REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 289 OF 2015

FRANCIS NGIGI NYOIKE.....APPELLANT

-V E R S U S –

UAP PROVINCIAL INSURANCE CO. LTD..... RESPONDENT

***(Being an appeal from the judgement of Hon. T.S. Nchoe (MR) delivered on 23rd May 2014 in the Senior Resident Magistrate's Court at Milimani Commercial Civil suit no. 9027 of 2002*)**

JUDGEMENT

1) Francis Ngigi Nyoike, the appellant herein, filed an action against UAP Provincial Insurance Co. Ltd, the respondent herein, vide the amended plaint dated 14.12.2005 before the Chief Magistrate's court whereof he sought for a declaration that the respondent is bound to indemnify the appellant for all liabilities accruing from the effectiveness of the Maximed Medical Insurance Policy taken on 2/3/2001. The respondent filed its statement of defence in which it claimed that the appellant's son's medical illness was not covered by the insurance policy. The suit was heard by Hon. T. S. Nchoe, the then Senior Resident Magistrate who eventually dismissed the suit. The appellant was unhappy with the decision hence this appeal.

2) On appeal, the appellant put forward the following grounds:

1. The learned magistrate erred in law and fact in arriving at a decision contrary to law and facts/evidence before the court.

2. The learned magistrate erred in fact in finding that the chronic illness suffered by the plaintiff's/appellant's son was not covered in the policy.

3. The learned trial magistrate erred in law and fact in not finding that the respondent was in breach of the express terms and conditions of the insurance policy control.

4. The learned trial magistrate erred in law by failing to make any finding on the doctrine of indemnity.

5. The learned trial magistrate erred in fact in not finding that the condition and or illness suffered by the plaintiff's/appellant's son was not among those excluded under Clause No. 4 of the insurance policy.

6. The learned trial magistrate erred in law and fact in not finding that the insured had not sought medical attention for congenital condition and did not know of its existence hence not falling under clause no. 11 of the insurance policy.

7. The learned trial magistrate erred in fact and law by not finding that the condition or illness suffered by the plaintiff's/appellant's son was not expressly excluded in the insurance policy.

8. The learned trial magistrate erred in law and fact by deciding in favour of the defendant/respondent and yet he never tendered any evidence nor submissions before the court to look at.

9. The learned trial magistrate erred in law and fact by not finding that the plaintiff's/appellants claim was not challenged nor is the evidence of the plaintiff's/appellant's rebutted or controverted at all.

10. The learned trial magistrate erred in law by failing to adequately provide the reasons for his ruling as required by law and

practice.

11. The learned trial magistrate erred in law and fact by failing to consider and analyze the entire evidence of the appellant and thereby arrived at the wrong finding on the issue before the court.

12. The learned trial magistrate erred in law and fact by failing to consider the plaintiff's/appellant's submission and judicial authorities tendered before the court.

13. The learned trial magistrate's decision was against the weight of evidence and contrary to the law of contract thus the same being bad in law.

14. The learned magistrate's inordinate delay in delivery of the judgment for a period of 8 months rendered the entire judgment null and void.

3) When the appeal came up for hearing, learned counsels appearing in the matter recorded a consent order to have the appeal disposed of by written submissions.

4) I have re-evaluated the case that was before the trial court. I have further considered the rival written submissions. The history behind this dispute can be deduced from the pleadings and the evidence presented before the trial court. The appellant and the respondent entered into an insurance contract vide the Maximed Medical Insurance policy no. 010/091/000704/2000. The respondent was to provide the appellant with Medical Insurance Cover and the appellant would remit premiums. While the policy was in force, George Njoroge Ngigi, the appellant's son, fell ill and was admitted at Getrudes Garden Hospital. He was later transferred to Mater Hospital where he was diagonised with Hirchsprungs disease. Despite the appellant's son having been treated, the respondent refused to settle the medical bill claiming the obligations under the insurance policy is that the disease that the appellant's son had been diagonised with is congenital which was not covered under the insurance policy. The dispute eventually landed in court.

5. I have already set out the 14 grounds put forward by the appellant which may be summarised to one main ground that is to say, whether or not the learned Senior Resident Magistrate properly dismissed the appellant's suit. It is the submission of the appellant that the respondent had failed to tender evidence to support its defence hence the appellant's evidence remained uncontroverted. The appellant was of the submission that he had proved his case on a balance of probabilities. The respondent on the other hand is of the view that the trial magistrate arrived at the correct finding. It is said that the learned Senior Resident Magistrate was guided by the application for insurance, the policy conditions and the exclusion therein and the expert opinion of the doctors.

6. It is apparent from the recorded proceedings that the appellant was the only witness who testified in this case in support of the appellant's case. The respondent closed its case without summoning witnesses in support of its defence. The appellant tendered documentary evidence showing he had entered into an insurance contract with the respondent known as Maximed Medical Insurance Policy. He told the trial court that his son was admitted to Getrudes Garden Children's Hospital where he was issued with an invoice which was settled by the respondent. It is also the evidence of the respondent that the treatment and management processes continued for over six months at the same hospital and the respondent dutifully settled the medical bills until 30th July 2001, when the appellant declined to settle invoice no. 110689 for ksh.314,520/= claiming that the disease the appellant's son had been diagonised with was a congenital disease that was not covered under the insurance policy. In a one page judgement, the learned trial Senior Resident Magistrate formed the opinion that the chronic illness suffered by the appellant's son was not covered in the policy. I have on my part re-evaluated the evidence tendered. After a careful examination of the insurance policy, I have come to the conclusion that the appellant's son's illness was covered under the policy therefore the respondent is under duty to honour its obligation under the policy to settle the appellant's bill. It was therefore wrong for the learned Senior Resident Magistrate to dismiss the appellant's action yet he had tendered credible evidence to prove his claim. The appellant had produced receipts and invoices showing the amounts that he incurred as a result of the medical expenses in respect of his son.

7. In the end, this appeal is allowed. Consequently the order dismissing the suit is set aside and is substituted with an order entering judgment in favour of the appellant and against the respondent in terms of prayers **(i)** and

(ii)A of the amended plaint dated 14.11.2002.

8. The appellant to have costs of both the suit and this appeal.

Dated, Signed and Delivered in open court this 16th day of February, 2018.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent