REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. APPLICATION NO. 011 OF 2020

IN THE MATTER OF ARBITRATION ACT, NO 4 OF 1995

IN THE MATTER OF AN APPLICATION TO SET ASIDE AN ARBITRAL AWARD

BETWEEN

GLADYS MUTHONI MBURU.....CLAIMANT/APPLICANT

VERSUS

JUBILEE INSURANCE COMPANY OF KENYA LTD.....RESPONDENT

RULING

The Applicant/Claimant (herein **"Gladys Muthoni Mburu")** file Chamber Summons application dated 20th January 2020, pursuant to **Section 35 of the Arbitration Act 1995, Section 1A, 1B, 3A of the Civil Procedure Act and Rules 4(2), 7, 11 of the Arbitration Rules, 1997** and all enabling provisions of the law and sought Orders;

a) That the Arbitral Award made and published by the Hon. J.B. Havelock on 22nd October 2019 be set aside for being contrary to public policy to the extent that it found:-

i) That there was a **disclaimer of liability by the Respondent under the Group Insurance Policy No. COR0001721.**

ii) The legal proceedings commenced by the Claimant/ Applicant were time barred by dint of **Clause 20 of the Group Insurance Policy No. COR000xxxx.**

b) That this Court makes such further or other order(s) as it may deem appropriate including remitting the Arbitral Award for corrective action on the impugned portions of the Award on the issues in prayer (1) above.

The Application was based on grounds;

a) That the legal interpretation by the Arbitrator at **paragraphs 68 and 69 of the Award that found that the letters of 25th October 2016 and 8th November 2016 amounted to a disclaimer of liability, was an interpretation that offends the basic canons of interpretation laid out in the law.**

b) That interpreting a position taken on quantum by the Respondent in its letters of 25th October 2016 and 8th November 2016 as a disclaimer of liability has far reaching effects to contractual relationship generally and to the insurance industry in particular having regard to the following amongst other factors:-

i) The constitutionally sanctioned principle of freedom of contract and parties' rights to contract as only they deem fit would be seriously eroded.

ii) It offends public policy for adjudicators of disputes, such as the Arbitrator to depart from the well settled legal principles relating to interpretation of contracts**.**

iii) Departure from the well settled legal principles aforesaid would occasion uncertainty, disorder and chaos to contracts generally

and would undermine the certainty and predictability that is crucial to commercial contracts, including contracts of insurance.

iv) The Respondent and other insurance companies will forthwith interpret their advice on quantum as disclaimer of liability.

v) Such unlawful interpretation of "disclaimers of liability" would unjustly defeat any claims by medical insurance policy holders.

vii) Such unlawful "disclaimer of liability" would cut across all kinds of policies by the Respondent and other insurance companies not limited to medical insurance policy holders as was the case herein.

ix) Such unlawful disclaimer of liability would severely undermine the practice and business of medical insurance throughout the country.

c) That the determination at **paragraph 70 to 72 of the Award that found that the proceedings commenced by the Claimant/Applicant ("the Claimant") were time barred by dint of Clause 20 of the Group Insurance Policy No. COR000xxxx ("the policy") were inconsistent with the findings at paragraphs 62 to 67 of the Award to the extent that:-**

i) By paying the sum of Ksh 400,000.00 in respect of the Claimant's expenses at Nairobi Hospital, the Respondent effectively waived the exclusion **being No.7 of Section 3(B).**

ii) The Claimant's condition was not capped at the inpatient benefit of Ksh 750,000.00

d) That having found that the Respondent had waived the exclusion and made part payment, the Arbitrator could not thereafter find for the Respondent in disclaiming liability. **Clause 20** of the Policy could not come into play and cannot be relied upon to avoid liability.

e) That the Arbitrator should not have resulted to a technical interpretation of the time bar clause to deny the Claimant the balance of the quantum payable. Having made part-payment, the Respondent acquiesced on its disclaimer if at all, and became liable for the entire inpatient benefit limit.

In the supporting affidavit of Gladys Muthoni Mburu, the Claimant/ Applicant herein, she stated that the Arbitral Award made and published by the Hon. J. B. Havelock (**"the Arbitrator")** on 22nd October 2019 ("the Award") was annexed and marked as **"GM-1"** at page 1 to 43 of the exhibit.

The Claimant/Applicant averred that the background of the facts leading up to the Award were summed up as;

a) Vide **section 4 at clause 11** of the Policy at page **90 of GM-1**, the Policy was a one-year contract renewable on the anniversary of the start date. Accordingly, as the anniversary of the contract approached, the Respondent would make an invitation for renewal of the Policy for a further period of one year, and which renewal confirmation would be received prior to the expiry of the policy period.

b) The initial period of cover of the Claimant's medical insurance was 6th February 2015 to 5th February 2016 where the Applicant covered under Category A of the Policy (**page 99 and 100 of GM -1**), whose inpatient cover limit was Ksh 10 million.

c) On the **4th February 2016**, the Respondent invited Stegra Limited to a renewal of the Policy for a further period of 6th February 2017 ("the Insured Period") and the Applicant's cover was renewed at the inpatient cover limit of Ksh 10 Million. The renewal expressly provided that all other terms and conditions applying to the initial cover applied to the renewal proposal.,

d) Sometime in **September 2016,** the Applicant noticed a swelling on the neck and upon consulting an ENT specialist at the Nairobi Hospital, she was referred to Dr. Pallaw Shah in London for further diagnosis. The Respondent was duly notified of the medical attention the Applicant received at the Nairobi Hospital as a consequence whereof, the Respondent settled the then incurred medical costs amounting to Ksh 400,000.00.

e) While in London, the Applicant incurred additional costs by way of medical expenses which by March 2017 had accumulated to GBP 105,835.42 (approximately Ksh 14 million)

f) On 19th October 2016, the Applicant claimed reimbursement of GBP 68,028.60 from the Respondent, being the amount incurred by way of medical expenses as at 11th October 2016. Notably, the amount of GBP 68,028.60 (approximately Ksh 8,911,746.60) was within the inpatient cover limit of Ksh 10 million, in the Policy.

e) By letter dated **25th October 2016**, the Respondent indicated that having been admitted with a **chronic condition**, the Applicant was only covered up to a sub limit of Ksh 750,000.00 within the inpatient benefit.

g) The Respondent then settled an additional sum of Ksh 750,000.00 vide cheque dated 3rd May 2017 leaving a balance of Ksh 8,850,000.00 from Claimant's inpatient cover limit of Ksh 10 million.

h) The Respondent failed, refused and/or neglected to pay the sum of Ksh 8,850,000.00 despite the Applicant's demand letter dated **21st June 2017, at page 151 and 154 of GM-1.**

The Applicant contended that the Arbitrator's finding that there was a disclaimer of liability by the Respondent at Paragraph 68 and 69 of the Award were hinged on the letter dated 25th October 2016 and 8th November 2016.

The Applicant stated that the Arbitrator's determination at paragraph 70 to 72 of the Award that the proceedings the Applicant commenced were time barred by dint of clause 20 of the Policy were inconsistent with the Arbitrator's earlier findings as demonstrated here below;

a) At **paragraph 62** of the Award, **the Arbitrator found that whereas there was an exclusion clause on the policy for pre-existing and chronic conditions (at Section 3(B) No. 7 of the Policy "hereinafter referred to as the Exclusion Clause"),** the Respondent settled a claim for expenses at the Nairobi Hospital in the sum of Ksh 400,000.00.

b) At **paragraph 63** of the Award, the Arbitrator found that having paid the claim of Ksh 400,000.00 in respect of the Nairobi Hospital bill knowing that the Applicant was diagnosed with **a chronic condition**, the Respondent could not thereafter cap the inpatient benefit to Ksh 750,000.00 vide Endorsement One. Pages **189 to 191 of GM-I** is a copy of Endorsement One.

c) At **paragraph 64** of the Award, the Arbitrator found that by paying the amount of Ksh 400,000.00 in respect of the Applicants expenses at the Nairobi Hospital, when it had no obligation to do so under the policy, the Respondent effectively waived the exclusion in the Exclusion Clause.

d) At **paragraph 65** of the Award, the Arbitrator found that the Applicant's condition was not capped at the inpatient of Ksh 750,000.00

e) At **paragraph 67** of the Award, the Arbitrator found that the limit of Ksh 750,00.00 contained in Endorsement One was of no effect.

f) Accordingly, if the Applicant's condition was not capped as a result of the **Respondent's waiver of the Exclusion Clause, and the non-effectiveness of Endorsement One**, then the Applicant was entitled to the full inpatient cover limit of up to Ksh 10 Million as provided for in the Policy.

g) The **time bar clause** did not therefore apply to limit payment of the balance of the Applicant's quantum up to the Ksh 10 million inpatient benefit.

REPLYING AFFIDAVIT

The application was opposed vide an affidavit dated 19th March 2020, sworn by Dr. Patrick Gatonga the Chief Executive Officer of the Respondent. He averred that there were no "public policy" issues arising out of the Application or any substantiated evidence justifying the invocation of **section 35 (2) (b) (ii) of the Arbitration Act 1995.**

The Respondent stated that so far as paragraph 1 (a) of the Application was concerned, it is plain that both the content of the **Respondent's letter of 25th October and 8th November 2016** as well as sequence of correspondence preceding this correspondence, showed that the interpretation, meaning and effect of the Respondent's said correspondence amount to a clear and unequivocal disclaimer. **The fact that this correspondence constitutes a disclaimer was itself expressly acknowledged in the Applicant's advocates' letter of demand dated 21st June 2017** and reproduced at pages **158 to 160 of exhibit GM-I.**

The Respondent asserted that as far as paragraph 1 (b) of the Application is concerned, **this claim was clearly time-barred under the terms of the policy irrespective of whether one looks at it from the latest date when the disclaimer was re-confirmed by the Respondent in its letter dated 8th November 2016 or even if it was assumed that time began to run from the time of the Applicant's letter of demand dated 21st June 2017. Clause 20 of the policy (page 91 of exhibit GM-1 annexed to the applicant's Affidavit) expressly requires proceedings to be brought by a party within 90 days of the date of any disclaimer.**

It is not disputed that the Applicant commenced proceedings against the Respondent on 14th November 2017 (paragraph 11 of the parties' Agreed Statement of Facts filed with the Arbitrator on 13th June 2019 at page 220 to 221 of exhibit GM -1). This was clearly well outside the 90-day period prescribed by the policy whichever way one looks at it.

CLAIMANT/APPLICANT'S SUBMISSIONS

The Claimant/Applicant submitted on whether the Arbitrator's findings on the Award offend any of the ingredients of public policy, the Applicant relied on the case of ***Mall Developers Limited vs Postal Corporation of Kenya [2014] EKLR;***

> ***"Section 35 of the Arbitration Act gives the Court jurisdiction and power to go beyond glossing over the said Arbitral Award as it is bound to ask itself whether the conclusions reached by the Arbitral Tribunal would have been consistent with the decision of the court had the court had the same facts for the underlying dispute been placed before the court for determination."***

The Applicant submitted that the Arbitrator's finding that there was a disclaimer of liability is at **paragraph 68** of the Award at page **40 of GM-1** which stated in part as follows;

> ***"I turn now to Issue No. 1- whether there was a formal disclaimer of liability by the Respondent under the Policy. I have***

carefully perused the Respondent's two letters dated 25th October 2016 and 8th November 2016. The Respondent's said letter of 25th October 2016 relied upon the Policy provision (as per Endorsement One) that as the Claimant's condition was chronic, she was only covered up to the sub-limit of Ksh 750,000.00. It is quite clear to me that this letter as well as its predecessor of 25th October 2016 amounted to clear disclaimers of liability by the Respondent under the policy and I so hold."

The Applicant submitted that at **paragraph 64** of the Award, page 36 of GM-A, the Arbitrator found that by paying the amount of Ksh400,000.00 in respect of the Claimant's expenses at the Nairobi Hospital, when it had no obligation to do so under the Policy, the Respondent effectively waived the exclusion in the Exclusion Clause. In fact, the Arbitrator went on to give the legal basis as to why the Respondent had waived the Exclusion clause by quoting at paragraph 65 of the Award, the case of ***Sita Steel Rolling Mills Ltd*** which stated as follows:-

"Waiver is a form of election. In insurance claims, an insurance which has a right to avoid liability may elect not to do so or may be deemed to so have elected, provided that it has knowledge of the breach and either expressly so elects or acts in such a way as would induce a reasonable insured to believe that it is not going to insist upon its legal rights."

On whether the award should be remitted to the Arbitrator for corrective action of the impugned portions of the award, the Applicant submitted that **Section 10 of the Act** empowers the Court to intervene in matters governed by the Act as is expressly provided for by the Act. The Act at **Section 35 (4)** gives this Court the power to order that the Arbitrator resumes the Arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award. The same provides as follows;

"The High Court, when required to set aside an arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the Arbitral Tribunal an opportunity to resume the arbitral proceedings or to take such other actions as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award."

RESPONDENT'S SUBMISSIONS

On answering the question, whether the application falls within and/or satisfy the requirements of **section 35 (2) (B) (ii) of the Arbitration Act 1995** and/or whether it amounts to an attempted appeal against the Arbitrator's decision, the Respondent submitted that what may be considered to be in conflict with the public policy of Kenya had long been deliberated in the Kenyan Courts. It was accepted that the landmark decision by Ringera J. (as he then was) in ***Christ for All Nations vs Apollo Insurance Co. Ltd [1999] LLR 1635 (CCK),*** sets out the core grounds for setting aside an arbitral award under **section 35(2) (b) (ii) of the Arbitration Act** as being contrary to the public policy of Kenya:

"I take the view that although public policy is a most broad concept incapable of precise definition, or that, as the common law judges of yonder years used to say, it is an unruly horse and when once you get astride of it you never know where it will carry you, an award could be set aside under section 35 (2) (b) (ii) of the Arbitration Act as being inconsistent with the Public policy of Kenya if it was shown that it was either;

a) Inconsistent with the Constitution or other laws of Kenya, whether written or unwritten; or

b) Inimical to the national interest of Kenya; or

c) Contrary to justice or morality

The first category is clear enough. In the second category I would, without claiming to be exhaustive, include the interest of national defense and security, good diplomatic relations with friendly nations, and the economic prosperity of Kenya. In the third category, I would, again without claiming to be exhaustive, include such consideration as whether the award was induced by corruption or fraud or whether it was founded on a contract contrary to public morals."

The Respondent submitted that the provisions of **Section 35 (2) (b) (ii)** are prone to misuse is equally recognized by the courts in Kenya. In ***Mahan Ltd vs Villa Care Ltd [2019] eKLR***, Tuiyott J. stated;

"The jurisdiction of a Court in Section 35 application is one that is circumscribed. Parties to an Arbitral agreement elect to refer their disputes or differences to a particular mode of dispute resolution. They should not be permitted to resile from that arrangement by attempting to set aside an award simply because the outcome is not in their favor. A party seeking to benefit from Section 35 must demonstrate that the grounds set out under those provisions truly exist.

One of the grounds that is most abused is that an award is against public policy. A misunderstanding or misspeak of the law by an arbitrator, without more, does not make an award counter to public policy. To accept otherwise is to accept that an award can be challenged on public policy consideration every time an arbitrator misconstrues the law and evidence. It cannot be so because it would be to allow parties to challenge an arbitration award as though it was an appeal against the decision. No wonder a warning had been sounded that the public policy ground, if unguarded, could be an unruly horse (Christ For All vs Apollo Insurance Company Limited [2002] EA 366)."

It was the Respondent's submission that the finding in ***Christ for All Nations*** are completely at odds with the Applicant's case. Tellingly, the principles involved in that case are remarkably similar to this case. In the instant case, the insured points to the wide-ranging damage set to arise out of the Arbitrator's interpretation of the relevant letters based on the sub-limits contained in an endorsement to the Insurance Policy.

In ***Christ for All Nations***, it was the insurer who similarly sought to argue that by giving a particular meaning to the wording of an endorsement to an insurance policy would result in the award being inconsistent with Kenyan Public policy because it was against "national interests" and "contrary to justice" Ringera J. emphatically rejected that argument: -

> ***"with regard to the first premise, I would say this. First, there is no evidence that that is the view of the industry. The only thing on record is that that is the considered view of the applicant. Secondly, it should be obvious that an endorsement on a contract is a variation of that contract only in terms of the endorsement. The interpretation of the terms of the endorsement cannot have universal meaning as contended by the Applicant."***

> ***"…I also do not accept the contention that the award is contrary to justice. To accept the Applicant's contention would be tantamount to accepting a most dangerous notion that whenever a tribunal adopts an interpretation of a contract contrary to the understanding of one of the parties thereto, an injustice is perpetrated. Justice is a double-edged sword. It sometimes cuts the Plaintiff and at other times the defendant. Each one of them must be prepared to bear the pain of justice's cut with fortitude and without condemning the law's justice as unjust."***

Chitty on Contracts, 28th Edition at paragraph 12-043. Intention of the parties, states;

> ***"The task of ascertaining the intention of the parties must be approached objectively; the question is not what one or the other of the parties meant or understood by the words used but "the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been availed to the parties in the situation in which they were at the time of the contract. The cardinal presumption is that parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say the meaning of the document or of a particular part of it is to be sought in the document itself. One must consider the meaning of the words not what one may guess to be the intention of the parties." However, this is not to say that the meaning of the words in a written document must be ascertained by reference to the words of the document alone. In modern law, the courts will in principle, look at all the circumstances surrounding the making of the contract which would assist in determining how the language of the document would have been understood by a reasonable man.***

> ***Further, it has long been accepted that the courts will not approach the task of construction with too nice a concentration upon individual words."***

The Respondent submitted that the invitation by the Applicant to reopen the Arbitral Award to interrogate his interpretation of the Relevant letters would amount to this court sitting on appeal on that Award and runs contrary to the principle of finality in arbitration. Such an invitation was roundly condemned in ***Zakhem International Construction Ltd vs Quality Inspectors Ltd [2019]eKLR***, the court observed;

> ***"Whilst Zakhem has criticized the Arbitral Award as being contrary to public policy, all it has done is to assail the Arbitrator's appreciation of the evidence tendered. What Zakhem is inviting this court to do is to re-assess or re-evaluate the evidence placed before the Arbitrator with a view to reaching a different outcome. That, typically, is the task that an appellant court is required to undertake in an appeal on issues of fact. It would be inimical to the concept of finality of arbitration if the courts were to routinely interfere with the findings of fact of an arbitral tribunal."***

In ***Samuel Kamau Muhindi vs Blue Shield Insurance Company Ltd [2010]eKLR***, it was held;

> ***"The arbitrator evaluated the evidence that was adduced by the parties herein. She reached the determination… This court cannot re-evaluate the evidence adduced before the arbitrator with a view to determining whether or not she reached the correct finding. If this court embarks on such an exercise it would be sitting on appeal against the decision of the arbitrator."***

The case of ***Continental Homes Ltd vs Suncoast Investments Ltd [2018] eKLR,*** (page 87 of LOA) reiterates that the courts have no appellate role to play in such matters and emphasizes the threshold required to set aside an Arbitral Award for being inconsistent with public policy:

> ***"In order for this court to set aside the award for contravening public policy, the Applicant must point at an illegality on the part of the arbitrator. The Applicant needs to show that the arbitration is so obnoxious to the tenets of justice that the only way to salvage the reputation of arbitration is to set aside the award. This court has no appellate jurisdiction over the arbitral award. It is therefore immaterial that this court would have arrived at a different conclusion from that reached by the arbitrator."***

Clause 20 of the Insurance Policy provides;

> ***"In the event of Jubilee Insurance liability in respect of any claim hereunder Jubilee Insurance shall not be liable to such claim or possible claim after expiry of ninety (90) days from the date of such disclaimer unless the disclaimer shall be the subject of legal proceedings or arbitration actually commenced against Jubilee Insurance"***

The Respondent submitted that the place of time bar clauses in commercial contracts must be respected to ensure that any dispute that may arise is dealt with swiftly, this is in line with the intention of parties to a contract binding themselves to Arbitration as their first port of call. In ***West Mount Investments Ltd vs Tridey Building Company Ltd [2017]eKLR,*** **Onguto J.** observed;

> ***"Contractual time bar clauses are common place in commercial, especially engineering and construction contracts. They vary***

from contract to contract. Some state when a claim may be commenced, others state when arbitration or litigation may be instituted. Yet others make notification of dispute a mandatory prerequisite to lodging any claim or commencing any arbitration. The purpose of a contractual time bar clause is to ensure that any dispute that may arise is dealt with swiftly: see The Simonburn [1972] 2 Lloyds Rep 355 at 394 per Lord Denning Mr. The clauses also help in ensuring that relevant evidence in support of or in opposition to a claim (or dispute) is assembled with samples not destroyed and scenes or sites not altered beyond recognition. Effectively, contractual time bar clauses allow greater commercial certainly with parties able to deal and transact without the potential threat of unknown claims. There is no point in a party keeping a dispute up his sleeve with a "wait and see what happens" attitude while considerable costs and expenses are incurred….

"As contractual time bar clauses make reasonable commercial sense in administration of contracts and management of risk, courts ordinarily will not and should not interfere especially where the parties have equal bargaining strength. If claims fall foul of such limitation clauses then the claim or the arbitral process may be barred, even where it appears to have been a bad bargain…"

"…A strict interpretation is therefore to be adopted when construing a contractual time bar clause given that it has the potential of locking out a claim which statute has not time barred: see Niajing Tianshun Shipbuilding Co. Ltd vs Orchard Tankers PTE Ltd [2011] EWHC 164. There should be no room for implied and inferred conditions and consequences but the clause ought to be clear plain and express as to its purport and effect."

DETERMINATION

After consideration of parties pleadings and submissions the issues that emerge for determination are;

a) Is the final Arbitral award of 22nd October 2019 contrary to public policy under Section 35 2 (b) (ii) of Arbitration Act?

b) Was there a disclaimer of liability in the Insurance Contract?

c) Was there a waiver to the disclaimer?

d) Was there a time bar to commencement of legal proceedings?

PUBLIC POLICY

a) Is the final Arbitral award of 22nd October 2019 contrary to public policy under **Section 35 2 (b) (ii) of Arbitration Act**?

35. Application for setting aside arbitral award

(1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).

(2) An arbitral award may be set aside by the High Court only if-

(a) the party making the application furnishes proof-

……

(b) the High Court finds that—

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

(ii) the award is in conflict with the public policy of Kenya

The Arbitrator's findings are contained from Paragraphs 68-72 of the Final Arbitral Award. In a nutshell, against the Claimants claim for Ksh 8,850,000 incurred on medical expenses and treatment, the Arbitrator found that there was a disclaimer of liability by the Respondent under the Policy. Secondly, the legal proceedings commenced were time barred by dint of **Clause 20** of the Policy.

Both Claimant and Respondent cited in great detail the landmark case of **Christ of All Nations *supra*** with regard to what constitutes public policy. There is also the case of ***Glencore Grain Ltd versus TSS Grain Millers Ltd. [2002] 1 KLR 606,*** where the Court considered public policy as;

"A contract or arbitral award will be against the public policy of Kenya in my view if it is immoral or illegal or that it would violate in clear unacceptable manner basic legal and/or moral principles or values in the Kenyan society. It has been held that the word "illegal" here would hold a wider meaning than just "against the law". It would include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive".

DISCLAIMER

b) Was there a disclaimer of liability in the Insurance Contract?

The Claimant submitted that disclaimer hinged on the Respondents letters of 25th October, 2016 and 8th November 2016, did not deny liability but merely pointed out the quantum available for payment as Ksh 750,000/-. The Claimant stated that if the Respondent disclaimed liability then it would not have discussed the quantum considered to be payable to the Claimant. The Claimant's position is that the letter of 25th October ,2016 admitted liability of cover for payment of chronic and pre-existing conditions under the policy and the only issue was quantum. The Letter of 8th November 2016 was reference to the definition of chronic condition under the policy and not disclaimer of liability.

The first relevant letter of 25th October 2016, was written by the Respondent in specific response to the Claimant's said letter. It read;

> ***"We are in receipt of your letter dated 19th October, in reference to the above named.***
>
> ***The member was admitted for a condition that is Chronic. In line with the policy provisions, Chronic & Pre-existing conditions are covered up to a sublimit of Ksh 750,000/- within the inpatient benefit. In a previous admission, the member had incurred a bill of Ksh 400,000/- hence the balance available for reimbursement is Ksh 350,000/-***
>
> ***We were in communication with the contact person (Joan Khasabuli/Russet Insurance Agency Limited) on the same and advised them accordingly."***

The Respondent wrote a further response in the second relevant letter dated 8th November 2016, which read;

> ***"We are in receipt of your letter dated 28th October 2016 in reference to the above named.***
>
> ***The member was admitted with a chronic disease as per the medical report received from Dr. Muhindi Wanjugu.***
>
> ***A Chronic condition by definition in the policy document is as below.***
>
> ***A disease, illness or injury which has got at least one of the following characteristics;***

- ***No known cure***
- ***Recurrent and can lead to permanent disability***
- ***It is caused by changes to one's body which cannot be reversed.***
- ***It is permanent***
- ***Requires one to be specially trained or rehabilitated.***
- ***Needs prolonged supervision, monitory or long term treatment.***

> ***As such, the claim was adjudicated correctly as per the policy provisions."***

The Respondent submitted that the Applicant through a letter dated 21st June 2017 from their advocates recognized that the Respondent had issued a disclaimer of liability on any amount exceeding the sub-limit of Ksh 750,000. The Letter states;

> ***"We are instructed that despite providing all the necessary documentation, you [i.e the Respondent] have now declined to reimburse the medical expenses up to the in-patient cover of Ksh 10 million strangely claiming that the our(sic)Client's ailment was chronic."***

To this claim, the Respondent submitted that in September 2016, the Claimant was admitted at Nairobi Hospital for medical tests that cost Ksh 400,000/- which the Respondent paid. On receipt of the medical report from the Claimant's doctor, it was confirmed that the Claimant was ailing from chronic ailment and that was not covered under the Policy. **The Policy excluded pre-existing and chronic conditions**. The Respondent paid Ksh 750,000 as per **Clause 6 (a) of Endorsement 1 of the Policy.** The Claimant demanded reimbursement of the balance of her claim under the Insurance policy of Ksh 10 million, Ksh 8,850,000/- The Respondent claimed that it was not served with the evidence in support of GBP 68,028.60 or GBP 105,835 in medical expenses incurred at the Royal Marsden Hospital in London UK. In any case it was not liable to pay.

The Court perused the **Corporate Policy of Insurance for 2016, Part 3 titled Exclusions; Clause 7 liability is excluded in chronic and pre-existing conditions.** The Claimant's ailment was not pre-existing, the medical policy commenced 2015 - 2016, was renewed in February 2016 – 2017 on similar terms – a growth emerged in September 2016 and this fact was not controverted by any medical evidence before the Arbitral Tribunal. So liability could not be excluded in this case as the Claimant's condition was Chronic but not pre-existing.

The Claimant was insured as a member of the Corporate Medical Insurance Policy for Stegra Ltd, initially during the period 6th February 2015-5th February 2016 under Category A of the Policy whose in-patient cover limit was Ksh 10 million.

The Respondent renewed the Corporate Medical Insurance on the same terms for the period 6th February 2016 - 5th February 2017, again **categoryA** the Claimant was entitled to Ksh 10 million in patient.

In September,2016, the Claimant noticed swelling on the neck and sought medical attention. Subsequent medical tests both in Kenya and in England confirmed diagnosis of the Claimant's medical condition. On notification, the Respondent denied liability and paid upto Ksh 750,000 of the Ksh 10 million in patient insurance cover citing the Exclusion clause vide letters of 26th October 2016 & 8th November 2016. The exclusion clause 7 – liability extended chronic and pre-existing conditions. The Claimant would not disclose what she did not know of and if it existed as at 6th February 2016, as she noticed the swelling in September 2016. The exclusion clause did not apply to the instant case.

WAIVER

The Respondent admitted payment of Ksh 400,000/- and later Ksh 350,000/- inspite of disclaimer of liability. The Respondent paid the amount voluntarily and claimed it was *exgratia*. If then there was/is valid and legal disclaimer, the Respondent's forbearance not to pay medical claims under Clause 7 for pre-existing and chronic conditions was waived by the Respondent's conduct of payment.

Chitty on Contract pg 22-042 reads

> ***A party who forbears will be bound by the waiver and cannot setup the original terms of the agreement*** *…..*

In the case of *Sifa Steel Rolling Mills Ltd* (supra)

PUBLIC POLICY

Article 43 of COK 2010

The Respondent's reliance on the exclusion Clause and Endorsement 1 made Arbitral Award of being contrary to public policy of Kenya; specifically, contrary to the **Constitution of Kenya 2010**. This is because;

Article 43 of COK 2010 provides;

43. Economic and social rights

> ***(1) Every person has the right—***
>
> > ***(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;***
> >
> > ……

In the endeavor to realize the highest attainable standard of health, the Claimant sought through the Corporate Medical Insurance Policy as member who was entitled to Class A treatment and rights in the event of ill health. The Insurance policy was valid, premiums were duly paid to the Respondent and the Claimant fulfilled obligations under the contract. The Claimant was diagnosed with the medical condition, through no fault on her part and due to circumstances beyond her, upon informing the Respondent; the Respondent withheld continued access to quality health care services at the highest attainable standard to the Claimant. The Claimant had to shoulder heavy financial cost while she contracted to manage or reduce the adverse impact of the medical condition under the policy with the Respondent who relied on exclusion clause in the Insurance Contract which it had waived by part payment.

Insurance is an arrangement by which a Company or the State undertakes to provide guarantee of compensation for specified loss, damage, illness or death in return for payment of a specified premium(s) to the Insurance Company. The members of the Corporate Medical Insurance Cover obtained such insurance and duly paid the premiums so as to cushion themselves during onset of ailment or ill health with stress free healthcare under stress free claims payment by the Insurance Company.

The Corporate Medical Insurance Policy was to cushion members that while they paid monthly premiums and while they enjoyed good health upon health concerns arising, the insurance would cushion them by attaining highest standards of medical services if and when medical ailments assailed them.

Alas, the Claimant was deprived of continued healthcare services of the highest attainable standard by virtue of the terms and conditions in the Policy which conform to a standard form contract.

This is an agreement which employs standardized, non- negotiated provisions usually in small print preprinted Form that the Claimant signed off and complied with its terms. Clause 7 excluded chronic and pre-existing conditions but not chronic condition as per the Claimants claim.

CLAUSE 7 OF CORPORATE POLICY OF INSURANCE 2016

The Claimant's condition was diagnosed in September 2016 way into the 2nd Year of insurance cover. The condition manifested by a swelling at the neck and the Claimant sought medical attention. The Claimant's condition was unexpected, unforeseen and not anticipated

until it occurred and was confirmed by medical examination. Therefore, the Claimant could not disclose what she had not suffered before or had knowledge of until it happened and was confirmed by medical experts. It certainly was not pre- existing even if it was classified as chronic as defined in the policy. The exclusion clause could/cannot legally hold as **Clause 7** of the Policy refers to **Pre-existing and Chronic Conditions** were excluded.

Pre-existing was not proved by the medical reports presented during the Arbitration proceedings.

In **Clause 7** of the Final Arbitral Award, the Arbitrator noted that the Respondent maintained the Claimant's condition was preexisting after the Claimant challenged the Respondent on this fact, the Respondent relied only on the fact the Claimant had chronic illness which was diagnosed in September 2016.

Whereas the Arbitrator is master of facts of the case and the Court may not interfere with findings of fact as stated in the following cases;

In ***TCAT Limited vs Joseph Arthur Kibutu [2015] eKLR,*** where the court stated as follows;

> ***"if the court would look into the issue of whether there was enrichment as invited to do, it is my finding that the same would be tantamount to the court trying to render itself on a question of fact. The Arbitrator used the facts before him in determining whether or not there was breach of any of the terms of the subject Agreement. And as the Arbitrator remains the master of the facts, the Court can only make a finding as to an error in law and not of fact. See the case DB Shapriya & Co. vs Bishint (2003) 3 EA 404, where there is judicial consensus that;***
>
> > ***"all questions of fact are and always have been within the sole domain of the Arbitrator…. The general rule deductible from these decisions is that the court cannot interfere with the findings of facts by the Arbitrator."***

This Court is precluded by **Section 10 of the Arbitration Act** it is incumbent for the Court to consider whether the Final Arbitral award is contrary to public policy and that exercise includes consideration of the process and outcome of the Arbitral proceedings and if they are in conformity with the public policy of Kenya.

FREEDOM OF CONTRACT

After perusing the Final Arbitral Award, the Court found no evidence was adduced to the Arbitrator, on whether, the members of the Corporate Medical Insurance Policy either individually or through representatives, negotiated terms of the said contract and that there was mutual acceptance of terms and exclusion clauses and thereafter each member executed the contract after negotiations on the terms and conditions of the policy were discussed.

In the absence of such evidence, the members, more so the Claimant who was a secondary member, she was not privy to negotiating terms and conditions, she did not have the bargaining or negotiating opportunity to the Contract as it was a standard Form Contract nor did she execute the same directly. There was no mutual assent or meeting of minds on terms and conditions of the contract. This vitiated the elements of a valid contract of mutual assent and meeting of minds to confirm intention to create legal relations in a valid contract.

It is against public policy to deprive person(s) of right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care without legal basis especially where they have complied with the terms of the contract. The Claimant has furnished proof that she complied.

ENDORSEMENT 1

The Arbitrator considered facts and evidence and made finding of fact with regard to endorsement 1.

The Disclaimer vide 2 letters of 26th October 2016 & 8th November 2016 based on the Policy made Reference to **Endorsement 1 attaching to and forming part of Group Medical Policy Number COROOO1721 under the name of Stegra Ltd applicable with effect from 6th February 2016** amending the Policy as follows;

> ***6. The following exclusions under Section 3B No 7 &3C of the Policy have been amended to the extent shown below;***
>
> > ***a) Medical and surgical expenses necessarily and reasonably incurred as a direct result of pre existing and/or chronic and/or HIV/Aids illness or disease will be covered upto a sub limit of Ksh 750,000/- for category A & Ksh 300,000/- for Category B,C.& D of the Inpatient limit and upto the full annual outpatient limit.***

Endorsement 1 was inserted to the Corporate Medical Insurance Cover for Stegra Ltd unilaterally by the Respondent. It is an addendum to the Policy executed by the Group. No evidence was presented during Arbitration Proceeding on why, how Endorsement 1was made an addendum to the Policy which was already in force as of 6th February 2016.

Secondly, Endorsement 1 addendum to the Policy already in force and binding to contracting parties was signed on 26th October 2016 by the Respondent's officers only. How would it bind the members of Corporate Medical Insurance Policy if they were not consulted, involved in contracting and did not accept and execute the same? These circumstances depict imposition of an illegal contract as parties to the contract were not involved were not notified and did not sign the addendum to the existing policy that belatedly capped payment for inpatient in pre-existing and chronic conditions.

In the case of ***Margaret Njeri Muiruri vs Bank of Baroda (K) Ltd [2014] eKLR;***

> ***"Courts have never been shy to interfere with or refuse to enforce contracts that are unconscionable, unfair, oppressive due to the procedural abuse during formation of the contract, or due to contract terms that are unreasonably favorable to one party and would preclude meaningful choice for the other party……..."***

Thirdly, the Claimant through Stegra Limited vide letter dated 25th October 2016, wrote to the Respondent Insurance Company and sought reimbursement of medical expenses incurred at Royal Marden Hospital London UK.

The Respondent replied to the said letter on 25th October 2016 as follows;

> ***"In line with the Policy Provisions Chronic and Pre-existing Conditions are covered upto a sublimit of Ksh 750,000/- within the in-patient benefit. In a Previous admission, the member had incurred a bill of Ksh 400,000/- hence the balance available for reimbursement is Ksh 350,000/-"***

There was/is no such provision in the Corporate Medical Group Insurance at the time of the letter of 25th October 2016, except Part 3 Exclusion Clauses Clause 7 on Pre-existing and Chronic conditions.

It is thereafter, **on 26th October 2016** that the Respondent on their own, cobbled the addendum in form of Endorsement 1 and annexed it to the already existing policy of Stegra Limited. The members of Stegra Limited insured under the insurance contract were not privy or aware of the same and did not contract and execute the Endorsement 1. The Endorsement 1 cannot be legally enforceable retrospectively, after the insurance contract commenced on 6th February 2016. The Arbitrator found the same ground at **Clause 63 of the Final Arbitral Award** on the evidence presented as follows;

> ***"Further, it was surprising, to me that the Respondent after receiving the letter from Stegra Ltd Dated 19th October 2016, and after it had written its letter dated 25th October 2016, suddenly produced Endorsement 1 dated 26th October 2016…***
>
> ***In my view, the Respondent cannot have it both ways, having paid the claim for Ksh 400,000 in respect of the Nairobi Hospital bill, knowing that the diagnosis from Dr Wanjugu was in respect of a chronic condition, it could not thereafter cap the in patient benefit vide Endorsement 1 when it knew what the Claimant's claim for her medical expenses in London were going to be upon receipt of Stegra Ltd said letter of 19th October 2016."***

It is against public policy to impose terms not negotiated by parties to a contract. Endorsement 1 was imposed to an ongoing valid executed contract without knowledge or consent of contracting party. The Endorsement cannot legally operate retrospectively.

There was a disclaimer in the Policy but it was not applicable in the circumstances of the instant case because on the one hand, the Claimant did not have a pre existing condition only chronic condition and therefore disclaimer would not apply. The Endorsement 1 was illegally imposed on the members of the Corporate Medical Insurance Policy and was effected after the Policy was in force and could not apply retrospectively after the Claimant lodged her claim for reimbursement of medical costs incurred.

If there was disclaimer validly applicable it was waived by the Respondent's conduct; part payment of Ksh 750,000/-.

The Arbitrator made similar finding at **Paragraph 65 of the Final Arbitral Award.**

For these reasons there was no valid disclaimer by the Respondent to the Claimant's claim.

TIME BAR CLAUSE

C) Was there a time bar to commencement of legal proceedings?

The Claimant's claim was dismissed due to time bar **Clause 20** in the Policy which read;

> ***In the event of Jubilee Insurance disclaiming liability, in respect of any claim hereunder, Jubilee Insurance shall not be liable to such claim or possible claim after expiry of 90 days from the date of such disclaimer, unless the disclaimer shall be the subject of legal proceedings or arbitration actually commenced against Jubilee Insurance***

The Arbitrator found as stated in **Paragraph 68 of the Final Arbitral**

Award as follows;

> ***It is quite clear to me that this letter as well as its predecessor of 25th October 2016 amounted to clear disclaimers of liability by the Respondent under the Policy and I so hold.***

The Court finds this finding contrary to the finding by the Arbitrator in **Clause 68** of the Final Arbitral Award. How could the disclaimer vide letter of 25th October 2016 be vide Endorsement 1 which was unilaterally drawn on 26th October 2016?

Applying the Arbitrator's finding to the Time bar Clause, clearly the disclaimer was/is in issue hence the 90 day time bar to stop proceedings being commenced does not arise/apply in this case.

Assuming the 90 day time bar is applicable when the disclaimer contested or waived when did the 90 days start running? The record confirms that the Respondent's last letter with reference to the issues raised was one dated 8th November 2016.

Yet, the Claimant through Stegra Ltd wrote to the Respondent on 15th November 2016 and 1st December ,2016 and the Respondent did not respond/reply.

The Claimant through her advocate on record wrote a demand letter to the Respondent on 21st June 2017 and the Respondent did not respond /reply until the Claimant filed suit ***CMCC NO. 8076 of 2017***, on 14th November 2017. So, with the correspondence attached when did the 90 day bar begin to run? It is not clear when. The Respondent took advantage and declined to respond to the Claimant's correspondence and when Court proceedings commenced relied on the Time Bar Clause. It is not clear from the Final Award and to this court when the 90 days commenced.

Finally, the Arbitral Award proceedings confirm that the issue of time bar clause of 90 days was raised as Preliminary objection by the Respondent and the Arbitrator vide Ruling of 17th December 2018 dismissed the Preliminary Objection. The import is that the 90 day time bar did not apply to these proceedings if it was not so, the Arbitration proceedings would have halted at the Preliminary stage and the time bar Clause upheld as per the Arbitrator's Ruling. However, the Arbitrator proceeded culminating with the Final Arbitral Award on 22nd October 2019.

Clause 20 of the Insurance policy presents that the Insurance Company shall be liable for a claim for 90 days from the date of disclaimer unless the disclaimer is subject to court or Arbitration proceedings.

Since the issue of disclaimer is an issue in contention, the period of 90 days computation is also contested as the Respondent failed to respond to the Claimant, the Time Bar Clause cannot be enforced.

The Arbitrator dismissed the Preliminary Objection and proceedings commenced and terminated with a Final Arbitral Award. The Arbitrator did not enforce the Time Bar Clause.

DISPOSITION

1. **From the totality of the above circumstances, this Court finds that the Final Arbitral Award of 22nd October 2019 is against public policy under Article 43 of Constitution of Kenya 2010 and is hereby set aside.**

2. **Each Party to bear its own costs.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH DECEMBER 2020 (VIDEO CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR. GATUGUTI FOR THE RESPONDENT

MRS. MWIHURI FOR CLAIMANT/APPLICANT

COURT ASSISTANT: TUPET

Mr. Gatuguti: We would like to apply for leave to appeal**.**

Court: There shall be a stay of execution of the Ruling for 30 days.

Mrs Mwihuri: Leave to appeal can only be granted by Court of Appeal as ***Nyutu Agrovet Limited vs Airtel Networks Kenya Limited*** case for decision under **section 35 Arbitration** and there is no automatic right of appeal. I oppose the leave sought.

Court: The Parties/Counsel to obtain certified proceedings and Ruling upon payment of requisite fees.

M.W. MUIGAI

JUDGE