



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CIVIL SUIT NO. 9 OF 2007**

**BEATRICE GIKUNDA.....PLAINTIFF**

**VERSUS**

**CFC LIFE ASSURANCE LIMITED FORMERLY KNOWN AS ALICO KENYA LIMITED**

**(AMERICAN LIFE INSURANCE (K) LIMITED)**

**NOW KNOWN AS LIBERTY LIFE ASSURANCE.....DEFENDANTS**

**J U D G M E N T**

**A. Summary of pleadings**

1. The suit herein was commenced vide a plaint 5/02/2007 and which was subsequently amended vide the orders of 27/05/2020. The plaintiff averred that at all material times she was a teacher and a member of Kenya National Union of Teachers' National Executive Council. That by virtue of her membership, she was covered by the group personal accident policy No. 9000447 which cover had been taken by Kenya National Union of Teachers on 28/11/2001 to cover its national executive members between 28/11/2001 to 27/1/2002 and which covered her for various benefits including accidental death, permanent disability, accident indemnity income and accident medical disbursements amongst others.

2. The plaintiff averred that on 5/03/2001, she was involved in an accident while travelling in Motor Vehicle Registration No. KAC 924J Peugeot 504 along Meru- Embu road and as a result of which she was seriously injured and that she was injured while on duty and thus well covered under the said policy. The particulars of the plaintiff's injuries were itemized in paragraph 6 therein. Further that as a result of the said accident and the injuries, she was hospitalized and continued to attend hospital and paying medical expenses. The particulars of special damages were itemized in paragraph 9. She thus prayed for judgment against the defendant for: -

- a) *Specific performance of the contract*
- b) *Payment of personal accident cover under the personal accident cover police No. 9000447*
- c) *Reimbursement of hospital expenses resulting from the personal accident involving the plaintiff*
- d) *Special and general damages*
- e) *Costs and interests.*

3. The defendant upon entering appearance filed a defense whereby it denied the contents of the plaint and further averred that the policy in question was between the defendant and Kenya National Union of Teachers on behalf of various insured persons. That the policy was meant to protect the employer and policyholders from financial loss in event of disability of their members of staff which might make them unable to discharge their duties thereby compelling the policyholder to engage the services of hired replacement staff whilst continuing to incur salary expenses on the account of the disabled staff. That the policyholder informed the defendant on 8.03.2007 of the accident involving the plaintiff and upon scrutiny of the policy document, the defendant requested the policyholder to avail the necessary physician's form duly completed to enable it carry preliminary assessment of the loss. Upon receipt of the report, they advised for annual review of the condition so as to allow for treatment, recovery and hence objective assessment of the residual disability. That when the examination was made the doctor recommended that the plaintiff be retired on medical grounds.

4. That the defendant thereafter referred the plaintiff to its consultant surgeon for a final objective assessment and which assessment revealed

that the plaintiff could fully recover if given appropriate medical attention and that after considering the final medical assessment, the defendant established that the plaintiff was retired on having attained the mandatory retirement age of 55 and not on medical grounds and that the defendant duly informed the Policyholder that in the circumstances and on reading the policy, its claim on behalf of the plaintiff was not valid and was inadmissible.

### **B. Evidence during hearing**

5. At the hearing of the suit, the plaintiff (PW1) in support of her case testified that she sustained multiple injuries on the head, bruises on the hand and the neck, spine and legs and the head was swollen. That she was transferred to Nairobi Hospital after the request from KNUT and this she believed was due to her status in the said KNUT as an Executive Council member and that the office had taken out an insurance cover for the said Executive Council members. That she was admitted and discharged after one week after which she attended monthly clinics for three years and she was told not to do heavy work or lift heavy objects. That she lodged her claim against the defendant through the KNUT National office but when it became impossible she filed the instant suit so as to recover the medical charges and get compensation.

6. Further that she did not go back to work due to severe injuries and she retired in 2001 during the medical leave at the age of 55 years. That she was entitled to payments and refunds for medical expenses by KNUT. She produced her list of documents as PExbit 1. In cross examination by the counsel for defense she testified that she was aware that there was a policy between KNUT and the defendant and that it operated up to her retirement and that her claim was for the period before retirement. Further that the discrepancies on the dates of the policy and the date of the accident were as a result of the errors in drafting the plaint. She further stated that KNUT paid about Kshs. 40,000/= though the policy was for Kshs. 300,000/= and that she filed a case against the insurance company which had insured the vehicle and was awarded Kshs. 300,000/= which was yet to be paid. That the insurer's doctor one Dr. N.H Bhaji M. Kuresh confirmed that she was partially disabled and that the insurer's letter to KNU was to the effect that she retired due to compulsory age and not on medical grounds and further that her age as appeared on the defendant's documents was erroneous. In re-examination, she testified that Dr. Kuresh examined her on the request of the insurance company.

7. The defense called one witness Jackson Mbuthia Kiboi - the Deputy Manager- Legal for Liberty Life Assurance (Kenya) Limited which is the successor of the Defendant company. It was his testimony that the defendant did not have any contract with the plaintiff and no such contract was produced and as such she had no standing against the defendant in the instant matter. Further that the policy in question for policy number 9000541 which was to run from 28/11/2002 to 27/11/2003 was a group personal accident cover for Kenya National Union of Teachers and thus there was no contractual relationship between the plaintiff and the defendant. He thus prayed that the instant case be dismissed. During cross examination by the plaintiff's counsel Mr. Gikunda, he testified that between 2000 and 2001 there was a policy in force where the plaintiff was insured and the benefits were accidental death, dismemberment and permanent total disablement.

8. That the plaintiff was part of the cover policy number 9000447 but she had cited policy number 9000541. That the accident occurred on 5/03/2001 and she was insured under policy number 9000447 which was an annual cover renewable every year and which was renewed the following year. That as per the letter from KNUT dated ..... she was retired on medical grounds and was paid all her retirement benefits as per the letter dated 14/07/2003. It was his evidence that the plaintiff was insured and was entitled to claim under certain heads but that the problem was that she cited the wrong policy and that the insurer could not pay on the wrong policy. In re-examination, she reiterated that the period of the policy No. 9000447 was effective from 4/07/2000 to 03/07/2001 under which the plaintiff ought to have claimed. That the plaintiff was retired on compulsory retirement age grounds as per the letter dated 20/7/2000.

### **C. Parties' written submissions**

9. The plaintiff submitted that the plaintiff was entitled to settlement and/or benefits payable by the defendant under the policy for the reasons that the defendant at all material times acknowledged and appreciated the plaintiff as an insured under the group cover and that at no time did the defendant deny the accident or the fact that the plaintiff was insured and that the denial of the same was an afterthought and the defendant was estopped from denying that the plaintiff was insured and was not privy to the contract/policy.

10. It was the plaintiff's submissions further that the plaintiff was entitled to benefit from the insurance cover with the defendant as from the correspondences on record and the conduct of the defendant, the plaintiff proved to have permanent disability and thus her claim was admissible. As such, the plaintiff prayed that the defendant be compelled to pay the full benefit as per the cover being Kshs. 2,000,000/= plus costs and interests.

11. On their part, the defendants in their submissions admitted that the KNUT took a Group Personal Accident policy number 9000447 from 4/07/2000 to 3/07/2001 and where the plaintiff was entitled to any benefit under the said policy which protected KNUT from financial loss in the event of permanent disability by staff wherein KNUT would be forced to hire staff to replace the disabled staff whilst continuing to incur expenses salary and other expenses for the disabled staff and that the benefits under the said policy only accrued in respect of accidental deaths, dismemberment and permanent disability.

12. It was further admitted that the plaintiff was involved in the accident resultant of the instant suit but the defendants submitted that the plaintiff was not eligible to compensation either under the policy or even under the principles of equity as at the time of the accident, the policy relied upon was not in force and further that the beneficiary under the policy was KNUT and thus the plaintiff was ousted on account of privy to contract.

13. Reliance was made on the case of **Securicor Guards (K) Limited –vs- Mohamed Salim Malik & Another (2019) eKLR** where it was held that a contract cannot confer rights or impose obligations on any other person other than the contracting parties. It was argued further that the plaintiff was not an eligible beneficiary on account of the injuries sustained from the accident as the same were neither permanent nor did they amount to dismemberment as was required under the policy and neither did the plaintiff demonstrate to have been qualified for the benefits under the policy. Further that the plaintiff's cessation of work was as a result of having attained the retirement age of 55 years as opposed to medical grounds as alleged and that she did not tender evidence to support condition which would entitle her to the benefits under

the policy.

14. Further that the plaintiff did not hold any remedy under the principles of equity. Reliance was made on the principles of equity to wit that “equity will not be used as a vehicle for fraud”, “equity will not suffer a wrong without remedy” and that “he who comes to equity must come with clean hands” to advance this point. As such, it was submitted that, the plaintiff was not entitled to the remedy of specific performance of the contract of insurance or any other remedy as prayed as she did not prove that she had a personal cover with the defendant yet she had that burden under Section 107 and 109 of the Evidence Act. Further that the plaintiff was not entitled to costs for costs follow events and that by failure of the plaintiff to prove her claim in the suit, the defendant ought to have the costs as it was the successful party. Reliance was made on Section 27 of the Civil Procedure Act (Cap 21 Laws of Kenya) and the High Court’s decision in **Brian Asin & 2 Others –vs- Wafula W. Chebukati 7 9 others (2019) eKLR**. The defendant thus prayed that the suit be dismissed in its entirety and with costs.

#### **D. Issues for determination**

15. I have considered the pleadings herein, the evidence tendered by the parties during the hearing of the case and the rival written submissions. It is not in dispute that the plaintiff herein was involved in a road accident on 5/03/2001 while travelling in Kenya National Union of Teachers’ vehicle KAC 924J Peugeot and while travelling for official duties from Meru to Nairobi. The said fact was admitted by the defendant both in its pleadings, in its evidence in court as well as in its written submissions. Further it is not disputed that the said Union had a policy with the defendant at the time of the accident and being number 9000447 and which policy named the plaintiff as one of the beneficiaries named thereunder. The defendant’s position was that the correct policy was 9000447 and not 9000541 as stated in the plaint.

16. The plaintiff however sought leave to amend the plaint and in the Amended plaint the policy number is 9000447 as opposed to the number in the original plaint. It is noted that the defendant did not file an amended defence despite being granted leave to do so and neither did it apply for leave to cross examine the plaintiff pursuant to the said amendment. As such, the records are clear that the policy in question was No. 9000447. The defendants in their submissions admitted that at the time of the accident the plaintiff was covered by policy number 9000447. As such, it is not in dispute as to the policy which was in force as at the date of the accident. Further it is not in dispute that the said policy covered accidental death, dismemberment and permanent total disablement.

17. The main issues for determination in this suit are as follows: -

*i. Whether the plaintiff was entitled to indemnity pursuant to the terms of the policy number 9000447.*

*ii. If so, what was her entitlement in a way of quantum.*

*iii. Who is to pay the costs of the suit.*

#### **E. Analysis of Evidence & Determination**

##### **i. Whether the plaintiff was entitled indemnity pursuant to the terms of the policy number 9000447?**

18. It was the plaintiff’s case that she was entitled to payment of the benefits under the policy between the Union and the Defendant as she was one of the members covered by the policy. However, this was disputed by the defendant whose position was that the plaintiff was not entitled to the said benefits. The reasons being that she was not privy to the said contract and further that she did not suffer the injuries capable of protection under the said policy. entitled to indemnity pursuant to the policy in question? To determine the same, this court ought to decide whether the plaintiff was a beneficiary under the policy and whether the injuries sustained by the plaintiff were within the injuries covered under the policy?

19. It is not in dispute that the policy in question was a group personal accident policy being policy number 9000447 having been taken out by Kenya National Union of Teachers in favour of the plaintiff amongst other beneficiaries. The insurer was the defendant’s predecessor American Life Insurance Company (K) Limited. It was the plaintiff’s case that she was entitled to the benefits therefrom. However, the defendant’s position was that the policy was to cover the union against loss due to injuries suffered by the insured therein following which injuries the insured would be unable to discharge her duties thereby compelling the union being the policyholder to engage services of a hired replacement staff whilst continuing to incur salary expenses on the account of the disabled staff. The defendant argued that the plaintiff was not privy to the contract which was between the union and the defendant.

20. It is my view that the existence and validity policy No. 9000447 between the defendant and KNUT was not in dispute. It was admitted by the defendant who even produced a schedule to the policy as its first exhibit part one. It is headed “Schedule of Insured, Benefits and Primiums” giving the effective date as 4/07/2000 to 3/07/2001. The column of benefits indicates that the thirty-three (33) insured persons was each entitled to a benefit of Kshs. 2,000,000/= the plaintiff B. Gikunda included. The defendant in its argument that the plaintiff was not insured under the policy did not attempt to explain why the plaintiff was named in the schedule the defendant produced an insured. Neither did the defendant point out the clause in the policy that they were relying on in disputing the claim. This was despite the defendant pleading in his defence paragraph 4 that it shall “rely on the pol8icy for its full tenor and effect” at the hearing.

21. The nature of the policy was a group cover taken out by KNUT for the benefit of the employer in certain instances as specified in the policy. Under insurance law, a group policy is defined as a type of insurance in which a single contract covers an entire group of people. Typically, the policy owner is the employer or an entity such as labour organization, and the policy covers the employees or members of the group. The cost of a group cover is far much less as opposed to what an individual would pay for individual protection. It is the employer who keeps the actual insurance policy known as the master contract. A cover taken by the employer remains in force until the employment of a group member is terminated or until specific term of coverage ends.

22. The issue which arises from the arguments of the parties herein is whether the plaintiff was entitled to benefit from this policy taken out by the employer. I have indicated the owner of the policy was KNUT in this case. The listed 33 members were entitled to benefit in three instances: i) accidental death; ii) Dismemberment and, iii) partial or total disability.

23. The argument of the defendant was that the plaintiff herein lacked the *locus standi* because she was a stranger to the contract. It is not in dispute that the plaintiff was an official of KNUT who was in a vehicle belonging to KNUT and travelling to Nairobi on duty at the material time. The plaintiff as well as the other 32 group members are named in the policy schedule part 1 as the insured. As such they were insured by the defendant through their employer who signed the contract and paid a premium of Kshs. 5,100/= for each member. In a group insurance, there is no requirement that every group member execute or signs the contract. The contact of the owner of the principal is sufficient coupled with the names of the insured being indicated in the policy schedule. I am of the considered opinion that the issue of privity of contract does not arise herein and is meant to avoid liability that KNUT had made good in favour of its employees.

24. The other issue raised was that the plaintiff did not suffer permanent disability to justify being considered in the policy. The plaintiff produced the medical report by Dr. Faya S.S. of Aga Khan Hospital dated 17/09/2001. The injuries suffered were soft injuries on the limbs, rigid neck with anterior subluxation of C5 over C6 and weakness in the left upper limbs; she was admitted in hospital for nine (9) days. The permanent disability was assessed as 40%.

25. Dr. Faya's report of 23/04/2002 recommended early retirement for the plaintiff due to impact of the injuries and her advanced age. However, although it was said that the employer the Teachers Service Commission (TSC) had accepted the recommendation and written a letter of retirement, investigations later revealed that the TSC had not approved any retirement. A report by Dr. Quresh dated 29/04/2004 acknowledged good progress in recovery of the plaintiff and assessed the degree of PD at 15%.

26. The defendant relied on the report of Dr. N. H. Bhanji dated 23/07/2003 which was not at variance with that of Dr. Faya on the injuries sustained by the plaintiff save for the impact of those injuries. Dr. Bhanji said the injuries on the neck had caused restriction of movement of the neck. The left supra scapular area had tenderness on palpation as well as the neural spines of the cervical vertebrae and first lumbar vertebra. He recommended treatment of the said areas by an infiltration procedure.

27. Dr. Bhanji noted that a small haematoma had been removed from the left temporal area under local anesthesia on outpatient basis two months after the accident. He concluded that a permanent capacity can only be assessed after the patient has undergone the recommended treatment.

28. The defendant disputed that the plaintiff suffered permanent disability. Dr. Faya assessed the terminal liability as 40% in his report dated 17/09/2001. During a subsequent examination on 23/04/2002 the doctor found that the patient had made tremendous progress on recovery and assessed permanent disability at 15%. The defendant's report by Dr. Bhanji did not assess permanent liability saying that it could only be assessed after the patient underwent an operation he had recommended. As such the defendant did not adduce any evidence to controvert that of the plaintiff on permanent liability. Based on Dr. Faya's report, I find that the plaintiff has satisfied the court that she suffered 15% liability.

29. A person may suffer partial or total disability. The policy covered both partial and total disability. The plaintiff was therefore covered by policy No. 9000447 that was valid between 4/07/2000 to 3/07/2001 for the accident occurred within the period of the policy.

30. The payment of Kshs. 2,000,000/= in the schedule is a one-off payment and all-inclusive depending on the rules of the defendant. As such I do not find it appropriate in the circumstances to assess the quantum of damages and to compute the hospital expenses. However, in the event of this judgment being overturned on appeal, I would award the plaintiff general damages of Kshs. 1,500,000/= bearing in mind that she received compensation of Kshs. 300,000/= from another insurance company and special damages as per receipts amounting to Kshs. 101,281/=.

31. The defendant argued that the plaintiff was not entitled to any remedy having come to court without clean hands in that she had conflicting data. The employment records showed that the plaintiff retired upon attaining the normal retirement age of 55 years. At the same time her doctor had written a letter recommending retirement on medical grounds stating the plaintiff's age as 52 years while she was aged 54 years by then. The defendant imputed that the plaintiff's injuries may have resulted to terminal or residual injuries due to her advanced age.

32. This argument does not make sense in that it is not in dispute that the accident occurred on 5/03/2001 and that the plaintiff sustained injuries. Whatever could have made the plaintiff injuries result to terminal injuries would well be articulated in a doctor's report but not a statement from the bar. The defendant did not produce a report to that effect.

33. Dr. Faya had recommended retirement on medical grounds which is within his professional ambit. If he indicated the plaintiff's age as 52 instead of 54, this was not the plaintiff's fault. The compulsory retirement age is 55 years in the public service. A doctor could recommend retirement even at the age of 54 years which is in order depending on the health condition of the patient.

34. I do not find any basis to find that the plaintiff came to court with unclean hands as alleged.

#### **ii. Is the plaintiff entitled to specific performance of the insurance contract?**

35. Having found that the plaintiff was an insured under policy No. 900447 and that the policy was valid at the time of the accident as well as that the plaintiff had a beneficial interest in the said policy, I reach a conclusion that she is entitled to be given her right. I therefore find that the plaintiff herein is entitled to be compensated under the said policy and as such is entitled to the remedy sought.

#### **F. Conclusion**

36. I find that the plaintiff has proved her case on the balance of probabilities. I hereby enter judgment in her favour against the defendant in the following terms: -

*a) That the defendant do pay the plaintiff the contract sum of Kshs, 2,000,000/= as per policy No. 9000447 plus interests from the date of filing the suit.*

*b) That the defendant meets the costs of the suit.*

37. It is hereby so ordered

**DELIVERED, DATED and SIGNED at EMBU this 19<sup>TH</sup> day of November, 2020.**

**F. MUCHEMI**

**JUDGE**