REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 542 OF 2009

NALICHANDRA SHAH.....….....APPELLANT

VERSUS

HEALTH FIRST INTERNATIONAL LIMITED ……..….....RESPONDENT

(Appeal from the original judgment and decree of Miss. Hon W. Mokaya (PM) in Milimani Commercial Courts, CMCC No. 7028 of 2004 delivered on 3rd November 2009.)

JUDGMENT

1. The appellant **Nalichandra Shah** sued the respondent **Health First International Limited** who were his medical insurers. The two parties entered into a contract on 14th April 2001 for the provision of a medical insurance to the appellant. The contract was thereafter renewed between the years 2002 and 2003. On 31st January 2004, the appellant offered to renew the contract upon certain terms and conditions to which the appellant accepted and paid a consideration of kshs 60,550/= as premium. On 6th April 2004, the respondent withdrew their offer by sending a letter to the appellant and returned the cheque for kshs 60,550/=. According to the letter, membership terminates automatically at the age of 60 years and the company reserves the right to refuse any application for extension of membership or upgrading from one service combination to another, without giving any reason for so doing. Upon hearing the matter, the trial court found that the appellant had no claim against the respondent since there was no contract between the parties that could be enforced.
2. Being dissatisfied with the trial court's judgment, the appellant filed this appeal on the following grounds:

a. ***The Learned Magistrate misapprehended the law by dismissing the suit upon holding that respondent could not be held liable for declining to contract with the appellant;***
b. ***The Learned Magistrate interchanged the legal responsibility of the parties by wrongly imputing that the appellant was the offeror with the intention to renew the policy of insurance and that the respondent was the offeree when the opposite was in fact the case;***
c. ***If the learned magistrate had properly understood the law, she would have come to the inescapable conclusion that the respondent had expressly offered to renew the medical cover upon the appellant paying the premium within the policy duration and that a contract was formed which the respondent was liable on when the appellant accepted and paid the premium;***
d. ***That the Learned Magistrate erred in finding that the respondent had the discretion to terminate the insurance contract ;***
e. ***There was a valid contract upon the applicant paying the premium as invited by the respondent and the learned magistrate was clearly wrong to hold that the respondent could not be held liable for declining to contract with the plaintiff.***

3. This being the first appeal, it is my duty to re-evaluate the evidence

tendered before the trial court and arrive at an independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. In a civil appeal in **Selle and Another versus Associated Motor Boat Company Ltd & Others 1968 EA 123 at 126** where the Court (Sir Clement Lestang, V.P) said:-

"I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdulla Hameed Saif v. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)."

4. The appellant's case was that, he entered into a contract with the respondent on 14th April 2001 where the respondent agreed to provide a medical cover to the appellant on terms and conditions contained in the agreement. At this particular time, the appellant was 60 years old. The contract was later renewed for the year 2002 and 2003 despite his age. On 31st January 2004, the respondent sent the appellant a letter offering to renew the contract in accordance with the terms and conditions laid down in the letter. On 1st April 2004, before expiry of the appellants membership, the appellant paid Kshs 60,550/= vide cheque number 012412. On 6th April 2004, the respondent rejected the renewal of the membership contract and returned the cheque. The appellant is aggrieved and avers that he was not aware of the terms and conditions until he received the letter dated 6th April 2004. The letters expressly provided that the membership would be renewed upon receipt of payment provided the membership had not lapsed. Following the termination, the appellant has incurred a sum of Kshs 805,773.64/= for surgery in India. The respondent had paid Kshs 107,489/= at Agakhan hospital after the appellant suffered a heart attack and is only trying to evade paying any further monies towards the appellant's treatment. The appellant therefore claims for a refund of kshs 805,773.64/= incurred in treatment.

5. The respondent's case was that, the contract had expired and that they were not willing to renew the contract since the appellant did not meet the terms and conditions of the contract which included the fact that he was 60 years old and above and the company reserved the right to refuse the application for or subsequent extension of membership or upgrading from one service combination to another without giving reason for doing so. It is for these reasons that they rejected the payment and sent it back to the appellant. They averred that the membership agreement provided that: annual limit for the medical cover to be provided would be kshs 10,000,000/=; the respondent would provide worldwide service benefits limited to US Dollars 60,000/= , the annual subscription would be kshs 60, 550/= and membership would terminate at the age of 60. The respondent argued that one would become a member of the scheme only from the date that would be notified by the respondent and the membership status would only be conferred after successful application and payment of the full amount of premium. It is upon payment of the renewal fee that the contract would automatically be renewed unless the respondents informs the applicant in writing of any changes or cancellations.

6. According to the court record, when the matter came up for hearing the appellant testified that he was a member of the respondents insurance which he joined on 14th April 2001 and the contract was renewed yearly. The appellant argued that the respondent paid for his admission in hospital on 25th March 2004. He was later referred to India for further treatment. He was asked to renew his membership vide a letter dated 31st January 2004 which he did by paying the required premium of Kshs 60,550/= but the same was returned later accompanied by a letter that indicated that he could not renew his membership as he was over 60 years of age. He proceeded to India on 26th

April 2004 where he incurred the sum of kshs 805,773.64/=. He produced the receipts and tickets to that effect which were marked as exhibits 15,16 and 17.

7. The respondent called, **Charity Ruth Mbogo**,DW1 to testify in support of his case. DW1, told the trial court that, who testified that there was no membership card for the appellant in 2005, hence he was not entitled to any benefits. The respondent was of the view that the terms and conditions of the insurance policy could not be changed that's why the appellant's cheque was returned. She produced the contract in the form of an application form dated 14th April 2001 as exhibit D1 which was signed by the appellant showing his intention to be bound. She explained that the reason the contract was not renewed was because the appellant had attained the age of 60 years. She further testified that the letter dated 31st January 2004, was sent as matter of protocol but that did not automatically guarantee that the insurance would be renewed as the same is purely on the discretion of the respondent. She added that the appellant was born on 27th September 1941. On cross examination, she stated that she was not sure whether the terms and conditions were given to the appellant. The terms provided that membership would automatically be terminated at 70 years contradicting the alleged 60 years one. She further testified that she was not sure whether age was a determining factor for renewal of the contract as the same is subject to their medical underwriters.
8. The parties filed their respective submissions. The appellant's advocate submitted that the appellant is the offeree and not the offeror. The appellant accepted the offer and paid for the renewal of the membership which payment was rejected by the respondent hence was in breach of contract between the parties. He further submitted that the respondent could have avoided the extension by ensuring that it does not notify the appellant of the renewal of the contract. He added that, by inviting the appellant to renew the contract prompted him to accept and pay the premium.
9. The respondent advocate conversely, submitted that the appellant is the offeror while the respondent is the offeree. He stated that the respondent cannot therefore be forced to contract since he rejected the offer of renewing the membership by rejecting the premium. He submitted further that, the respondent had a right to reject the contract without any explanation as was provided in the terms and conditions. The respondent argued that the appellant cannot have read the contract selectively without referring to the general terms and conditions applicable to him. The advocate submitted also that the court is being invited to re-write the contract for the parties.
10. Having set out the background of this appeal I now wish to consider the merits or otherwise of this appeal. This is a case of an alleged breach of contract. I will address the second and third grounds of appeal first which grounds are interrelated. The Appellant has argued that the Learned Magistrate interchanged the legal responsibility of the parties by wrongly imputing that the appellant was the offeror and the respondent the offeree. He averred further that If the learned magistrate had properly understood the law, she would have come to the conclusion that the respondent had expressly offered to renew the medical cover upon the appellant paying the premium within the policy duration and that a contract was formed which the respondent was liable on when the appellant accepted and paid the premium. On this ground, it is clear that there is a dispute as to who is the offeror and who is the offeree. It is evident from the court record that the two parties have had previous contracts in regard to the medical insurance. As at 31st January 2004 when the respondent wrote letter to the appellant, there was medical insurance policy in place that was deemed to expire on 13th April 2004. The respondent is the one who wrote to the appellant vide a letter dated 31st January 2004 referring to the Jupiter Family Gold expiring on 13th April 2004. They indicated that:

"You are our valued member and it is our hope that that you will continue your membership with us when it expires on 13th April, 2004."

They proceeded in the same letter to indicate the benefits that will be available to the appellant, they included, annual limit of kshs 10,000,000/=, worldwide benefits limited to US $ 60,000/=, standard private room accommodation, rescue vacation, Funeral expense benefits up to kshs 60,000/= . They informed him further of renewal subscription fee that had been revised for the subsequent twelve months. They also stated in the same letter that their agent would be contacting the appellant to confirm renewal of the insurance.

11. In my view, the contents of that letter illustrate an offer being advanced to the appellant and not vice versa. The respondent is the one enticing the appellant with a medical cover proposal. It further lists the benefits that the appellant will be able to enjoy should he accept the proposal. Moreover, it quotes the annual premium that is payable as contained in the basket of offer advanced. A call is deemed to follow the events so that the respondent can ascertain whether the appellant is willing to accept the proposal. This offer is acted on by the appellant who accepts it by writing a cheque of Kshs 60,550/= which amounts to the total annual premium subscription. Therefore, I find that the appellant is the offeree while the respondent is the offeror
12. I will tackle the first, fourth and fifth grounds of appeal together. The appellant claims that, the learned magistrate misapprehended the law and reached the wrong conclusion by dismissing the plaintiff's case. He argues that the respondent had no discretion to terminate the insurance contract since there was a valid contract upon the applicant paying the premium as invited by the respondent and the learned magistrate was clearly wrong to hold that the respondent could not be held liable for declining to contract with the appellant.

13. According to the court record, the appellant argued that there was a contract between him and the respondent who was to provide him with a medical cover. He claims that he has been a member since April 2001 and the contract was renewed in 2002 and 2003. The problem arose in 2004 when the respondent offered to renew the contract vide a letter dated 31st January 2004 only to decline the appellant's cheque of kshs 60,550/= sent as consideration for purposes of renewing a contract. The respondent on the other hand argues that there is no contract in place since he declined the consideration for reasons that the appellant did not confirm to the terms and conditions warranting renewal of the contract.
14. I have looked at the court record, it is not in dispute that the two parties have previously had contract to provide the appellant with medical insurance since 14th April 2001. It is also not in contention that the contract was renewable on a yearly basis. The respondent renewed the contract in 2002 and 2003 but declined to renew it for the period dating 14th April 2004 to 13th April 2005 for the reason that the respondent was not compliant with the terms and conditions put in place for renewal. The respondent does not deny the fact that they sent an offer to the appellant to renew his membership before the 14th of April 2004. They however argue that the same was only done as a matter of protocol and the renewal was subject to fulfillment of the terms and conditions to be satisfied before renewal could be effected.
15. I have also looked at the evidence contained in the record of appeal. The membership cards were issued annually on 14th of April after expiry of the medical insurance cover. There was a renewal subscription fee for every year that was expected to paid and the same was elevated as at 1st January 2004 as per the letter dated 20th January 2004. On 31st January 2004, the appellant was sent a letter of offer by the respondent where he was required to renew his membership and subscription of kshs 60,550/=. On 6th April 2004, the appellant received a letter from the respondents who informed him that IT will not renew his membership based on the review of his medical file by their underwriters. It also returned his cheque.
16. The question arising therefore is whether there was contract that was breached. A contract constitutes of an offer, acceptance and consideration. According to the Text Book on Contract Law by Jill Poole, 10th Edition; ***An offer is an expression of willingness to contract on the specified terms without further negotiation, so that it requires only acceptance for binding agreement to be formed. Acceptance on the other hand is what turns specific offer, made with the intention to be bound, into an agreement. To constitute an acceptance, the offeree's unequivocal expression of interest and assent must be made in response to and must exactly match the terms of the offer and the matching acceptance must be communicated to the offeror in order to be effective...An offer can be deemed to be terminated if time has lapsed, upon death and revocation. ..In express revocation, the offeror is free to withdraw the offer anytime before the acceptance. It therefore follows that revocation of an offer after the time of acceptance is ineffective***
17. What then follows, is whether there was breach of contract. As stated above, an offer is deemed an expression of willingness to contract on the specified terms without further negotiation, once accepted, it becomes binding to the parties. The acceptance on the other hand is unequivocal expression of interest which matches the offer and is communicated to the offeror. In this case

there was an offer as I have stated above. The appellant responded by writing a cheque in the tune of kshs 60,550/= as proposed in the letter of offer. That to me is without a doubt an equivocal acceptance that matched the terms of the contract. The only way the offer can be terminated in this particular case is by revocation which revocation can only be valid if it was done before the acceptance. The refusal by the respondent to accept the cheque is unacceptable as revocation of an offer after the time of acceptance is ineffective. Furthermore, I note that the appellants cheque is dated 1st April 2004, this shows that the respondent had ample time to withdraw its offer since January but failed to do so only to reject the cheque at the last minute.

18. I also note that the argument advanced by the respondent that the medical insurance cover was not going to be renewed because he had turned 60 years old. It is evident that from the time this offer was advanced to the appellant in April 2001, he was already 60 years old, having been born on 27th September 1941. The membership was renewed twice after that despite his age. It is wrong to say that the contract was supposed to terminate automatically at the age of 60 years. The terms specifically state that ***"For new applicants and renewing members aged 50 years and above, membership/renewal shall only be effected upon receipt of satisfactory results of prerequisite medical tests ordered by the company. Membership shall terminate at the age of 70 years. "***
19. I have noted the respondents case that the medical underwriters advised against renewal of the membership hence another reason for refusing to renew the contract. This maybe the case but the fact that the respondent sent an offer to the appellant to renew the membership which he accepted and even sent the consideration to seal the agreement is enough to show the intention of the parties to contract. I therefore find that there was contract in place and parties should endeavor to perform their duties under the contract as legally obligated.
20. In view of the above, I find that the amount of Kshs 805,773.64/= should be paid by the respondent to the appellant being medical expenses that were incurred by the appellant in India.
21. The 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 with costs. The appellant is awarded costs of the appeal.

Dated, Signed and Delivered in open court this 28th day of October, 2015.

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent