated 22/10/2014, the plaintiff stated this was not tenable as the letter of offer was a binding contract and rejected any purported refund.

54. Further, in a letter dated 9/03/2015, he returned cheques that were allegedly issued to him by the defendant as a refund of the deposit and in returning the cheques, he stated: -

> " We refer to the above matter and return herewith your cheques numbers xxxx91 and xxxx92 for kshs.1,600,000.Please be advised vide my letter to you dated 22nd October 2014, I am ready, able and willing to complete the sale transaction and I demand you forward the agreement for sale for your execution"

55. This court has noted the defence of frustration albeit not pleaded in the defence, was introduced in the defendant's submission. As a matter of fact, there was no evidence of coercion into signing the letter of offer, undue influence, mistake, misrepresentation, duress illegality or fraud.

56. I must also mention that although the DW1 contended the local authorities varied the building plan hence stopping the defendant from completing the contract, this was not proved.

57. As a result, having considered the intent of the parties, I conclude and find the letter of offer was a contract whose terms bound the parties.

58. I will now proceed to deal with the 2nd limb of the issue. In his claim, the plaintiff sought several reliefs but of significance were the reliefs of specific performance and special damages which were alternates of each other. In other words, I have been invited to grant either of these reliefs.

59. As held in the Court of Appeal in Ritho v Kariithi and another [1988] KLR 237, this court has the power to award damages in place of specific performance. In Gharib Suleman Gharib v Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998, the Court of Appeal stated the guidelines in determining the appropriate remedy when it held that:

> "The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages."

60. Being guided by Gharib Suleman Gharib (Supra), it is my humble view that in the circumstances of this case where the defendant has put another party in occupation, the appropriate remedy would be an award of damages.

61. It is trite law that special damages must be specifically pleaded and proved with a degree of certainty and particularity.

62. In the circumstances of this case, the special damages of kshs. 1,600,000/- being the deposit of the purchase price as paid by the plaintiff to the defendant was undisputed. Therefore, I find the plaintiff is outrightly entitled to this amount. I find the plaintiff is entitled to an interest thereon at court rates payable from 4/07/2012.

63. The plaintiff also pleaded the sum of ksh. 9,000,000/- being sums payable for loss of bargain. As held in the persuasive decision of Hydro Water Well (K) Limited v Sechere & 2 others (sued in their representative capacity as the officers of Chae Kenya Society & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society) [2021] KEHC 22 (KLR), in calculating loss of bargain, the court looks at the difference between the claimant's actual situation and the situation in which he would have been if the primary contractual obligation had been performed.

64. In this case, the plaintiff stated the loss was the sum of kshs. 9,000,000/- which was the difference between the purchase price of kshs. 8,000,000/- and the current market value of the suit property which was allegedly 17,000,000/=.

65. Considering the adduced evidence, I agree with the defendant's counsel this amount was not proved by the plaintiff. This is because this sum of ksh.17,000,000/- as an alleged appreciated value of the suit property was not contained in the contract. Furthermore, an expert report was never adduced to substantiate this amount and it can only be concluded that it is a speculative figure.

66. It is noteworthy the plaintiff produced an expert report by Clayton Valuers who valued the suit property at ksh. 8,500,000/- but in my opinion, it is unreliable as the said expert did not have an opportunity to conduct an internal assessment of the suit property. I find this amount was not proven.

67. In the end, it is my ultimate finding the plaintiff was successful in his claim. It is trite law costs follow the event. I award the plaintiff costs of the suit. Therefore, I hereby issue the following final disposal orders: -

a. Judgment is hereby entered in favour of the plaintiff against the defendant for the total sum of Kshs. 1,600,000/-

b. The said sums will attract interest at court rates from the date of 4/07/2012 until payment in full.

c. Costs are awarded to the plaintiff.

Orders accordingly.

DATED AT MACHAKOS THIS 25TH DAY OF FEBRUARY, 2025

HON A. Y. KOROSS

JUDGE

25. 02.2025

Delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr. Masese for Plaintiff

Mr. Kofuna for Defendant

Ms Kanja- Court Assistant