Cigna International Health Services (Formerly Vanbreda International) v Vaghella & another (Civil Appeal 483 of 2017) [2023] KEHC 17802 (KLR) (Civ) (11 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17802 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL 483 OF 2017

CW MEOLI, J

MAY 11, 2023

BETWEEN

CIGNA INTERNATIONAL HEALTH SERVICES (FORMERLY VANBREDA INTERNATIONAL) ..... APPELLANT

AND

MANISH DHANSUKH VAGHELLA ..... 1ST RESPONDENT

GOLDSTAR HEALTH CARE LIMITED ..... 2ND RESPONDENT

(Being an appeal from the ruling of E.A. Nyaloti, CM delivered on 31st August 2017 in Nairobi Milimani CMCC No. 7357 of 2016)

JUDGMENT

1. This appeal emanates from the ruling delivered on 31st August 2017 in Nairobi CMCC No. 7357 of 2016. The suit, founded on breach of a medical insurance contract, was brought by Manish Dhansukh Vaghella (the plaintiff in the lower court and hereafter the 1st Respondent) through the plaint dated 18th October, 2016 by which he was seeking general damages in the sum of Kshs.6,000,000/-, and special damages. The defendants named in the lower court were Cigna International Health Services (hereafter the Appellant) and Goldstar Health Care Limited (hereafter the 2nd Respondent) for an alleged.

2. It was averred that on 20th January 2011 the 1st Respondent entered into a medical insurance contract with the Appellant through an intermediary (the 2nd Respondent) to the effect that the Appellant and the 2nd Respondent would insure the 1st Respondent under the Medistar Policy, Elite Plan Type Policy Number MEDI1100022/00 pursuant to the special conditions of the 1st Respondent. Further that, during the subsistence of the policy, the 1st Respondent sometime in the year 2014 was diagnosed with heart disease, chronic gastritis, and high blood pressure among other conditions.

3. That upon the 1st Respondent presenting his claim for reimbursement of medical expenses incurred, the Appellant and the 2nd Respondent failed/refused to reimburse him, the Appellant further refusing to acknowledge the existence of the 1st Respondent's illnesses. This even though the 1st Respondent had faithfully paid his premiums. The 1st Respondent averred that the actions/omissions by the Appellant and the 2nd Respondent constituted a breach of the insurance contract in the manner particularized in the plaint, resulting in damage to 1st Respondent as particularized in the plaint.

4. Subsequently, the Appellant filed the Chamber Summons dated 17th November, 2016 (hereafter the application) seeking that the dispute between itself and the 1st Respondent be referred for arbitration in accordance with Clause 13.1.2 of the Medistar Insurance Policy (Medistar General Conditions) Policy Number MEDI1100022/00 (hereafter the policy contract) and that the costs of the suit and the application be borne by the 1st Respondent. The application was opposed by the 1st Respondent. Upon hearing the parties, the trial court by way of the ruling delivered on 31st August 2017 allowed the application and ordered the parties to subject themselves for arbitration in Nairobi within 14 days.

5. Aggrieved with the ruling, the Appellant preferred this appeal based on the following grounds in its memorandum of appeal: -

> " 1. That the learned magistrate erred in law and fact in holding that the arbitration between the parties be held in Nairobi and in doing so, failing to uphold the arbitration clause under the contract.
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> 2. That the learned magistrate erred in law in purporting to vary the contract between the parties.
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> 3. That the learned magistrate erred in law and in fact in failing to find that the parties had the right to choose the substantive and procedural law to govern them in case of a dispute as well as the place where such dispute was to be determined and in doing so, failing to uphold the sanctity of the contract.
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> 4. That the learned magistrate erred in law and in fact in failing to find that she had no jurisdiction to vary the contract between the parties or to impose a place for determination of the dispute not agreed to by the parties in the contract.
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> 5. That the learned magistrate erred in law and in fact in failing to exercise her discretion properly by ordering the applicant/appellant to pay the costs of the application, thereby failing to follow the express provisions of Section 27(1) of the *Civil Procedure Act* to the effect that costs of any action shall follow the event and failing to give reasons for such an order."

6. The appeal was canvassed by way of written submissions. Counsel for the Appellant argued that Clause 13.1 of the policy contract provided for the manner in which any dispute arising between the Appellant and the 1st Respondent would be resolved, and that Clause 13.1.2 specifically stipulated that any dispute arising out of the policy contract be resolved by way of arbitration to be held in Paris, France pursuant to the applicable rules on arbitration.

7. The Appellant therefore argued that the trial court erred by ordering that the dispute be referred to arbitration in Nairobi instead and cited the case of Kenya Alliance Insurance Co. Ltd v Annabel Muthoki Muteti [2020] eKLR where the court cited the decision of the Court of Appeal in East African Power Management Limited vs. Westmont Power (Kenya) Limited Civil Appeal No. 55 of 2006.

8. Counsel argued that the trial court ought to have referred the dispute to arbitration in accordance with the terms of the policy contract and by failing to do so, contravened the provisions of Section 10 of the *Arbitration Act*. Counsel further argued that the trial court had no jurisdiction to vary the terms of the policy contract concerning arbitration or at all and placed reliance on the case of Areva T & D India Limited v Priority Electrical Engineers & Another [2012] eKLR to buttress the point. It was also submitted by Counsel that a court cannot rewrite the terms of an agreement entered into between parties and that the parties are bound by the terms thereof.

9. Concerning costs, the Appellant's submission was that costs follow the event and hence the trial court erred in ordering the Appellant to bear the costs of the application despite allowing it. For these reasons, Counsel urged the court to allow the appeal.

10. The 2nd Respondent echoed the sentiments of the Appellant. In urging that the appeal be allowed, Counsel for the 2nd Respondent submitted that the terms of the arbitration clause were unambiguous regarding the place and manner in which the dispute ought to be resolved and the trial court had no basis to order that the matter be resolved at a different arbitration venue. He cited the case of Atlas Copco Customer Finance Ltd v Polarize Enterprises Limited [2014] eKLR where it was held that the court can only grant the orders sought and cannot depart therefrom.

11. Counsel further submitted that the trial court had no jurisdiction to vary the terms of the contract, particularly the arbitration clause, and in doing so, fell into error. Finally, Counsel echoed the sentiments of the Appellant that the trial court erred in ordering the Appellant to pay the costs of the application when in fact the said application had been decided in favour of the Appellant.

12. The 1st Respondent did not participate in the appeal.

13. The court has considered the documents and submissions filed in respect to the appeal. This is a first appeal. The Court of Appeal for East Africa set out the duty of the first appellate court in Selle v Associated Motor boat Co. [1968] EA 123 in the following terms:

> " An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of particular circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.
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> An appeal to this court from a trial by the High Court is by way of 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.
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> 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 demeanor of a witness is inconsistent with the evidence in the case generally."

14. An appellate court will not ordinarily interfere with a finding of fact made by a trial court unless such finding was based on no evidence, or it is demonstrated that the court below acted on wrong principles in arriving at the finding it did. See Ephantus Mwangi & Another v Duncan Mwangi Wambugu [1982 – 1988] IKAR 278).

15. In the present instance, it is not in dispute that at all material times a medical insurance contract subsisted between the Appellant and the 1st Respondent. It is also not in dispute that the essentially the application in the lower court by the Appellant was allowed by the trial court. The contentious issues for determination are whether the trial court erred in specifically ordering that the matter be referred to arbitration in Nairobi, and whether the trial court erred in ordering the Appellant to bear the costs of the application.

16. In support of the application in the lower court, the Appellant averred that the proper forum for resolving the dispute between the parties herein was arbitration in accordance with the terms of the policy contract. On his part, the 1st Respondent by his replying affidavit sworn on 9th December, 2016 stated while conceding the existence of the arbitration clause in the contract that the said clause violated his statutory rights to determine the rules and procedure of arbitration and therefore contravened the law. The 1st Respondent had therefore urged the trial court to declare the arbitration clause null and void and to dismiss the application with costs.

17. In its ruling, the trial court reasoned that both *the Constitution* and the *Arbitration Act* recognize arbitration as a form of alternative dispute resolution and that since the parties had not subjected themselves to the arbitration process, it would be prudent for the matter to be referred for arbitration. On that basis, the trial court directed the parties to subject themselves to arbitration in Nairobi within 14 days therefrom, and further directed that the Appellant do bear the costs of the application.

18. The arbitration clause in the contract 13.1.2 stipulated that:-

> " For any dispute arising out of or in connection with the contract, the policyholder and the insurer agree to set out their position in writing and meet in order to reach an amicable settlement of the dispute. The dispute will be heard in English. Any dispute for which an amicable settlement cannot be reached within three (3) months following the day on which either party first dispatched its position in writing, shall be settled in Paris under the Rules of Arbitration of the International Chamber of Commerce of Paris by one or more arbitrators appointed in accordance with these Rules. English law shall apply. Arbitration fees and expenses shall be shared equally between the parties unless otherwise awarded by the Arbitrator(s)." (Emphasis added)

19. From the foregoing, it is evident that the venue and terms of the arbitration had been clearly set out in the policy contract and that the parties herein had submitted themselves to the jurisdiction of Paris. In the absence of any cogent grounds, special and exceptional circumstances to support the averments by the 1st Respondent that the arbitration clause was in contravention of the law, it is the court's view that the trial court had no basis upon which to vary the terms of the said arbitration clause, and in particular the venue of arbitration.

20. In so finding, this court guided by the reasoning of the Court of Appeal in the case of East African Power Management Limited v Westmont Power (Kenya) Limited Civil Appeal No. 55 of 2006:

> " The arbitration clause in question is not in our view ambiguous. The intention of the parties to refer any dispute to arbitration is clearly expressed in the clause and as held by the Superior Court it was not only necessary to give effect to the intention of the parties but it was a mandatory duty on the part of the court. Again it has not been demonstrated that there is no agreement at all to refer to arbitration or that it is not valid. Thus, the court's limited role in intervening where parties have agreed to refer a matter to arbitration is set out in section 10 of the *Arbitration Act* as follows: "Except as provided in this Act no court shall intervene in

matters governed by this Act." The equivalent to Article 6 of the Model Law upon which the Kenyan provision is based reads: "In matters governed by this Law, no court shall intervene except where so provided by this Law." In short, the role of the court as captured in the 1995 Act is a facilitative role."

21. Further the Court of Appeal in the case of Areva T & D India Lmited v Priority Electrical Engineers & Another [2012] eKLR reiterated the foregoing in holding that:

> " I fully agree that the rule that the parties should be held to their bargain should only be departed from in a special and exceptional case. Here, in the case before us, as I have pointed out, no such special and exceptional circumstances have been established to depart from the contract that the parties had freely and voluntarily agreed upon. The learned Judge's conclusion that his Court "would fail in its duty to do justice to the parties if it allowed an unjust clause in an agreement to be enforced by one party to the detriment of the other party where clearly there is no legal or logical justification" is based on no evidence that we can discern from the record, and the Judge's order that the arbitration be conducted by "a single arbitrator to determine the dispute between them within fourteen (14) days of today's date failure of which the chairman of The Institution of Engineers of Kenya shall appoint a single arbitrator to determine the dispute" is without jurisdiction."

22. In directing that arbitration proceedings be conducted in Nairobi, the trial court essentially purported to re-write the terms of the policy contract without reasonable justification thus acted beyond its jurisdiction. It is trite law that a court cannot rewrite the terms of a contractual agreement as that would be contrary to the general legal principle that parties are bound by the terms of contracts freely entered into.

23. This principle was affirmed by the Court of Appeal in the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR:-

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge."

24. In view of all the foregoing, it is patently clear that the trial court fell into error in determining that the dispute be referred for arbitration in Nairobi, a venue other than that agreed upon between the parties.

25. Concerning the issue of costs, it is trite law that costs follow the event, as acknowledged by the Court of Appeal in the case of Attorney General v Halal Meat Products Limited [2016] eKLR as follows:

> " Generally, costs ought to follow the event unless the court otherwise orders for good reasons. The Supreme Court in Jasbir Singh Rai & 3 Others -vs- Tarlochan Singh Rai & Others (2014) eKLR held:
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> > "It is clear that there is no prescribed definition of any set of "good reasons" that will justify a Court's departure, in awarding costs, from the general rule, costs-follow-the-event. In the classic common law style, the Courts have proceeded on a case-by-case basis, to identify "good reasons" for such a departure."

26. In the present instance, the trial court did not assign reasons for finding the Appellant liable to pay the costs of the application despite granting the Appellant's application. The said order was therefore

an unjustified departure from the general legal principle regarding the awarding of costs, and cannot stand.

27. The upshot therefore is that the appeal is merited and is hereby allowed. The court hereby sets aside the lower court's ruling in respect of the Chamber Summons dated 17th November, 2016 and substitute therefor an order allowing the application in its entirety, with costs to the Appellant and which costs are to be borne by the 1st Respondent. In the circumstances of the appeal, each party will bear its own costs in the appeal.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 11TH DAY OF MAY 2023.

C.MEOLI

JUDGE

In the presence of:

For the Appellant: Mr. Rao h/b for Mr. Muthui

For the 2nd Respondent: Mr. Kimani h/b for Ms. Akong'a

C/A: Carol