GK (Suing as the Next Friend and Father to WKK-A Minor) v Hillcrest Investments Limited t/a Hillcrest International Schools (Civil Case E116 of 2021) [2023] KEHC 19211 (KLR) (Civ) (22 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19211 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE E116 OF 2021

CW MEOLI, J

JUNE 22, 2023

BETWEEN

GK (SUING AS THE NEXT FRIEND AND FATHER TO WKK-A MINOR) ..... PLAINTIFF

AND

HILLCREST INVESTMENTS LIMITED T/A HILLCREST INTERNATIONAL SCHOOLS ..... DEFENDANT

JUDGMENT

1. The present suit was instituted by George Kagucia (hereafter the Plaintiff) in his capacity as the next friend and father to WKK (hereafter the minor) against Hillcrest Investments Limited T/A Hillcrest International Schools (hereafter the Defendant) by way of the plaint dated May 18, 2021. Therein, the Plaintiff sought general and special damages in the sum of Kshs 17, 994, 943. 29, costs of the suit and interest thereon. The claim was founded on the tort of negligence.

2. The Plaintiff averred that at all material times, the minor was a student at the Defendant's Hillcrest School situated in Karen and that on the 19th day of May, 2018 the Defendant organized for a Parent Rep Family Fun Day during which the Defendant owed a duty of care to ensure the safety of all the students taking part in the Fun Day. That on the material day, the minor; while playing with fellow students tripped and fell on exposed electric cables affixed on an inflatable slide, causing her serious injuries. The Plaintiff attributed the injuries sustained by the minor to negligence on the part of the Defendant, particularized as follows:

> "Particulars of Negligence

i. Installing the wet inflatable slide with exposed electric cables exposing the students to clear and imminent danger of electrocution;

ii. Failing to inspect the wet inflatable slides and ensuring that all electric cables were sealed and secured;

iii. Failing to provide adequate supervision while the students were playing;

iv. Failure to implement safety and precautionary measures when contracting third parties and inspecting all the equipment installed and procured for the Family Fun Day; and

v. Failing to adhere to and implement the safety standard manuals of schools in Kenya as published by the ministry of education".

3. The Plaintiff pleaded in the plaint that following his injuries, the minor was rushed to Karen Hospital where she received emergency treatment, before being transferred to Nairobi Hospital for specialized treatment for injuries including burns to gluteal regions, lumbar and right scapular area; deep dry eschar in all the burn areas, and eventual permanent incapacity assessed at 50%.

4. The Plaintiff further pleaded that due to intense pain, the minor was re-admitted at Nairobi Hospital between June 11, 2019 and June 25, 2019 to undergo further treatment and surgery. It was averred that the Plaintiff also sought treatment for the minor in the United States (US) causing thereby incurring expenses amounting to the respective sums of Kshs 4, 372, 960.23 and Usd 87,700 and that the injuries sustained brought about trauma, loss and damage to the minor.

5. The record shows that the parties recorded a consent vide the consent letter dated June 14, 2022 and which was adopted as an order of the court on October 11, 2022. The consent was both in respect to liability and part of the damages, in the following manner:

1. Liability 90: 10 in favour of the Plaintiff

2. General damages - Kshs 5,000,000/- less 10% (Kshs 500,000/) = Kshs 4,500,000/-

3. Future medical expenses - Kshs 4,000,000/- less 10% (Kshs 400,000/-) = Kshs 3,600,000/-

4. Undisputed special damages - Kshs 15,384,192.34 plus 50% interest @14% court rate from the date of filing suit (Kshs 1,076,893.40) totaling Kshs 16, 461,085.74 less 10% (Kshs 1,646,108.55) = Kshs 14, 814, 977.2

   Total aggregate of damages awardable to the Plaintiff = Kshs 22, 914, 977.24 to be settled by the Defendant within 30 days from the date of filing of the consent

5. Disputed special damages - Kshs 2,758,628.19 to be determined by the court."

6. In view of the foregoing, the remaining issue pending for determination by the court was the disputed special damages, which the parties addressed by consent, through written submissions. To support the disputed special damages sought, counsel for the Plaintiff argued that the same were pleaded and proved. And that notwithstanding the fact that the disputed sum of Kshs 2,758,628.19 was paid by various insurance companies on behalf of the Plaintiff, he was entitled to recover the amount from the Defendant because he had at all material times paid premiums to the respective insurers.

7. To buttress the above submissions, counsel cited various authorities, including *Jackson Onyango Aloo v Jumba Aggrey Idaho & 2 others* [2019] eKLR and *Leli Chaka Ndoro v Maree Ahmed & S.M. Lardhib* [2017] eKLR. It was contended that Section 43 of the National Hospital *Insurance Act* (the Act)

which provides for the recovery of compensation/damages arising out of injuries or illnesses, does not preclude the Plaintiff from seeking compensation for the sums paid out by National Hospital Insurance Fund (NHIF) to Nairobi Hospital in respect of the minor's treatment. In conclusion, counsel contended that the Plaintiff is therefore entitled to the sums collectively paid by Sanlam Insurance, UAP Insurance and NHIF in settlement of the minor's hospital bills for the injuries resulting out of negligence on the part of the Defendant, plus interest thereon.

8. In opposing the special damages sought in the sum of Kshs 2,758,628.19 counsel for the Defendant submitted that the Plaintiff did not prove that the said sums were expenses directly incurred by the Plaintiff towards the medical treatment of the minor. That these sums were instead paid out by the stated insurance companies in settlement of part of the hospital bills at Nairobi Hospital and Karen Hospital, respectively.

9. Counsel therefore submitted that the Plaintiff is not entitled to the disputed special damages. He cited *Forwarding Company Limited & another v Kisilu; Gladwell (Third party)* (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR) and *Tijan Kisilu v Bonfide Clearing and Forwarding Company Limited & 2 others* [2018] eKLR to argue that a party cannot claim compensation against payments made by insurance companies towards medical bills unless the insured is also the person who paid the premiums, and is enjoined in the suit.

10. Counsel also submitted that Section 43 of the NHIF Act does not entitle the Plaintiff to seek compensation against hospital bills which were settled by NHIF as held in *John Mwangi Munyiri & another v Paul Wachira Njuguna* [2020] eKLR and *Rosemary Kaari Murithi v Benson Njeru Muthitu & 3 others* [2020] eKLR. The court was therefore urged to dismiss the claim for the disputed special damages.

11. The Court has considered the pleadings, the material on record and the parties' respective submissions. As earlier mentioned, the parties entered into a consent on liability and the general damages, as well as part of the special damages. The remaining issue for determination by the court is whether the Plaintiff is entitled to the disputed special damages in the sum of Kshs 2,758,628.19 admittedly paid by various insurance companies in settlement of the minor's hospital/medical bills broken down as follows:

    a. Nairobi Hospital Interim bill dated June 3, 2018 for the minor's admission from May 20, 2018 to June 3, 2018

        i. Kshs 1,883, 696.37 paid by Sanlam Insurance

        ii. Kshs 56,000 paid by NHIF

    b. Nairobi Hospital Invoice No. MHIPB0615428/18 dated June 25, 2018 for the minor's admission from June 11, 2018 to June 25, 2018

        i. Kshs 646, 538.91 paid by Sanlam Insurance

        ii. Kshs 56,000 paid by NHIF

    c. Karen Hospital Bill No. BL754204 in the sum of Kshs 185,371.90 paid by Sanlam Insurance

    d. Aga Khan University Hospital Invoice No. HFB30136/18 in the sum of Kshs, 104, 481/- paid by UAP Insurance on December 20, 2018.

12. This being a claim under the head of special damages, it is trite law that special damages must both be specifically pleaded and strictly proved. See the decision of Court of Appeal in *Hahn v Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717 and 721 where the learned judges held that:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

13. Concerning the question on whether the Plaintiff is entitled to receive compensation on the sums paid to the respective hospitals by the various insurance companies, the court takes guidance from the decision of the Court of Appeal in the case of *Forwarding Company Limited & another v Kisilu; Gladwell* (Third party) (Civil Appeal 344 of 2018) [2022] KECA 96 (KLR):

> " On whether the respondent was entitled to the sums paid to offset the medical bills by the insurance company, the respondent appears to be invoking the doctrine of subrogation. The word subrogation is defined by Black's Law Dictionary 9th Edition at page 1563 as follows: "The substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies or securities that would otherwise belong to the debtor."
>
> The principle of subrogation applies where there is a contract of insurance. If the "insured risk" takes effect and the insurer settles the insured's claim, then the insurer is entitled to diminish the loss suffered by its insured by seeking compensation from the party who caused the loss. See Leli Chaka Ndoro v. Maree Ahmed & S.M. Lardhib [2017] eKLR.
>
> In "General Principles of Law" 6th edition (E.R. Hardy Ivamy), the author states as follows at page 493: -"In the case of all policies of insurance which are contracts of indemnity the insurers, on payment of the loss, by virtue of the doctrine of "subrogation' are entitled to be placed in the position of the assured, and succeed to all his rights and remedies against third parties in respect of the subject-matter of insurance. Thus, subrogation applies to marine insurance policies and to many non-marine policies, e.g. a fire, motor, jewelry, contingency insurance providing cover against non-receipt of money within a given time, fidelity, burglary, solvency, insurance of securities, and an export credits guarantee policy. But it does not apply to life insurance nor to personal accident insurance, for these are not contracts of indemnity."
>
> In "Bird's Modern Insurance Law" (7th edition) - John Birds, the author states as follows in chapter 15 under"subrogation": -"This chapter is concerned with the fundamental correlative of the principle of indemnity, namely, the insurer's right of subrogation. Although often in the insurance context referred to as a right, it is really more in the nature of a restitutionary remedy. The "fundamental rule of insurance law" is "that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified". A number of points arise simply from that oft-cited dictum and the doctrine of subrogation has many ramifications that must be examined. It is convenient first, though, to consider some general points-: subrogation applies to all insurance contracts which are contracts of indemnity, that is, particularly to contracts of fire, motor, property and liability insurance. It does not apply to life insurance nor prima facie to accident insurance." (Emphasis added)

14. Having outlined the law, he Court of Appeal proceeded to state as follows regarding the facts of the case before it:

> " In this case, the respondent's father (PW2) testified that that his insurer paid a sum of Kshs5,318,755.00 towards the doctor's fees and hospital bill for the respondent. PW2 testified that he was claiming this money as the respondent's father and that he was entitled to the same although the money was paid was by his insurance company. The trial court after in its judgment stated as follows:
>
> > "In this case the plaintiff did not pay any premiums for the medical insurance, it was his father, PW2 who claimed that his insurance company paid some medical expenses and therefore PW2 or Catherine Kisenga under whose name some bills were issued should have been enjoined to this suit to claim for such reimbursement of special damages incurred on their dependant/son-the plaintiff herein and settled by the insurance company."

We agree with the finding of the trial court on this issue. It is PW2 who paid premiums to the insurance company and not the respondent and therefore it is PW2 who could have claimed reimbursement of the same. PW2 was not a party to the suit but a witness of the respondent. Therefore, there could not have been any basis for the trial court to award the entire sum of Kshs5,318,755.00 paid by PW2's insurer.

We have looked at the Ndoro case (supra) cited by the respondent and note that the circumstances therein are distinguishable from those in the instant case. In the Ndoro case, it was the appellant who had taken out an insurance policy and paid for the premiums. In this case, it is not the respondent but his father who took out the insurance and paid the relevant premiums. Therefore, in the present case even if the respondent's father would have been entitled to any form of reimbursement, the court could not have had any legal basis of awarding the same as he was not named as a party to the suit. We accordingly make the finding that the respondent is not entitled to the sum of Kshs5,318,755.00 paid by his father's insurance company."

15. The court examined the medical bills which were produced by the Plaintiff by consent of the parties. In respect to the interim bill dated 3.6.2018 issued by Nairobi Hospital for the sum of Kshs 1,883,696.37, the same does not indicate who the principal member insured in that instance (Sanlam General Insurance Company Limited) was. The court further examined the final bill issued by Nairobi Hospital on 25.6.2018 for the sum of Kshs 667,538.91 in respect to the minor and similarly covered by Sanlam General Insurance Company Limited. The principal member indicated therein is Rose Kagucia and not the Plaintiff herein.

16. The Plaintiff also produced various email correspondences between the said Rose Kagucia and the Nairobi Hospital in that respect. Upon its perusal of the bills issued by Karen Hospital and the Aga Khan Hospital for the respective sums set out earlier on, the court found no reference to the Plaintiff as the insured of the insurance companies which settled the respective bills. It is apparent that the insurance policies in place had been taken out by Rose Kagucia.

17. Moreover, there is no material on the record to indicate that the Plaintiff paid the premiums towards the various medical policy covers. Concerning the NHIF payments made, the Plaintiff did not tender any credible evidence to prove that the NHIF membership relied on by the minor was in his name or that he was the one who paid premiums towards the cover.

18. In view of all the foregoing circumstances and applying the principles set out by the Court of Appeal in *Forwarding Company Limited & another v Kisilu; Gladwell (Third party)* (supra), the court is of the view that the Plaintiff had no proper basis for claiming reimbursement on the monies paid by the various insurance companies, in the absence of proof of payment of the premiums or any documentation to demonstrate that it is the Plaintiff who took out any of the medical covers.

19. Consequently, the court declines to grant the disputed special damages sought herein and the claim for special damages in the sum of Kshs 2,758,628.19 must fail. The Plaintiff is however entitled to the total sum of Kshs 22,914, 977.24 pursuant to the consent order recorded on October 11, 2022 in adoption of the parties' consent in the letter dated June 14, 2022.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 22ND DAY OF JUNE 2023.

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr. Chege h/b for Mr. Issa

For the Defendant: Mrs. Ochieng

C/A: Carol