



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS) Civil Appeal 556 of 2001**  
**AAR HELATH SERVICES LIMITED.....APPELLANT**  
**VERSUS**  
**JOYCE WAMUYU KAGIRI.....RESPONDENT**

*(Being an appeal from the judgment of Hon. Mr. C.O. Kanyangi,  
Senior Principal Magistrate, Milimani Commercial Court, delivered on  
19<sup>th</sup> September, 2001 in Civil Suit No.E.J.546 of 1999))*

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

1. This is an appeal arising from a suit which was filed in the Chief Magistrate's Court at Nairobi, by Joyce Wamuyu Kagiri, (hereinafter referred to as the respondent). She had sued AAR Health Services Ltd (hereinafter referred to as the appellant). The respondent was seeking judgment for Kshs.296,353.30, being amount paid by the respondent in respect of medical services to Dr. L.P. Were, Dr. E.N. Anyim, Dr. P.F. Hagembe, and Nairobi Hospital following her hospitalization at the Nairobi Hospital.
2. The respondent claims that during the year 1998, when she incurred the expenditure, she was a bona fide member and holder of the appellant's silver card. It was an express and or implied term of her membership that the appellant would pay expenses arising from her medical treatment. The appellant however, failed and or neglected to pay the medical expenses thereby rendering the respondent's suit necessary.
3. The appellant admitted that the respondent was a member of the appellant's Health Scheme, but denied that it was liable to the respondent for the medical expenses incurred, because the expenses were in respect of a pre-existing medical condition, which was excluded under the terms and conditions of the contract.
4. During the trial in the lower court, two witnesses testified in support of the respondent's suit. These were Dr. Philip Mwasege Mwangemi, and the respondent. Their evidence was that, the respondent was an employee of Barclays Bank. During the time of her employment she was covered by the bank under the AAR Service Scheme. In 1997 after the appellant retired from the bank, she obtained a medical cover through the appellant directly. She did not have any chronic problems at that time, and had not had any operation within the last 2 years.
5. Sometime in August, 1998, she fell ill. She went to see Dr. Mathenge who referred her to Dr. Hagembe. Dr. Hagembe treated her and referred her for some tests and thereafter had her admitted at Nairobi Hospital. The appellant's personnel visited the respondent at the hospital and wished her quick recovery. She was admitted between 15<sup>th</sup> September, 1998 and 25<sup>th</sup> September, 1998. She was re-admitted again on 1<sup>st</sup> October, 1998 and was operated on. She was discharged on 10<sup>th</sup> October, 1998. She paid the medical bills hoping to get a refund from the appellant. However, the appellant refused to pay the bill explaining that the doctor had indicated that she had a terminal illness. The respondent continued attending Dr. Hagembe's clinic. She later moved to Dr.

Quresh but Dr. Quresh was not able to get the treatment notes from Dr. Hagembe.

6. The respondent explained that in 1987 she had a thyroid operation. As at the time she applied for the appellant's membership, she had not had any operation done within the last 2 years immediately preceding her application. She maintained that she had no back problem and therefore the appellant had no good reason for refusing to settle her medical bills.
7. Dr. Phillip Mwasege Mwangemi, testified that between 12<sup>th</sup> August, 1993 to 9<sup>th</sup> January, 1996, he examined and treated the respondent for pain in the left ankle joint. He later referred her to a bone specialist. He maintained that the ankle joint pain could not have any relation to her back problem. He was not aware if the respondent had any degenerative back problem or spinal disease.
8. The appellant called two witnesses in support of its defence. These were Dr. Brigit Monda Ang'awa, and Dr. Peter Felix Hagembe. Dr. Ang'awa testified that the respondent applied for membership into the appellant's scheme through an application form, which she filled and signed. Dr. Ang'awa explained that the respondent was required to declare any previous medical condition which she had suffered from. She stated that the respondent never declared any previous medical condition.
9. The respondent was hospitalized in Nairobi Hospital on 16<sup>th</sup> September, 1998 under Dr. Hagembe, a consultant surgeon. The respondent who was admitted in the hospital as an emergency case, requested Dr. Hagembe to look after her. The appellant requested for a medical report from Dr. Hagembe who gave a report to the appellant in which he formed the opinion that the patient was suffering from a degenerative spinal disease. Since the respondent had not declared a previous medical condition, the appellant disclaimed liability on the grounds that the respondent had a pre-existing medical condition.
10. Each party's counsel filed written submissions urging the court to find in favour of his client. The respondent's submissions appeared to have been omitted from the record of appeal. No prejudice was however suffered as I was able to access them from the original record of the lower court. In his judgment, the trial magistrate found that it was not disputed that the respondent had an operation for simple goiter in 1987, and that there the goiter problem and the ankle problem were not related to the back ailment for which the respondent was hospitalized. The trial magistrate found that the respondent correctly answered the information required by the appellant. He held that the appellant acted wrongly in disclaiming liability to pay the respondent's hospital bill. He noted that the respondent disclosed all the information required of her except for technical information that the respondent could not have been expected to have known of. The trial magistrate therefore found the appellant liable to the respondent.
11. Being aggrieved by that judgment, the appellant has lodged this appeal raising 8 grounds as follows:
  - (i) The learned trial magistrate erred in law and in fact not giving any consideration to the crucial evidence of a material witness, Dr. Peter F. Hagembe, that the respondent had a recurrent degenerative disease of the spine (back problem) prior to signing the contract.
  - (ii) The learned magistrate erred in law and fact in finding that the respondent could not have disclosed material facts before entering into the contract of medical cover.
  - (iii) The learned magistrate erred in law and fact in finding that the respondent did not know that she was reasonably required to disclose that she had a degenerative spinal disease or (back problem) which existed five (5) years prior to the time of hospitalization at Nairobi Hospital.
  - (iv) The learned magistrate erred in law and fact in not finding that the respondent had made a misrepresentation of facts material to the contract by not disclosing that she had medical ailments which she should have disclosed in the medical declaration form forming part of the contract.
  - (v) The learned magistrate erred in law in not finding that the non-disclosure by the respondent of the fact that she had a thyroid disease for which she had an operation to treat simple goitre

way back in 1987, an ankle problem which she had been treated by her own doctor and back problem/degenerative disease of the spine, was a material omission to the contract and contrary to the principal of *uberrimae fidei*.

- (vi) The learned trial magistrate erred in law in finding that the respondent had proved her case to the required standard.
- (vii) The learned trial magistrate erred in law in not finding that the appellant was entitled to repudiate the contract with the respondent and refuse to pay for the medical bills incurred by the respondent while in hospitalization at the Nairobi Hospital for misrepresentation, fraudulent act and giving false information by the respondent when signing the contract.
- (viii) The learned magistrate's decision was against the weight of the evidence and contrary to the law of contract.

12. It was agreed by consent of both parties that the appeal be disposed off by way of written submissions which were duly exchanged and filed by the parties. For the appellant it was submitted that the respondent signed a contract which she read and understood. It was contended that the respondent was guilty of non-disclosure of material fact at the time of entering into the contract. It was submitted that the evidence of Dr. Hagembe showed that the respondent had a recurrent degenerative disease of the spine dating back to 5 years prior to her contract with the appellant. It was maintained that in accordance with the contract signed by the parties, the appellant was not liable for the respondent's condition as it was a pre-existing condition at the time of signing the contract. It was further contended that the respondent did not disclose material facts or withheld information, by not disclosing her previous ailments. It was pointed out that the contract between the appellant and the respondent being one of utmost good faith, the respondent was required to make full disclosure. It was argued that the effect of non-disclosure entitled the innocent party who in this case was the appellant to avoid the contract.

13. In support of their submissions, counsel for the appellant relied on the following cases:

- ***Kenindia Insurance Co. Ltd vs Kamithi & Another [2004] 2EA 115.***
- ***Gateway Insurance Co. Ltd vs Nganga Njuguna [2005] eKLR.***
- ***Motor Union Insurance Co. Ltd vs A.K. Ndamba [1963] EA 271.***
- ***Jubilee Insurance Co. Ltd vs John Sematenjo [1965] EA 233.***

The court was urged to find that the trial magistrate erred in failing to find that the respondent was entitled to repudiate the contract. Therefore, the judgment of the lower court should be set aside and the appeal allowed.

14. For the respondent it was noted that the major issue in the appeal was whether the respondent had a pre-existing medical condition at the time of signing the contract, and that if she had such a condition, whether she knew the existence of the same, and whether she had concealed that information. It was submitted that the respondent testified as to the true nature of her health at the time of signing the contract with the appellant. It was noted that the respondent was not a medical expert and could not therefore have known that the simple goiter she had suffered from many years back ought to have been declared in the application form as a thyroid disease.

15. It was pointed out that the defence witness, Dr. Peter Hagembe testified that there was no connection between the thyroid problem and the degenerative spinal disease, and also that there was no connection between the operation he undertook on the respondent and the simple goiter she had earlier suffered. In the circumstances, it was submitted that the trial magistrate could not have arrived at a different judgment. The court was therefore urged to dismiss the appeal.

16. In support of his submissions, counsel for the respondent relied on the following authorities:

- ***George Kanyi Kimondo & another vs UAP Provincial Insurance Ltd [2001] eKLR.***
- ***Margaret Nduta Kamithi & another suing as a personal representative of the Estate of***

***Stephen Kamithi, deceased vs Kenindia Insurance Co. Ltd [2000] eKLR.***

17. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial magistrate. I have also considered the judgment of the lower court, the memorandum of appeal, the submissions and the authorities cited. I do note that the bone of contention between the parties are two-fold. Firstly, as regards the information provided by the respondent on the appellant's membership application form in answer to question No.1, that is whether she had ever suffered from any of the listed medical conditions, to which the respondent answered in the negative in respect of all the listed conditions. Secondly, whether at the time of signing the membership form, the appellant was suffering from a pre-existing condition which she failed to disclose.
18. It was not disputed that the respondent had suffered from a goiter problem in 1987 which necessitated the respondent undergoing a thyroid operation. It was evident from the membership application form that one of the question to which the respondent answered in the negative, was whether she had ever suffered from a thyroid disease. The respondent's answer to the question was obviously not correct as the respondent admitted in her evidence, that she had had a thyroid operation 10 years ago.
19. The respondent's explanation for failing to disclose her thyroid illness was not that she did not understand the question, but that the question related to an operation or illness suffered within the last 2 years prior to the date of the application. However, a perusal of the membership application form, showed that the question to which the respondent answered in the negative was simply ***"Have you ever had any of the following medical conditions? (Ask your Doctor for assistance if needed)"***
20. That question did not relate to any specific period. It simply enquired whether the respondent had "ever" suffered any of the mentioned medical condition. It did not therefore matter that the respondent had suffered the condition 10 years before. The submission that the respondent may not have understood what thyroid disease is, is further overruled by the fact that the respondent was advised to seek the advice of her doctor, if the respondent did not do so then it can only be assumed that it was because she clearly understood the question and the conditions referred to.
21. Further, the respondent answered in the negative as to ever having suffered from arthritis. The respondents witness Dr. Phillip Mwasege Mwangemi however testified that between August, 1993 to January, 1996, she treated the respondent for chronic pain in the ankle joint and that an x-ray revealed mild arthritis changes. This was a problem for which the respondent had to see a bone specialist. Therefore the respondent must have understood what she was suffering from. I find that in response to question No.1 in the membership application form, the respondent failed to disclose the fact that she had previously suffered from a thyroid disease and arthritis and therefore she withheld material information.
22. As regards the issue as to whether the appellant's back ailment was a pre-existing medical condition at the time she signed the membership agreement, pre-existing medical condition is defined in the membership agreement application form as:  
***"one which a member knew or ought reasonably to have known existed prior to his becoming a member of AAR for the first time, or prior to upgrading from one service combination to another, whether or not declared."***
23. The respondent testified that in August, 1998, she was referred to Dr. Hagembe after she had consulted Dr. Mathenge. Dr. Hagembe who testified for the appellant, confirmed that he saw the respondent for the first time on 2<sup>nd</sup> September, 1998 at Nairobi Hospital where the respondent had been admitted with severe low back pain. The membership application form indicates that it was signed by the respondent on 29<sup>th</sup> April, 1998. That means that the respondent consulted Dr. Hagembe for the back ailment just about 4 months after signing the

membership agreement.

24. In his medical report, Dr. Hagembe added an addendum that from the laboratory and radiological evidence, he formed the opinion that the respondent's illness went back to more than 5 years duration. In his evidence before the court, Dr. Hagembe testified that his examination of the respondent revealed that she was suffering from a degenerative spinal disease. He reiterated his opinion that the respondent had had the back problem for not less than 5 years.
25. The respondent maintained that at the time she filled the membership application form, she did not have any problem with her back. Nevertheless, in view of the evidence of Dr. Hagembe, it is clear that that was not the position. The onset of the severe low back problem could not have come suddenly, given that it was a degenerative arthritic problem.
26. I find that the trial magistrate did not address his mind to the appellant's defence that respondent's back problem was a pre-existing condition. Had he done so, he would have concluded that it was a problem which the respondent either knew of or ought to have known of at the time of signing the membership application form. The respondent's back problem was thus a pre-existing condition. Under Clause 21 of the terms and conditions of the membership agreement, the appellant was not liable for any services arising from a pre-existing condition.
27. The upshot of the above is that the judgment of the trial magistrate cannot stand. It is accordingly set aside and substituted thereof with an order dismissing the respondent's suit. In view of the circumstances of this case, I find it appropriate that each party should bear its own costs. It is so ordered

Dated and delivered this 3<sup>rd</sup> day of March, 2010

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Githinji H/B for M/s Gichuki for the appellant

Gitonga H/B for A. Kimathi for the respondent

Eric - Court clerk