



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MOMBASA**

**Civil Case 360 of 2009**

**ROSE WANGARI NDEGWA .....PLAINTIFF**

**VERSUS**

**RESOLUTION HEALTH EAST AFRICA LTD .....DEFENDANT**

**R U L I N G**

The plaintiff, Rose Wangari Ndegwa, filed this suit against the Defendant M/s Resolution Health East Africa Limited on 19<sup>th</sup> October 2009 seeking the following reliefs:-

*I. A mandatory injunction restraining the Defendants either by*

*themselves, servants, agents, and/or employees from terminating the contract medical insurance scheme with the plaintiff or in any manner whatsoever refusing to provide the contractual cover for the period ending November 2009.*

*II. A declaration that the termination of the contract with the plaintiff is unlawful, mischievous, against natural justice null and void.*

*III. Costs of this suit and interest at court rates from the date of filing the suit.*

*IV. Any other or further Orders this Honourable Court may think to be fair to grant.*

The plaintiff claimed that:-

- At all material times, material to the suit the plaintiff was and is still a principal member of the insurance scheme

described as the Premier Plan with membership number 134145 - 01 with validity period running up to 30<sup>th</sup> November, 2009.

- The said membership was confirmed duly renewed on 26<sup>th</sup> June 2009 vide the defendants letter of even date and remains valid to date.
- The plaintiff on the 8<sup>th</sup> October 2007, at the recommendation of Dr. Okanga requested that the defendant facilitate and finances her treatment in India.
- The defendant vide its letter dated 9<sup>th</sup> October 2009 unlawfully and without any good reason unilaterally and un-procedurally terminated the said contract with the plaintiff without due consideration to the plaintiff's serious health condition which required immediate attention.
- The plaintiff's claim against the defendant is for a mandatory injunction restraining the defendant either by themselves, agent and/or employee and/or servant from any manner whatsoever refusing and failing to service the medical cover provided for in the contract confirmed 'vide' the Respondent's letter dated 26<sup>th</sup> June 2009 pending the hearing and determination of this suit.
- The purported termination of the contract with the Defendant is unlawful, malicious and against natural justice and shall seek a declaration that the same is null and void.
- The termination coming after request to the defendant to finance and facilitate the plaintiff's treatment in India is an excuse by the defendant to avoid fulfilling its obligation under the contract.
- The plaintiff has demanded that the termination be withdrawn and has duly notified the defendant of the intention to file suit but the defendant has declined to provide the services or remedy the situation.

Simultaneously the plaintiff filed an application seeking interim injunctive orders on inter alia the following terms:-

"1 .....

**2. That this Honourable court be pleased to issue a temporary injunction restraining the Defendant or its agents from any manner whatsoever interfering with the services due to the plaintiff or refusing to provide the plaintiff with the services under the medical cover contract dated 26<sup>th</sup> June, 2009 pending the hearing and determination of this application.**

**3. That this Honourable court be pleased to grant interim order that the service due to the plaintiff under medical cover provided by the Defendant under the contract be honoured in the following terms:**

**(a) That the defendant to immediately facilitate and provide finances to the plaintiff to enable her to proceed and secure the treatment recommended by Dr. J.B. Okanga at the SHALBY HOSPITAL/ASIAN HEART HOSPITAL c/o DR. VIVEK ALABADA in India for the right knee surgery and back spine treatment.”**

In her affidavit in support of the applicant depones that unless the respondent facilitates and finances the medical trip to enable her receive the required medical attention she may suffer irreparable damage or loss which may cost her, her life. She stated that she was bedridden and cannot help herself. In the certificate of urgency under which the application came to court, her counsel stated that:-

“...there is therefore grave threat to the applicant’s life as the ailment affects her work and has made her bedridden and continue to endanger her life unless drastic steps are taken to grant her the required treatment.

.....”

On the basis of the said claims, that the Applicant’s health was deteriorating and she was bed-ridden and needs urgent medical attention in India, the application was certified as urgent but no ex parte orders could be given since the main order sought was a mandatory injunction to compel the Respondent to perform its alleged part of the contract and to pay for the Applicant’s immediate airlift to India and treatment at the Shalby Hospital/Asian Heart Hospital by Dr. Vivek Alabada.

The Respondent opposed the application. It filed a Replying affidavit sworn by the Chief Executive Officer and Director Mr. Peter C. Nduati. The Defendant/Respondent also filed a defence and counterclaim immediately.

The Defendant’s case is that:-

-The plaintiff membership was duly and lawfully terminated on or before 7<sup>th</sup> July 2009 after notice to the plaintiff issued by the advocates on record for the defendant vide their letter dated 18<sup>th</sup> June 2009.

- As a result the claim as sought by the plaintiff under paragraph 7 of the plaint lacks basis in law at all.

The plaintiff is no longer a member of the Defendant’s medical scheme and therefore no contract between the plaintiff and defendant exists as the membership was terminated due to

the plaintiffs' non-payment of the sum of

Kshs.62,788.99.

The defendant also filed a counterclaim seeking inter alia a declaration that there is no contract between the plaintiff and the Defendant. The Defendant cites breach of contract as a ground for seeking this relief, namely, that the plaintiff failed to pay a sum of Shs.62,786.99 before renewal being amounts exceeded in her out-patient cover.

I have considered the application, the rival affidavits, the pleadings and submissions by Counsel.

It is common ground that the plaintiff was granted membership to the defendant's medical scheme on 4<sup>th</sup> December 2006 being membership No. 134145 – 01 for a period of one year and renewable. Under this health membership referred to as Premier Plan Cover, the plaintiff was entitled to medical indemnity cover up to a limit of expenses of Kshs. 5 million for hospital admissions (in-patient cover) and Shs.50,000/- to medical expenses incurred as out-patient. There was cover for critical illness of shs.500,000/-. The defendant renewed her membership for the year 2007 to 2008 and there is no dispute on this. After payment of all premiums the plaintiff duly enhanced her out-patient cover to Shs.75,000/-.

The defendant in paragraph 19 of the Defence/counterclaim states that subsequent to renewal of membership for the year 2008 to 2009 it established that the plaintiff had exceeded the limit of benefits available to her under the out-patient cover for the year 2006-2007 by Kshs.15,245.54 and the year 2007 – 2008 by Kshs.42,784.95, making a total of Shs. 62,786.99 which was demanded from the plaintiff.

It is clear and also undisputed that indeed the insurance cover for the year 2008 to 2009 also was renewed despite any outstanding amounts in respect of the out-patient cover. The plaintiff paid Shs.58,402 and was issued with receipt No. 1<sup>st</sup> December 2008.

A dispute arose regarding the alleged payments beyond the limits for the out patient cover. By a letter dated 27<sup>th</sup> April 2009 through her advocates, the plaintiff's questioned the suspension of her out-patient cover. The advocate demanded the following:

1. That an approval be given for the 2009 contract which has been duly paid.
2. That the contract in respect of 2009 covering inpatient and out patient be confirmed as fully paid in favour of the plaintiff.
3. That the questions raised on over utilization by the plaintiff be addressed and sorted out before any future demand is made from her.
4. That all suspensions against her in respect of out-patient be lifted.

The plaintiff threatened to take legal action within 7 days

unless the said issues were addressed. The dispute was not resolved. The defendant on its part wrote a letter dated 18<sup>th</sup> June, 2009 through its advocates Wanjiku Nduati & Co. Advocates demanding payment of the said shs.62,786.99. The letter inter alia said:

“

.....  
.....

Your client applied for membership on client's Medical Scheme on 1<sup>st</sup> December 2006, and the said

membership granted on 4<sup>th</sup> December 2006 under the terms. The said membership was renewed on every consecutive year and the current renewed ON 1<sup>ST</sup> December 2008.

Our instructions are that during membership 2006 – 2007 your client was entitled to out-patient benefits under the plan 50 scheme and during membership year 2007 – 2008 she had access to the benefit under the plan 75 scheme.

Our further instructions are that your client exceeded the limit under both the schemes by a total of Shs.62,788.99.

.....

Kindly note that therefore your client’s out-patient cover remains suspended until payment of the sum of Kshs.62,788,.99 which sum we have been instructed to demand, which we hereby do from your client.

Kindly further note to inform your client that in default of such payment within 7 days of your receipt hereof, our client shall proceed to terminate membership and the premiums shall be forfeited.

.....”

(Emphasis mine)

While the dispute was ongoing the plaintiff’s health condition deteriorated. On 5<sup>th</sup> October 2009, her doctor Dr. J. B. O. Okanga made a report of her condition. He said:-

“5<sup>th</sup> October 2009 MEDICAL REPORT

RE: MS. ROSE WANGARI NDEGWA Dob 1953

Ms. Ndegwa has been my patient since early 80’s. During this period she has mostly maintained good health generally. In 1987 she had total pneumonectomy of her left lung which had been completely destroyed by TB. This has not interfered in any way with her respiratory health.

In 2008 she began to feel pain in her knees and these have become progressive she has been seen by several eminent orthopaedic Consultants in Kenya and including Prof. Gakuo and Prof. Mulimba amongst others so far conclusive diagnosis has not been reached neither has effective treatment been formulated. The problem now threatens to immobilize her client.....

As her doctor who has seen this problem becoming progressively worse, I have recommended that Ms. Ndegwa seek further medical opinion outside Kenya. I have recommended that she goes to India for this.

On 7<sup>th</sup> October 2009, the plaintiff notified the Defendant of Dr. Okanga’s and recommendation. The Defendant acknowledged receipt of the said e-mail and said:

“we are in receipt of your e-mail and my team is following it up. We will revert to you with confirmation”

.....”

It was copied to Dr. Okanga.

On 9<sup>th</sup> October 2009, the Plaintiff e-mailed the defendant to thank them and told them that she could hardly walk.

On the same day the defendant sent the plaintiff sent an e-mail purportedly terminating her membership status: the Defendant wrote:-

“ .....

A letter dated 18<sup>th</sup> June 2009 written by our lawyer stated that your membership was to be terminated if no payment for the debt was made. This payment has not been received by Resolution Health Limited.

It is with regret to announce that we will not be able to service your membership as we have terminated your membership status.

.....”

I do hold that the letter of the defendant’s advocate dated

16<sup>th</sup> June 2009 gave a notice to terminate the Insurance Cover on the ground of non-payment of the amounts due on the out-patient cover. By the said time, the out-patient cover and its uses by the plaintiff had been suspended. The in-patient cover was still in force and operational

I do find and hold that if any termination of the insurance cover took place that it was on 9<sup>th</sup> October 2009.

The conditions, for the grant of an interlocutory injunction – were settled in the case of GIELLA –V- CASSMAN BROWN CO. LTD (1973) E.A. 358 AT P.360:-

“ .....

1. First an applicant must show a prima facie case with a probability of success.
2. Secondly on interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately be compensated by an award of damage.
3. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

At this interlocutory stage and without determining the

questions in dispute, it is my view on a prima facie basis that the Insurance cover constituting the contract between the plaintiff and Defendant still exists and is in force. It has been in operation since 1<sup>st</sup> December 2008 when it was renewed. It is due to expire on 1<sup>st</sup> December, 2009. Despite the disputes about the outstanding amounts on the out-patient cover there had been no termination of the entire cover and in particular the in-patient cover and the critical illness cover. While the out-patient cover was suspended, at no time was the in-patient cover and critical illness cover interfered with. They continued without any interruption. It is only when the defendant learnt that the plaintiff needed an emergency air-lift and medical attention in India and realized that such an expense would be substantial that they decided to terminate the entire insurance cover. Can they do this? I do not think so. The amounts claimed on the out-patient cover are disputed and the defendant does not have the final say on the matter. In fact, the matter has now been placed for determination by the court by the defendant through the counter-claim i.e. a declaration that there is no contract between the plaintiff and the defendant. The defendant had not sued for the amount claimed. For the court to give the declaratory order it must determine whether the amounts claimed were due and therefore if the termination was justified. As a result it is my view that in view of the counterclaim, the dispute still exists and the validity of the termination can only be resolved in this suit.

I find that the timing of the termination of the cover is instructive. It is clear that considering the

plaintiff's medical condition given and her being bed-ridden that her treatment in India will require hospitalization thereby bringing the in-patient cover into application. It is possible that this is what has catalyzed the termination - the realization that the defendants are faced to under-write a substantial medical expense or outlay. In my view it would be improper to terminate on such a ground or basis. The plaintiff is covered for shs.5,000,000/- for in-patient hospitalization and the defendant were under a duty in accordance with the terms and conditions of the contract to honour its obligations.

In passing, it is possible that the question of out-patient cover and disputes could be severable and the in-patient cover could still be in operation despite the debt dispute. I say this considering that the out-patient cover was suspended early this year while the in-patient cover was still operational until the purported termination.

I do hereby find that the plaintiff has shown a prima facie case with a probability of success.

The plaintiff is seriously sick and almost immobilized due to her pain as stated by the doctor. This is a matter that involves life and death. The doctor has recommended that she goes to India for treatment. The doctor and hospital have been identified. Time is of the essence.

If this application is not allowed the plaintiff will certainly suffer irreparable injury, which certainly cannot be compensated by an award of damages. If the applicant is paralysed permanently by the time of trial such injury will not be compensable in damages. The extreme possibility is also imaginable

If I were in doubt which I am not I would have decided in her favour on a balance of convenience. That is to say, it is easier, practical, fair and just for the defendant to pay for the plaintiffs medical treatment as envisaged under the insurance cover, a liability and responsibility created by contract and the risk

for which the insurance cover was taken happening rather than the plaintiff's condition getting worse to an irreversible and permanent degree.

I do realize that if I grant the orders here it would amount to this court granting mandatory injunctive orders which are compulsive. In this case it even involves financial disbursement and outlay.

Several decisions of the Court of Appeal have given guidance on the principles of applicable when approached with such a situation. In **Despina & Pontikos (1975) E.A. 38 at 57** the East Africa Court of Appeal said:

**“.....this court has held more than once that interlocutory mandatory injunctions should only be granted with reluctance and only in very special circumstances.”**

The court of Appeal held in **KAMAU MUCUHA –V- RIPPLES LTD NAI 180 OF 1992** held that mandatory injunctions will only be granted exceptionally and in the clearest cases. In the case of **MWANGI –V- BRAEBURN LTD EALR (2004) 2 E.A. CAK** the Court of Appeal approved and applied the decision of the English Court of Appeal in **LOCABAIL INTERNATIONAL FINANCE LTLD –V- AGRO-EXPORT (1988) IALL E.R. 901** where it was held:

**“a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendants had attempted to steal a march on the plaintiff. Moreover before granting a mandatory interlocutory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction.”**

I have considered the said principles and I am bound to apply them. I feel confident that the prima facie case established here is strong and that the plaintiff is most likely to succeed in her case.

This is a special case which requires urgency. It is a matter of life and death that cannot wait for trial. I proceed with the knowledge that the suit has yet to be heard and that there is a counterclaim by the defendant.

I have considered the principles laid down in the case of **CRYNE & ANON –V- GLOBAL NATURAL RESOURCES (1984) IAI ER.225** which was referred to by our Court of Appeal in **DIAMOND TRUST BANK LTD –V- JASWINDER SINGH ENTERPRISES EALR (1999) 2 E.A.** it was held that:

**“Where the grant or refusal of an interlocutory injunction will have the practical effect of putting an end to the action, the Court should approach the case on the broad principle of what it can do in its best endeavour to avoid injustice and to balance the risk of doing injustice to either party. In such a case the Court should bear in mind that to grant the injunction sought by the plaintiff would mean giving them judgment against the defendant without permitting the defendant the right to trial. Accordingly the established guideline requiring the Court to look at the balance of convenience when an interlocutory injunction do not apply in such a case, since whatever the strength of the case, the defendant should not be precluded by the grant of an injunction from disputing the plaintiff’s claim at the trial.”**

I have considered the defendant’s right to trial and I do give these mandatory injunctions herein with a heavy heart but

with a sense of assurance that the justice of this case applying all principles demands the grant of such an order. This is one special case that I think mandatory injunctions must have been intended for. Orders accordingly.

**Dated and delivered at Mombasa this 18<sup>th</sup> day of November 2009.**

**M. K. IBRAHIM**

**J U D G E**

Delivered in the presence of Oruko for Applicant

Mrs. Nduati for defendant