Regus Kenya Limited v Rock Advisors Limited (Appeal E162 of 2024)
[2025] KEHC 8464 (KLR) (Commercial and Tax) (13 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8464 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

APPEAL E162 OF 2024

RC RUTTO, J

JUNE 13, 2025

BETWEEN

REGUS KENYA LIMITED ..... APPELLANT

AND

ROCK ADVISORS LIMITED ..... RESPONDENT

(Being an appeal against the Judgment of Hon. G. Simatwo delivered on 24th May, 2024 in Milimani Small Claims Courts SCCCOMM E6776 of 2023)

JUDGMENT

1. The appeal arises from a judgment and decree in Milimani Small Claims Court, SCCOMM/E6776 of 2024. In the said suit, the Appellant sued the Respondents for breach of a contract relating to office space with a claim of USD6575.9 as liquidated damages.

2. The Appellant asserted that it entered into a contract with the Respondent for the provision of office services and goods, with the Respondent undertaking to make recurrent payments for the same. The Appellant contended that despite fulfilling its obligations under the agreement, the Respondent materially breached the contract by failing to settle several invoices on their due dates, resulting in the termination of the agreement. Further, the Appellant contended that the contract was meant to run for the entire period until 30th June, 2023 and therefore the Respondent was under an obligation to complete the contract duration. Consequently, the Appellant claimed to have suffered a loss amounting to USD 6,063.26 for unpaid invoices and USD 512.64 for the remaining term of the agreement, bringing the total sum to USD 6,575.90. The Appellant further sought interest on the aforesaid sum at court rates until full settlement.

3. The Respondent, in its defence, conceded that on 18th November 2022 it entered into an office agreement with the Appellant for the period running between 1st January 2023 and 30th June 2023

at a total average price of USD 320.40 per person per month. The Respondent averred that it did not owe the Appellant any money claiming that it was a term of the agreement that it would pay in advance a security deposit equivalent of two month's rent and one month's rent pursuant to which it paid Ksh.388,900/- on 25th November, 2022 and further amount of Ksh.250,201/- on 12th January, 2023. Further, that it was a term of the agreement that should the Respondent wish to terminate the said agreement it should have issued the Appellant a 3 months' notice prior to the end of the term. Additionally, that in compliance with this provision, on 31st December, 2022, it issued a notice intimating its intention to terminate the agreement at the end of March, 2023. The Respondent stated that this was due to the office space that it had been assigned turned out to limit the Respondent's day-to-day operations and was therefore not fit for purpose. That the Appellant. and in disregard of its own terms, conditions and obligations under the agreement, refused to accept the Respondent's notification. The Respondent averred that it utilized the office space provided from 1st January, 2023 to 19th January, 2023 only when it vacated the Appellant's premises. The Respondent further asserted that it had already deposited an amount enough to cater for the 3-month notice period, being the one month's rent and security deposit equivalent of two months' rent, and which amount the Appellant had retained, and which the Respondent had at no time laid claim over. It contended that the suit was the Appellant's attempt at unjust enrichment, and requested the Court to dismiss the claim with costs.

4. Upon hearing the parties, the trial court rendered its judgment on 26th May, 2024. The court identified the key issues for determination as: whether the Respondent breached the terms of the contract and was obligated to pay the damages amount to USD 6575.9.

5. The Court established that the parties entered into a contract for provision of an office space for the respondent at a fee of USD 320 per person per month commencing on 18th November, 2022 and ending on 30th June, 2023. Further, the respondent had paid a security deposit amount equivalent to two months and one month rent and failed to pay for the remainder of the period as it claimed that the assigned office limited its day to day operations was therefore unfit for purpose. Vide an email of 31st December, 2022, the Respondent wrote to the Appellant notifying them of their intention to terminate the agreement at the end of March, 2023, which email was not acknowledged nor contract terminated.

6. The trial court acknowledged its role in reading the entire contract to give effect to each clause while interpreting the whole contract. The Court found that Clause 1.5 provided the Appellant liberty to terminate the contract via email. The Court held that since the Appellant was permitted to terminate the contract via email, this signalled that email was an accepted medium of communication between the parties. Therefore, the Respondent should be equally entitled to use the same medium. Consequently, the Court held that the notice of 31st December, 2022 was proper as it brought to the attention of the Appellant the intentions of the Respondent.

7. In addressing the Appellant's assertion that the Respondent was under a duty to ensure that the contract ran to its completion and was therefore obligated to pay for that period, the trial court referred to the validity of the notice period. The court noted that notice period was dependent on the term of the contract, if the term was month to month, the notice should not be less than a month from the first day of the calendar period, if the term is three months, the notice should be no less than two months' notice prior to the end of the term and finally if the term was more than 3 months, then the notice should be no less than three months prior to the end of the term. Finding that the Respondent's email of 31st December, 2022 intimating its intention to end the agreement at the end of March, 2023 was not disputed, it found this notice period to be valid and sufficient given that the term of the Appellant's and Respondent's agreement was longer than three months. Further, on the basis that it was undisputed that the Respondent had paid an amount equivalent to three months, that is a security

deposit equivalent to two months' rent and one month's rent, the trial court found this to be sufficient to cover the three-month notice period of between January and March, 2023. Consequently, the trial court concluded that the Appellant was not entitled to the remainder of the contract period, thereby dismissing the Appellant's Claim dated 17th April, 2023 with costs awarded to the Respondent.

8. The Appellant being aggrieved by this judgment lodged this appeal. It relies on its Memorandum of Appeal dated 10th June, 2024 raising grounds that the Learned Magistrate; erred in law by failing to uphold the doctrine of freedom of contract, thereby interfering with the parties' autonomy to enter into and enforce terms of their agreement as established by precedent and statutory provisions; and erred in law by departing from established legal principles under case law that it is not the court's business to rewrite the terms of the contract thus arriving at a decision that was unsustainable in law and so perverse that no reasonable court would have reached that conclusion.

9. The Appellant thus prayed that the appeal be allowed in the following terms:

    a. The judgment of the Hon. G. Sitamtwo delivered on 24th May, 2024 in Milimani Small Claims Court, be quashed and set aside;

    b. The Respondent be ordered to pay the Appellant the claimed amount of USD6575.9 as liquidated damages for breach of contract;

    c. Costs of the appeal and the initial claim be awarded to the Appellant;

    d. Any other relief that the court deems just and fair.

10. The Appeal proceeded by way of written submissions. The Appellant's submissions are dated 17th November, 2024 while the Respondent's submissions are dated 25th February, 2025.

The Appellant's Submissions

11. The Appellant addresses five issues. On whether the agreement provided for how the Respondent should have terminated the agreement, it is submitted that pursuant to Clause 1.5, if the Appellant wanted to terminate the agreement, it would do so by email, through the application or the online account. However, it is urged that if the Respondent intended to terminate the agreement, pursuant to the same clause, it would stop the renewal by sending an advance notice before the "automatic renewal" date, either through the online account or through the application. It is contended that this was so important that the Appellant put it in bolded capital letters.

12. On whether the Respondent abided by that clause, it is argued that the Respondent failed to and instead adopted the mode of termination by way of seeking an amendment. Further, that amendment to terms of a contract must be by agreement of the parties, which was not the case. It is urged that the Respondent created its own contract, created its own termination notice and proceeded to abide by it.

13. On whether the trial court had the power to alter the termination clause of the agreement, it is urged that, pursuant to the Court of Appeal decision in National Bank of Kenya Limited Vs. Pipeplastic Samkolit (K) Limited & Another [2001] e KLR, it is trite law that the court cannot rewrite a contract between parties. Further, it is contended that under the guise of interpreting the contract, the trial court varied the terms of the contract. It is also pointed out that neither party applied to have the contract or any part thereof held as unconscionable. Related to this, it is submitted that the parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. Due to the Respondent failing to terminate the agreement through the online account or the app as was required under the contract, it is submitted that the Respondent breached the termination clause if its true intention was to terminate the contract. Additionally, that the consequence of failing to abide

by the termination clause, means that the contract has to be deemed to have run to its conclusion and thus the Respondent has to pay for the entire contract period ending on 30th June 2023.

The Respondents' Submissions

14. The Respondents provided a brief summary of the case. Counsel for the Respondent addressed the same issues delineated by the Appellant. On whether the agreement provided for a clause on how the Respondent should have terminated the same, it is urged that pursuant to Clause 1.5 of the agreement, if the term of the agreement was more than three months, then the Respondent was required to issue a termination notice not less than three months prior to the end of the term. The Respondent having determined that the space issued to them was not fit for purpose, decided to terminate the agreement by issuing a three-month notice in compliance with the agreement. Therefore, the trial court was correct in finding that sufficient notice had been provided in accordance with the agreement. On whether the Respondent abided by the termination clause, it is urged that the Respondent's termination email dated 31st December, 2022 was acknowledged by Ms. Sarah Wairima in an email of even date wherein the Respondent was directed to write to a different email. It is further contended that the Respondent's Director, having been unable to access the online platform proceeded to email the Appellant of its intention to terminate the Agreement. It contended, therefore, that the trial court rightly determined that the contract gives liberty to the Appellant to terminate the agreement via email and the Respondent, clearly having issues with the online account, was at liberty to utilize the other recognized platforms for communication. It is submitted, therefore, the trial court merely confirmed that apart from the online account and the app, which were the set modes of communication for the Respondent, email communication was also recognized as a medium of communication.

15. In addressing whether the Clause 1.4 of the agreement was binding, the Respondent argued that it had an issue with the online account and thus proceeded to communicate its intention to terminate the agreement via email. The Respondent submits that it had every intention of complying with the terms of the agreement and that it is why it utilized all the recognized modes of communication.

16. Due to this, it argues that it did not breach the agreement and the trial court was correct in determining that sufficient notice has been communicate in a mode recognized by both parties. For this reason, the Court is urged to dismiss the appeal with costs for lacking in merit.

Analysis and Determination

17. Ordinarily, the primary duty of the first appellate court is to re-evaluate and assess the evidence afresh and draw its own conclusions. However, it remains mindful that, unlike the appellate court, the trial court had the advantage of observing the witnesses' demeanour and hearing their testimony firsthand. Nevertheless, appeals from the Small Claims Court are distinct, as they represent the first and final appeal pursuant to Section 38 of the *Small Claims Court Act* which limits the jurisdiction of this Court to matters of law only. It provides that:

> " 38.
>
> (1) A person aggrieved by the decision or an order Appeals of the Court may appeal against that decision or order to the High Court on matters of law.
>
> (2) An appeal from any decision or order referred to in subsection (1) shall be final."

18. What constitutes points of law, has been settled. the Supreme Court in the case of Munya v The Independent Electoral and Boundaries Commission & 2 others (Petition 2B of 2014) [2014] KESC 38 (KLR) held as follows as regards how to differentiate matters of law from matters of fact:

> " From the foregoing review of the comparative judicial experience, we would characterize the three elements of the phrase "matters of law" as follows:
>
> a. the technical element: involving the interpretation of a constitutional or statutory provision;
>
> b. the practical element: involving the application of *the Constitution* and the law to a set of facts or evidence on record;
>
> c. the evidentiary element: involving the evaluation of the conclusions of a trial Court on the basis of the evidence on record."

19. From the foregoing it is clear that the issue of whether the trial court appropriately considered and evaluated the evidence on record and reached a correct decision is a matter of law, not fact.

20. Consequently, guided by the above, I have considered the appeal and the parties' submissions, and the entire record, I find the following issues arising for determination:

    i. Whether the trial court erred in its interpretation of the termination clause by extending the mode of communication to email for the Respondent; and

    ii. Whether the Appellant is entitled to the liquidated sum of USD 6,575.90 for breach of contract.

21. I will deal with the issues together. Clause 1.5 of the Agreement provide as follows:

    1.5. Automatic renewal: so that we can manage your services effectively and to ensure seamless continuity of those services, all agreements will renew automatically for successive periods equal to the current term until brought to an end by you or us. all periods shall run to the last day of the month in which they would otherwise expire. the fees on any renewal will be at the then prevailing market rate (prices are set annually so depending on when your agreement is due to renew, there may be a change in price). if you do not wish for an agreement to renew then you can cancel it easily with effect from the end date stated in the agreement, or at the end of any extension or renewal period, by giving us prior notice. notice must be given through your online account or through the app. the notice periods required are as follows:

    Term Notice Period Month-to-Month - no less than 1 month's notice from the 1st day of any calendar month 3 months - no less than 2 months' notice prior to the end of the term More than 3 months - no less than 3 months' notice prior to the end of the term

    1. We may elect not to renew an agreement. If so, We will inform You by
    5. email, through the App or Your online account, according to the same notice periods specified above.

22. From the record, it is evident that there were several emails exchanged between the Appellant and the Respondent regarding terminating the agreement commencing with an email sent on 29th December, 2022 at 4.32pm from Belgrad Kenne to the Appellant's community Associate Sarah Wairima. In this email the Respondent's representative requested for a revised contract altering the initial period from

6 months to 3 months due to what they termed as "....rates extremely high for the space we occupy amid the low business prospects for the start up that we are". To wit, the Community Associate in an email sent on the same day at 4.44 pm responds that the contract was binding and could not be altered prior to the end date of 30th June, 2023. Still on the same date at 5.29 pm, the Respondent's representative intimated that the Respondent was not in a position to commit beyond March and requests the Appellant's community associate to discuss amending the contract with the Appellant's team.

23. A similar email exchange between the same representatives ensued on 30th December, 2022 with the Appellant's representative at 5.27pm firmly stating that it was the Appellant's policy once a client signs a contract, they are liable for the full term. While the Respondent's representative at 5.41pm reiterating the earlier sentiments that 3 months was reasonable notice by any standard to allow the Appellant to find alternatives and salvage what they could of the deposit.

24. On 31st December, 2022 the Appellant's representative wrote vide email at 11.32 am to the Respondent requesting the Respondent's write to the account team on a different email with their query. The Appellant however still requested for settlement of January payment to avoid late penalty. The Respondent acquiesced to this request and at 12.07pm wrote to the account team with the same request of amending their contract downgrading from 6 months to 3 due to financial hardship.

25. A response is then sent on 3rd January, 2023 from the Appellant's Helpdesk Agent, one Praveen Silvadas who states in part as follows:

> " ....We do offer flexibility to all our customers, but your agreement will end when due and we unable to early terminate your agreement. Please understand that we have to know your plans in advance, as we base our business on signed commitments from our customers.
>
> Ending your membership/agreement is early : simply log into your online account and go to the Account/Product & services section. Your termination will then be automatically confirmed with an email."

26. On 4th January, 2023 the Respondent's representative Belgard Kenne responded and yet again repeated the Respondent's request and reasons for the request. On 5th January, 2023 at 12.25 AM, the Appellant's representative from Account Helpdesk, one Cosmin Moraru wrote to the Respondent and stated that from the Account Helpdesk they are unable to terminate agreements on behalf of customers and then went ahead, in detail, how to terminate the agreement from the online account. Cosmin Moraru also stated that upon checking, the Respondent had signed a 6 month auto-renewing agreement ending on 30th June, 2023 and that they (being him from the Account Helpdesk) were unable to amend the terms and date of the contract. On the same day at 5.12 am, in what appears to be frustration, the Respondent's representative Belgrad Kenne wrote a lengthy email to Mark Dixon, the Appellant's group CEO, expressing his frustration with being unable to get assistance from the Appellant's team on the ground and requested his intervention in what was termed as a distress call for help. On the same day at 3.12pm, Mark Dixon responded stating that though he was travelling he had asked his management team to investigate as a matter of urgency and that a senior member would be in contact as soon as possible. Later on that day.

27. This was followed by a further response from the Appellant on 6th January, 2023 at 11.19 am from Daarshan Mohan from the Account Helpdesk wherein he reiterated the Appellant's earlier position that the Appellant was unable to amend the contract and was therefore unable to downgrade as per their policy.

28. From this Court's reading and interpretation of the contract as well as from the email exchange detailed hereinabove, it is evident that the agreement is explicit that the Respondent could only terminate the contract through the online account or the app. Clause 1.5 outlines that notice must be given in these specified methods and not through email. The Appellant repeatedly refused the Respondent's requests for amendment and explicitly communicated that the only way to terminate was through the online account. Despite the Respondent's multiple attempts and even escalation to senior management, the Appellant's position remained firm, emphasizing the need for the online process.

29. The Respondent's numerous attempts to negotiate out of the contract, including escalating the matter to senior management, are indeed reflective of good faith and an effort to resolve the matter amicably. These attempts demonstrate that the Respondent did not act with indifference but sought solutions given its financial constraints and the unsuitability of the office space for its operations.

30. While the Respondent's intent is clear, contractual strictness overrides intent unless there is a waiver or modification by the Appellant, which did not happen here. The Appellant's responses were consistent: the only valid way to terminate was through the online account or the app, as stipulated in Clause 1.5. The Respondent, despite being informed of this procedure multiple times, did not follow it. Despite, expressing frustration, the Respondent did not demonstrate that it was unable to access the online platform or app or that the Appellant acted in bad faith to frustrate its efforts to terminate.

31. The trial court, in its decision, extended the mode of communication to include email based on the Appellant's ability to terminate via email. However, the contract is clear that the Appellant and Respondent had different modes of termination. In National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR), it was held that courts cannot rewrite contracts for parties, they can only interpret them. Further, courts should be hesitant to rewrite contracts unless there is evidence of unconscionability, fraud, or coercion, which was not demonstrated here. Allowing email as a valid method of termination effectively modified the agreement, contrary to the legal principle that courts should not rewrite contracts.

32. Having established that the Respondent did not properly terminate the contract, the agreement remained in force for the full term ending on 30th June 2023. The Respondent's early vacation of the premises does not extinguish its contractual obligations. Consequently, it is this Court's finding that the Appellant is entitled to the liquidated sum of USD 6,575.90 as claimed, given that the Respondent did not lawfully terminate the contract and remained liable for the duration specified.

33. Accordingly, this Court allows the appeal in the following terms:

    a. The judgment in Milimani Small Claims Court, delivered on delivered on 24th May, 2024 be is hereby set aside;

    b. The Respondent be is hereby ordered to pay the Appellant the claimed amount of USD6575.9 as liquidated damages for breach of contract

    c. Each party to bear their costs of the appeal and the initial suit.

    Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS THIS 13TH DAY OF JUNE 2025.

RHODA RUTTO

JUDGE

In the presence of;

..... Appellant

..... Respondent

Sam Court Assistant