



Salim N. Yamani t/a Mbao & Allied Enterprises Limited v Jubilee Insurance Company of Kenya Ltd (Civil Appeal E830 of 2022) [2024] KEHC 8871 (KLR) (Civ) (18 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8871 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E830 OF 2022

AB MWAMUYE, J

JULY 18, 2024

BETWEEN

**SALIM N. YAMANI T/A MBAO & ALLIED ENTERPRISES
LIMITED APPELLANT**

AND

JUBILEE INSURANCE COMPANY OF KENYA LTD RESPONDENT

(Being an Appeal from the Judgment of the Hon. E.M. Kagoni (PM) delivered on 21st September, 2022 in Milimani CM Civil Suit No. 6609 of 2018)

JUDGMENT

1. The lower court's judgment that is the subject of this Appeal dismissed the Appellant's Amended Plaintiff dated 28th January, 2022 on the basis that the Appellant, then the Plaintiff, had not proved that the Respondent, then the Defendant, had breached the terms of the contract between the parties in the form of the J Biz Medical Insurance Policy.
2. The lower court's judgment dated 21st September, 2022 concluded with the following paragraph, which I quote verbatim:

“It is settled law that he who alleges must prove. Since the Plaintiff is the one alleging breach of contract, it was incumbent upon the Plaintiff to prove the breach alleged. For the Plaintiff to prove that the Defendant breached the contractual agreement between them he needs to show that gallstones are not a pre-existing condition or a chronic condition, and as such, the Defendant was entitled [read: obligated] to meet its medical costs. The Plaintiff submitted that gallstones are not pre-existing conditions. However, he failed to produce evidence that proved this argument. However, before the court there exists no evidence



proving or showing that gallstones is not a pre-existing or a chronic condition, and therefore the Defendant's breach. In light of this, the Plaintiff has failed to prove the Defendant breached the J Biz Medical Insurance Policy. In my view, this case needed expert opinion. It is only an expert in the medical field who would have authoritatively assisted the court and informed it whether gallstone is a chronic condition or not. Failure to call such a witness or producing any report which proving the disease is not a chronic condition was fatal."

3. The Appellant's Memorandum of Appeal dated takes issue with this finding on four grounds, which can be summarized as follows:
 - a. That the Learned Magistrate erred in law and fact by finding that an expert witness was required to establish whether gallstones are or are not a pre-existing or chronic condition;
 - b. That the Learned Magistrate erred in law and fact by finding that it was incumbent on the Appellant to prove the classification of gallstones when that burden lay with the Respondent;
 - c. That the Learned Magistrate erred in law and fact by determining the wrong issue and not determining that the correct one which was whether the gallstones were present before the contract was entered into by the Parties; and
 - d. That the Learned Magistrate erred in law and fact by failing to find that the Respondent had admitted that the Appellant did not have a pre-existing or chronic disease at the time of entering into the contract.
4. The Appellant's Written Submissions dated 25th June, 2024 flesh out those arguments. In response to and in opposition of the Appellant's Written Submissions dated 25th June, 2024 the Respondent filed written submissions dated 5th July, 2024. In those written submissions, the Respondent contends that:
 - a. Whereas the Respondent presented a witness who testified that the gallstones are a chronic condition and thus subject to the Kes. 500,000.00 limit that had been exhausted, the Appellant did not call any witness or adduce any evidence to rebut this position; and
 - b. With the Appellant having failed to prove a breach of contract by adducing testimony or evidence to show that gallstones are not either a chronic or a pre-existing condition as claimed by the Respondent, the Trial Court arrived at the correct decision.
5. It is the duty of this Court, sitting on appeal, to ascertain whether the Trial Court's reasons met the required legal and factual thresholds required to sustain its findings. In doing so, this Court, as the first appellate court, is called upon to re-evaluate the evidence in the Trial Court both on points of law and facts, and to thereafter reach its own findings and conclusions. The Court of Appeal for East Africa in *Peters V Sunday Post Limited*, [1958] at page 424 stated that:

"An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion."
6. I have reviewed the pleadings, testimony, and documents presented before the Trial Court and I can find no error of law or fact in the Learned Magistrate's Judgment. It was incumbent on the Appellant to prove that there had been a breach of contract by the Respondent, and he should have done so by providing medical or expert evidence on the classification of gallstones. This was made all the more necessary in light of the evidence of DW1, the Head of the Claims Department of the Respondent. While cross-examination of DW1 yielded some gains for the Appellant by securing DW1's admission



that gallstones may not have been a pre-existing condition, the Appellant failed to oust gallstones from being a chronic condition; which is the other aspect of the Kes. 500,000.00 sub-limit.

7. The Appellant bore the burden of proof to show on the balance of probabilities that the Respondent had breached the contract between the parties by finding that gallstones were a chronic or pre-existing condition when they were in fact not. This is made clear in Sections 107, 109, and 112 of the *Evidence Act*, on the burden of proof; which were extensively dealt with in *Anne Wambui Ndiritu V Joseph Kiprono Ropkoi & Another*, [2005] 1 EA 334, in which the Court of Appeal held that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”

8. The Learned Magistrate was clear that the classification of gallstones was a matter that to the Learned Magistrate’s mind required expert evidence or a medical report to be laid before the lower court. There are matters that are of general public knowledge or which a court can take judicial notice of; but the classification of gallstones does not fall in either of these categories. Simply put, the Learned Magistrate’s decision can be summed up as them stating that they needed information of a nature which the Appellant did not provide in order for the Trial Court to grant the prayers sought in the Amended Plaintiff. There is no error of law or fact in that, and thus the Appeal herein cannot succeed.
9. The Respondent has prayed for the costs of this Appeal. I note that the Respondent was awarded the costs of the suit, and I find that no reason has been presented before me as to why costs should not follow the event.
10. It follows, therefore, that this Appeal is not merited and it must be dismissed with costs to the Respondent; which I hereby do.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF JULY, 2024.

BAHATI MWAMUYE

JUDGE

In the presence of:

Ms. Natalie Obago h/b for Mr. John Mbaluto Counsel for the Respondent

No appearance for the Appellant

Mr Guyo, Court Assistant

