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ENFORCEABILITY OF A LETTER OF OFFER IN LAND TRANSACTIONS

The Letter of Offer, sometimes referred to as a letter of intent, is a document typically drafted by the Vendor in a property transaction where the Purchaser expresses their interest to purchase the land/apartment for a certain consideration. Usually, the Purchaser pays a reservation fee, which is nominal compared to the deposit required under an Agreement for Sale.

A party that has signed a Letter of Offer may be legally bound to honor it, depending on **how the letter is drafted**. In conventional transactions, a Letter of Offer generally includes a provision stating that it is non-binding. Even without such a provision, a court might rule that the letter is merely an expression of intent.

Section 3(3) of the Law of Contract Act provides that no suit may be brought upon a contract for the disposition of an interest in land unless the agreement is in writing, signed by all the parties and the signatures are duly attested.

However, compliance with Section 3(3) does not automatically mean that every signed and attested Letter of Offer is enforceable. The courts will still examine whether the document was intended to constitute the parties' final agreement or whether it

merely recorded the progress of negotiations pending the preparation of a comprehensive Sale Agreement.

Is a Letter of Offer a legally binding document? To answer this, it is essential to understand the different types of Letters of Offer.

A. THE CONDITIONAL LETTER OF OFFER

A Letter of Offer can be conditional, usually contingent on the Purchaser entering into a formal contract or Agreement for Sale. This type of offer letter implies an understanding to formalize the contract. If the Purchaser does not sign an Agreement for Sale by the specified deadline, the offer expires, the Vendor can accept other offers, and the Purchaser forfeits the reservation fee. Essentially, such a conditional offer letter is **not binding**.

The principle here is that an agreement to enter into a contract is not yet a binding contract. When many terms are not finalized and there is room for further negotiation, the law does not recognize it as a binding agreement. ***"An agreement to make an agreement is not itself an agreement."***

In ***East African Fine Spinners Limited (in receivership) & 3 Others vs. Bedi Investments***



Limited (1994) eKLR, Gicheru JA referred to **Winn v. Bull (1877) 7 Ch D 29**, noting that a proposal expressed to be subject to a formal contract means it is dependent on that formal contract being prepared and executed. This position was upheld in **Kessel Homes Limited v John Kimotho Nginga & another [2021] eKLR** as well as **Mwago v Kings Pride Properties Limited (Civil Appeal E148 of 2022) [2023] KEHC 21733 (KLR) (Commercial and Tax) (29 August 2023) (Judgment)**.

In **Keppel v. Wheeler & another (1927) 1 KB 577**, it was held that accepting an offer subject to a contract means the matter remains under negotiation until formal contracts are exchanged. Therefore, Letters of Offer made subject to a formal contract or Agreement for Sale are not legally binding.

The "Subject to Contract" Principle

Its legal effect is to communicate that, although the parties may have agreed on the principal commercial terms, they do not intend to be legally bound until a formal Agreement for Sale has been prepared, negotiated and executed.

The phrase therefore creates a strong presumption that the Letter of Offer is simply a negotiating document rather than a binding contract.

In **Ponangipalli Venkata Ramana Rao & another v Dipit Premchand Chheda & 2 others (Civil Appeal No. 540 of 2019) [2026] KECA 827 (KLR)** delivered on 30th April 2026, the Court held that 'subject to contract' means exactly that. No binding agreement arises from negotiations so qualified, and that a deposit forfeiture clause in pre-contractual correspondence cannot survive the failure to execute a formal contract even where a deposit has already changed hands. Accordingly, where a Letter of Offer expressly states that it is subject to an Agreement for Sale, the courts will generally regard it as a framework for negotiations rather than an enforceable contract.

Facts

In 2007, the parties entered into negotiations for the sale of machinery and plant worth Kshs. 20,000,000. The Respondents' opening letter made clear that any sale would be **'subject to the contract to be agreed upon between the parties'**. The Appellants replied, purporting to accept, and included terms providing for a 10% deposit and a forfeiture clause in the event of non-completion.

The Respondents paid the deposit of Kshs. 2,000,000 and forwarded draft sale agreements. The parties exchanged multiple versions of the agreement but never executed a final contract. The deal collapsed, and the Appellants moved to forfeit the deposit on the

basis of the terms in their acceptance letter. The Respondents sued for recovery of the deposit.

The trial magistrate found a valid agreement and upheld the forfeiture. On first appeal, the High Court set aside that decision, holding that there was never a meeting of minds on the terms. The Appellants then brought this second appeal to the Court of Appeal.

Issue

Whether the phrase 'subject to contract' in the parties' pre-contractual correspondence meant that no binding agreement had been reached, such that the forfeiture clause could not be enforced.

Analysis

The Court of Appeal dismissed the appeal and upheld the High Court. The Court drew on its earlier decision in *Guardian Bank Limited & 8 others v Shivali Investments Limited & 3 others [2025] KECA 1586 (KLR)*, endorsing the principle that an arrangement described as 'subject to contract' should ordinarily be **taken to mean exactly that: the parties do not intend to be legally bound until a formal contract is entered into.**

The Court acknowledged the Appellants' argument, drawn from the *Australian authority of Masters v Cameron (1954) 91 CLR 353*, that preliminary agreements can be binding in certain circumstances. However, it found that argument lacking in the facts. No waiver of the 'subject to contract' condition had been established, whether expressly or through the parties' conduct. The multiple unexecuted draft agreements and the unresolved negotiations all pointed to one thing: the parties had not yet arrived at a final, binding deal.

The Court reiterated that a waiver of a 'subject to contract' arrangement must be clear and unequivocal, demonstrating an intention to be bound. The bar is deliberately high, so as to protect 'subject to contract' negotiations as a useful commercial tool for parties working towards an agreement.

Key Takeaways

'Subject to contract' carries its ordinary meaning: Where parties use this phrase in pre-contractual correspondence, the courts will hold them to it. The arrangement is not legally binding until a formal contract is signed and exchanged.

Paying a deposit does not, by itself, create a binding contract: The fact that the Respondents paid the 10% deposit did not amount to acceptance of all the terms in the Appellants' letter, including the forfeiture clause. The deposit was paid in the context of ongoing, unconcluded negotiations.

Waiver of 'subject to contract' must be unequivocal: A party seeking to argue that the 'subject to contract' condition was waived, whether expressly or by conduct, must scale a high bar. The conduct relied upon must unerringly point to an intention to be immediately bound.

Practical implication for commercial negotiations: Parties and their legal advisers should be deliberate about whether they wish to be bound at the pre-contractual stage. If the intention is to be immediately bound on specific terms (such as a deposit or forfeiture provision), the correspondence must clearly and expressly waive the 'subject to contract' condition in relation to those terms; or, better still, a formal agreement should be executed without delay.

B. THE UNCONDITIONAL LETTER OF OFFER

An unconditional Letter of Offer has no conditions attached. Once accepted, the Purchaser is bound to complete the purchase and cannot cancel the agreement for any reason. Similarly, the Vendor, upon signing the Letter of Offer, is obligated to sell the property to the Purchaser. Unless it explicitly states that it is non-binding, an unconditional Letter of Offer is a binding document.

The Courts have shown **flexibility** in analyzing the enforceability of Letters of Offer in property transactions, albeit rare. For example, in the Malaysian case of *Syarikat Pertanian Emmal Sdn Bhd v. Tractors Malaysia (1982) Sdn Bhd [2009] 4 MLJ 223*, the court considered whether a binding contract was formed when the Vendor accepted the

Purchaser's offer to buy land and requested a 5% earnest deposit. The Purchaser issued a letter of intent and enclosed the earnest deposit, leading to a dispute when the Vendor attempted to withdraw the accepted offer.

The court examined the pre-contract documents and found that the duly signed **letter of acceptance**, including all material terms, was sufficient to form a contract. The essential terms—parties, price, property—were all identified, and the **intention** to enter a contractual relationship was evidenced by the earnest deposit. Referencing *Damon Cia Naviera SA v. Hapag-Lloyd International SA [1985] 1 All ER 475*, the court noted that payment of a deposit is a term of the contract, not a condition precedent to the formation of contractual relations.

The **conduct of both parties** indicated an intention to enter into a binding agreement. Consequently, the High Court ruled in favor of the Purchaser, allowing specific performance of the agreement with costs.

CONCLUSION

In conclusion, the enforceability of a Letter of Offer in property transactions hinges on its content and the conduct of the parties involved. Courts will consider these factors to determine whether a binding agreement exists. Conditional Letters of Offer generally are not binding, while unconditional ones can be, unless explicitly stated otherwise. Understanding these nuances is crucial for both Vendors and Purchasers in navigating property transactions.

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