



Nganga (Suing as the Legal Representative of the Estate of Catherine Wandia Kabinga - Deceased) v Jubilee Insurance Company of Kenya Limited & another (Civil Case 146 of 2018) [2024] KEHC 15254 (KLR) (Civ) (4 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15254 (KLR)

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

CIVIL

CIVIL CASE 146 OF 2018

AN ONGERI, J

DECEMBER 4, 2024

BETWEEN

DAVID KARIANJAH NGANGA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CATHERINE WANDIA KABINGA - DECEASED) PLAINTIFF

AND

THE JUBILEE INSURANCE COMPANY OF KENYA LIMITED 1ST DEFENDANT

THE KENYA HOSPITAL ASSOCIATION T/A THE NAIROBI HOSPITAL 2ND DEFENDANT

JUDGMENT

1. Catherine Wandia Kabinga (now deceased) filed this suit on 21/6/2018 together with an application under certificate of urgency of even date seeking a mandatory injunction to compel the 1st defendant to settle her outstanding bill at the 2nd defendant hospital.
2. In the alternative, the deceased sought a mandatory order to compel the 2nd defendant to release and discharge her to enable her seek urgent medical treatment elsewhere.
3. However, going by the record, it is averred that the deceased eventually passed away on 11/12/2019 during the pendency of this suit. Consequently, her husband David Karianjahi Nganga in his capacity as the legal representative of her estate, took over the matter and was substituted as the plaintiff by way of the further amended plaint dated 6/11/2023.



4. The Plaintiff avers in the further amended plaint that on or about 27/05/2018, the deceased who was said to be suffering from a medical condition known as Tuberculosis was admitted at the Nairobi Hospital (the 2nd Defendant's facility) with the prior recommendation, approval and consent of the 1st Defendant.
5. That the 2nd Defendant carried out further medical tests and subsequently informed the deceased on 8/06/2018 that she was suffering from Hodgkin's disease.
6. That the deceased sought to be discharged to enable her obtain a second medical opinion and commence treatment and immediately informed the 1st Defendant to settle her outstanding hospital bill which had accumulated to the sum of Kshs.547.172.00 (exclusive of the doctor's bills) as at 11/06/2018 but the 1st Defendant has declined to do so.
7. That as at the time of filing this suit, the deceased was still detained at the 2nd Defendant's facility where she was admitted on the express instructions of the 1st Defendant who has failed, refused and/or neglected to settle the outstanding hospital bill which as at June 20, 2018 stood at Kshs.749.161.00 (exclusive of the doctor's bills).
8. The 1st Defendant refused to honor the deceased's claim on grounds that the claim was non-payable as there is a waiting period of one year for the diagnosis made by the 2nd Defendant despite the fact that at the time of admission the initial diagnosis made by the 2nd Defendant in respect to the deceased was for tuberculosis.
9. The Plaintiff further avers that the 1st Defendant misled and fraudulently made the deceased believe that they would settle all medical bills and is guilty of material non-disclosure by recommending and expressly authorizing the deceased's admission at the 2nd Defendant's medical facility when they knew or ought to have known that they would not pay the medical bills if the disease was ultimately found to be subject of a waiting period.
10. The Plaintiff further avers that the 2nd Defendant is also guilty of fraud and collusion with the 1st Defendant in that at the time of admission to Nairobi Hospital from their Nairobi Hospital Out-patient clinic situated at Galleria Mall the 2nd Defendant knew or ought to have known that the medical bills will would be paid or settled by the 1st Defendant and therefore the deceased was admitted to the Nairobi Hospital without being subjected to pay a deposit as is required by any other patient who is not covered with a Health Insurance Medical Provider.
11. That the detention of the deceased at Nairobi Hospital against her will by the 2nd Defendant was an infringement of her fundamental right to human dignity under Article 28 and right to freedom and security of the person as provided under Article 29 of [the Constitution](#) of Kenya.
12. The Plaintiff avers that the deceased's medical condition known as Hodgkin's disease continued to rapidly deteriorate due to lack of provision of medical services whilst she was detained by the 2nd Defendant's facility yet she ought to have already commenced her Chemotherapy sessions to arrest the disease from spreading further and in fact on 20/06/2018 the deceased was informed by the medical attendants of the 2nd Defendant that the cancer was now spreading to the lungs.
13. The Plaintiff further avers that the denial of medical treatment for such a serious ailment such as Hodgkins disease and the denial of medical treatment for the same is an infringement of her/the deceased's fundamental right to medical treatment under Article 43 of [the Constitution](#) of Kenya and Sections 7, 8 and 12(2) of the [Health Act](#) No. 21of 2017.



14. The Plaintiff's claim against the 1st Defendant is that the 1st Defendant is liable to pay any hospital bill which is currently outstanding with the 2nd Defendant.
15. That despite demand being made and Notice of intention to sue having been issued, the 1st Defendant has failed, refused and/or ignored to pay the said sum due to the Plaintiff.
16. The Plaintiff is therefore seeking the following prayers in the further amended plaint:
 - i. A declaration that the 1st Defendant is duty bound to honour the terms of Policy No. INDO112736 between the Plaintiff and the 1st Defendant and specifically that the 1st Defendant is liable to clear all the outstanding charges levied by the 2nd Defendant in respect to the Plaintiff's admission and treatment at The Nairobi Hospital.
 - ii. A declaration that the Plaintiff's fundamental rights and freedoms as enshrined under Articles 28 and 29 of the Constitution of Kenya were contravened and infringed by the 2nd Defendant.
 - iii. A declaration that the Plaintiff's fundamental rights to medical treatment as enshrined under Article 43 (1) (a) and Sections 7, 8 and 12 (2) of the Health Act, 2017 were contravened and infringed by the 2nd Defendant.
 - iv. An award of general, exemplary and aggravated damages under Article 23 (3) of the Constitution of Kenya for the violations of the Plaintiff's rights by the 2nd Defendant.
 - v. An award of damages for breach of contract by the 1st Defendant.
 - vi. Costs of this suit.
 - vii. Any other relief that this Honourable Court may deem fit to grant.
17. The 1st and 2nd Defendants filed their statements of defence separately. The 1st Defendant on the one part filed its statement of defence dated 31/07/2018 and amended on 30.10.2023 (the amended defence). The 2nd defendant on the other part filed a defence and counterclaim dated 28/10/2019 and amended on 19/02/2024. In its counterclaim, the 2nd Defendant sought the sum of Kshs. 352,777.97 being the sum allegedly outstanding on the medical bill incurred by the deceased and which remains unpaid.
18. At the hearing of the suit, the Plaintiff who testified as PW 1 adopted his witness statement dated 8/04/2021 in which he states as follows;
19. That the deceased who was his wife and the Plaintiff originally, passed away, a result of which he sought and obtained a Grant of letters of administration ad litem on 1/12/2020 to enable him proceed with the suit on her behalf. He restated the averments in the pleadings that the deceased was at all material times insured by the 1st Defendant under the latter's Jubilee Active Health Scheme Policy No. INDO112736-Membership No. 11447290 commencing 23/10/2017.
20. That on 26/05/2018 he accompanied the deceased to the 2nd Defendant's Galleria Mall Branch Clinic for treatment, as she had developed breathing difficulties and coughing.
21. That on the following day, they returned to the abovementioned Clinic to receive the test results, which results revealed that the deceased was suffering from tuberculosis.
22. That the above diagnosis led to the admission of the deceased at the 2nd Defendant's main facility for further treatment, with the prior recommendation, approval and consent of the 1st Defendant, upon



- an undertaking that it would settle in full all hospital related expenses for the inpatient treatment of the deceased.
23. The Plaintiff stated that subsequent medical tests revealed that the deceased was in fact suffering from Hodgkin's disease, following which they sought to have the deceased discharged from the 2nd Defendant's facility to enable them seek a second medical opinion.
 24. That nevertheless, the 2nd Defendant issued them with an outstanding hospital bill to the tune of Kshs. 547,172/- as at 11/06/2018, excluding doctors' charges.
 25. That at the time of filing suit, the 1st Defendant had failed and/or neglected to settle the hospital bill raised by the 2nd Defendant and which had risen to a sum of Kshs. 749,161/- as at 20/06/2018; despite the said Defendant having previously indicated that it would settle in full the deceased's medical expenses.
 26. That in view of the foregoing, the 1st Defendant was guilty of fraudulent misrepresentation.
 27. Similarly, the Plaintiff stated that the 2nd Defendant is guilty of fraud and collusion with the 1st Defendant owing to the fact that the former ought to have known that the latter would or ought to have settled the deceased's medical bill at the time of admission.
 28. The Plaintiff equally faulted the 2nd Defendant for detaining the deceased for a prolonged period of time without allowing her to receive the necessary treatment for her Hodgkin's diagnosis.
 29. That by the time she was finally discharged, her condition had deteriorated.
 30. That the deceased unfortunately died on 11/12/2019 following her battle with the cancer.
 31. The 1st defendant called Kenneth Anunda (DW 1) as their witness. DW 1 produced his witness statement dated 30/10/2022 as his evidence in chief.
 32. DW 1 said as follows in the said statement; That he was at all material times an employee of the 1st Defendant, working as the Deputy General Manager-Operations Department.
 33. The witness stated that on 14/09/2017 the deceased applied for a retail medical policy with the 1st Defendant, which application was accepted by the 1st Defendant vide a letter dated 26/09/2017 on the terms that the deceased would be required to pay a premium sum of Kshs. 59,406/- within seven (7) days thereof.
 34. That subsequently, the deceased was issued with the policy.
 35. The witness further stated that pursuant to the policy, the 1st Defendant undertook to settle all non-recoverable medical and surgical expenses incurred by the deceased and her dependants, arising from accidental bodily injuries and/or illness/disease within the period of the policy, subject to the provisions and exclusions contained therein.
 36. That as pertains to the inpatient cover, the 1st Defendant was to cover all medically necessary and eligible treatment and service provided to the deceased.
 37. It is his averment that on 27/05/2018 the deceased visited the 2nd Defendant's facility for treatment, where initial tests revealed a tuberculosis diagnosis, the result of which the relevant physician recommended admission and treatment of the deceased, pending further investigations.
 38. That consequently, the deceased sought pre-authorization for admission and medical treatment from the 1st Defendant, which was approved on the basis of the provisional diagnosis.



39. That resultantly, the deceased received treatment for tuberculosis at the 2nd Defendant's facility, between 27/05/2018 and 13/06/2018, which treatment cost a sum of Kshs. 556,931.08.
40. That on 19/10/2023 the 1st Defendant paid the said sum to the 2nd Defendant pursuant to a partial settlement agreement dated 11/10/2023.
41. That during the intervening period, the deceased was diagnosed with Hodgkin's disease, which is a form of cancer, on 7/06/2018.
42. That pursuant to Clause 3 of the policy, the said policy excludes cancer treatment subject to 24 months waiting period and hence the 1st Defendant was not obligated to pay the deceased's medical bill during the aforesaid period, since the deceased's cancer condition was subject to a waiting period which had not been met at the time of her admission.
43. The 2nd defendant also called DR. Henderson Irimu as their witness. He produced his written witness statement dated 13/04/2022 as his evidence in chief. DW 2 stated as follows in the said witness statement;
44. That he is a pulmonologist by profession, and that he is among the doctors who attended to the deceased upon her admission at the 2nd Defendant's medical facility.
45. That on 19/06/2018 he indicated that the deceased wished to stay on at the facility as negotiations were ongoing between her family and the 1st Defendant, but that he never mentioned to the Plaintiff that the cancer was spreading across the deceased's body.
46. The 2nd defendant called DR. Samuel Odede who substituted Dr. Osoro. His statement was the same at that of Dr. Osoro dated 24/10/2019 which stated as follows;
47. That at the onset on 27/05/2018 the deceased was admitted at the 2nd Defendant's facility for purposes of receiving treatment initially for tuberculosis, but that subsequent further tests revealed a diagnosis of Hodgkin's disease, being a form of cancer.
48. That the deceased continued to receive treatment for the said disease and that sometime on or about 19/06/2018 she indicated that she wished to stay on at the 2nd Defendant's facility to undergo chemotherapy, as her family and 1st Defendant continued to negotiate.
49. That at no point therefore did the deceased allege or complain that she was being held against her will, and hence the allegations of fraud and collusion brought against the 2nd Defendant are untrue.
50. That at the time of her discharge from the 2nd Defendant's facility on 23/06/2018 the deceased's medical bill had not been settled.
51. That furthermore, during her time under the care of the 2nd Defendant's staff, the deceased received all proper and reasonable care and attention.
52. That going by the policies of the 2nd Defendant, any outstanding sums which remain unpaid within a period of 60 days, shall be borne by the patient or person who signed the admission form.
53. That consequently, the deceased was obligated to settle the outstanding hospital bill.
54. Upon close of the hearing, the parties were directed to file and exchange written submissions.
55. The Plaintiff submits inter alia, that it is not in dispute that there existed a contractual relationship between the deceased and the 1st Defendant at all material times, by way of the policy.



56. That pursuant to the said policy, the 1st Defendant was obligated to settle the medical expenses incurred by the deceased, including those incurred at the 2nd Defendant's facility on the material days.
57. That in the premises, the 1st Defendant cannot be heard to ride on the deceased's cancer diagnosis to avoid meeting its contractual obligations. The Plaintiff therefore urged the court to find likewise, arguing that to arrive at a contrary finding would be akin to sanctioning an unconscionable dealing, with reference inter alia, to the case of *Margaret Njeri Muiruri (Being The Administrator of The Estate of The Late Joseph Muiruri Gachoka (Deceased) v Bank of Baroda (Kenya) Limited* [2014] KECA 319 (KLR) where the Court of Appeal rendered itself thus:

“In *Commercial Bank of Australia Ltd v Amadio* [1983] 51 CLR 447 the Court in Australia stated that:

“Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or retain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute a special disability for the purposes of the principles relating to relief against unconscionable dealing may take a wide variety of forms and are not susceptible to being comprehensively catalogued. [Such disability includes] ..."poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary" the common characteristic of such adverse circumstances "seems to be that they have the effect of placing one party at a serious disadvantage vis-a-vis the other". (Quoting *Blomley v. Ryan* (1956) 99 CLR)”

58. The Plaintiff further submits that the failure by the 1st Defendant to settle the deceased's medical bill in full, pursuant to the policy, aggravated her medical condition even further. That in the premises and upon considering the legal principle stated in the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] KECA 362 (KLR) that parties are bound by the terms of their contract, this court ought to find that the Plaintiff has proved his case to the required standard.
59. On the subject of the reliefs sought, it is the contention by the Plaintiff that while the general legal principle is that general damages are not awardable in claims founded on contract, the same may be awarded in claims for breach of contract where such contracts are founded on good faith, as is the case involving insurance contracts, a principle which was upheld in the case of *S.M Thiga v Phoenix E.A Assurance Co.Ltd* [2016] KEHC 8135 (KLR) thus:

“In sum, it is my finding that given these circumstances the Plaintiff is entitled to some relief and he has asked for an award in general damages for his loss; and though, the Defendant, on the authority of *Dharamshi v Karsan* (1974) EA 41, submitted that no general damages may be awarded for breach of contract, in *MacGillivray on Insurance Law*, 11th Edition, Sweet & Maxwell, the authors expressed the view that damages can be awarded in suitable cases. They observed thus:

“One possible obligation was the insurer's post-contractual duty to observe the utmost good faith towards the assured, but the opportunity to give it the status of an implied condition affording damages for its breach was missed in *The Star Sea* and the only remedy for a breach of the duty in itself is avoidance. It is not the basis of damages for breach of a contractual duty of good faith that the Supreme Court of Canada has recently allowed a claim by an



assured for punitive damages when an unjustifiable defence of arson was persisted in for several years”.

60. It is equally the contention by the Plaintiff that upon considering the averments earlier pleaded and made at the trial that the deceased was illegally detained by the 2nd Defendant owing to the non-payment of her medical bill by the 1st Defendant, it is clear that her constitutional rights guaranteed under Articles 28, 29 and 143 of *the Constitution*, and Sections 7,8 and 12(2) of the *Health Act* were violated in the process, specifically by the 2nd Defendant. The Plaintiff therefore urges the court to be persuaded by the case of Tryphosa Jebet Kosgey v Elgon View Hospital [2016] KEHC 5178 (KLR) where the court held that to detain a patient in hospital constituted a violation of her constitutional rights enshrined under Article 29(a) of *the Constitution*. On those grounds, the Plaintiff proposes an award of Kshs. 1,000,000/- to be made against the 2nd Defendant, on general damages for unlawful detention.

61. The court was ultimately urged to allow the claim as prayed.

62. On its part, the 1st Defendant firstly submits that the onus lies with the Plaintiff to prove his claim for breach of contract, in line with the decision in Dormakaba Limited v Arcitectoral Supplies Kenya Limited [2021] KEHC 210 (KLR) thus:

“...a Plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the defendant; and (c) the Plaintiff suffered damage (loss) as a result of the defendant’s breach. The Plaintiff ‘is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics.’ A Plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the onus of proving that there was no such probability. The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff. This implies that the Plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff.”

63. The above ingredients were echoed by the Court of Appeal in the case of Attorney General v Kabuito Contractors Limited [2023] KECA 230 (KLR) thus:

“To successfully claim damages for breach of contract, a plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the defendant; and (c) the plaintiff suffered damage (loss) as a result of the defendant’s breach. The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. This implies that the plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the plaintiff.”

64. The 1st Defendant submits that while it is not disputed that a contractual agreement subsisted between itself and the deceased at all material times and by way of the policy, it was a term thereof that the 1st



Defendant would only pay monies towards eligible medical expenses. That by virtue of the fact that the deceased later signed an admission form with the 2nd Defendant, it was solely her responsibility to settle the outstanding medical bill, especially due to the contractual waiting period for cancer diagnoses. That the parties were therefore bound by the terms of their contract and the court could not re-write such terms, a principle which was echoed in the case of *Areva T & D India Limited v Priority Electrical Engineers & Another* [2012] KECA 258 (KLR).

65. That it fell on the Plaintiff to demonstrate the manner in which the 1st Defendant breached the policy agreement but he did not. That the 1st Defendant has demonstrated that it settled all expenses pertaining to the deceased's treatment on the tuberculosis diagnosis but that payments associated with the subsequent cancer diagnosis were not covered under the policy, unless the 24-months' waiting timelines were adhered to.
66. Flowing from the foregoing, the 1st Defendant argues that the Plaintiff having failed to prove his claim for breach of contract as against it, he is not entitled to any of the reliefs sought in the further amended plaint, with reference inter alia, to the case of *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018] KECA 312 (KLR) where it was held that general damages are as a general rule, unrecoverable in cases of alleged breach of contract. The 1st Defendant therefore urges the court to dismiss the suit with costs.
67. The 2nd Defendant on its part draws this court's attention to the decision in *Anne Wambui Ndiritu (Suing as Administrator of the Estate of George Ndiritu Kariamburi-Deceased) v Joseph Kiprono Ropkoi & Four By Four Safaris Company Ltd* [2004] KECA 65 (KLR) where the court held as follows:

“As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* Cap 80, which provides:

“107.

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

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. That is captured in sections 109 and 112 of the Act...”

68. The 2nd Defendant went on to argue that the Plaintiff herein did not tender any evidence to support the allegations that the said Defendant unlawfully or otherwise detained the deceased in its facility, and/or that the deceased's constitutional rights were infringed upon by the 2nd Defendant at any material time. That the deceased expressly chose to remain in the 2nd Defendant's facility of her own volition, to enable her continue with her chemotherapy treatment at the time.
69. The 2nd Defendant further argues that the mere fact that the deceased left its facility after instituting the suit in no way goes to show that she had previously been detained therein. The court is urged not to rely on speculations to make a determination of the dispute herein.
70. It is the contention by the 2nd Defendant that contrary to the allegations featuring in the further amended plaint and evidence by the Plaintiff, the deceased received proper and adequate treatment and medical attention while under the care of the 2nd Defendant, as seen in the evidence tendered on behalf of the said Defendant.



71. As pertains to its amended counterclaim, it is the contention by the 2nd Defendant that it is entitled to the sum of Kshs. 352,777.97 sought therein, given that the same remains unsettled to date. That in the premises, the estate of the deceased ought to be ordered to pay the above sum. In so submitting, the 2nd Defendant drew this court’s attention to Emmah Muthoni Njeri v Nairobi Women’s Hospital [2021] KEHC 8797 (KLR) where the High Court-Constitutional and Human Rights Division, reasoned that:

“It is important to point out that the Petitioner has an obligation to pay the balance of her medical bill. As was determined in the case of Gideon Kilundo & Daniel Kilundo Mwenga v Nairobi Women’s Hospital [2018] eKLR:

“While it is true that the relationship between the petitioners and the respondent was a contractual one for which the respondent should pursue other lawful means of recovering the debt other than detaining their former patient, this court is of the view that it does not augur well for the dispensation of justice for persons to walk into private hospitals for treatment and expect to walk out without paying a single cent under the guise of the constitutional protection of liberty and freedom of movement.” ”

72. On the subject of damages, it is the argument by the 2nd Defendant that should this court be inclined to award general damages, then the same be minimal. The 2nd Defendant proposes a sum of Kshs. 100,000/- with reliance on the case of Tryphosa Jebet Kosgey v Elgon View Hospital [2016] KEHC 5178 (KLR) in which a similar sum was awarded at the instance of a petitioner who had been held against her will in a private hospital, for a period of seven (7) days.

73. Otherwise, the 2nd Defendant urges this court to dismiss the Plaintiff’s suit and to enter judgment as prayed in the amended counterclaim.

74. The court has considered the totality of the pleadings, evidence and rival submissions on record. It is the duty of the plaintiff to prove case to the required standard in civil cases which is on a balance of probabilities.

75. The issues for determination in this case are as follows;

- i. Whether the plaintiff has proved his case to the required standard in civil cases.
- ii. Whether the 2nd defendant has proved his counterclaim against the plaintiff.
- iii. Whether the plaintiff is entitled to the remedies he is seeking against the defendants.
- iv. Who pays the costs of this suit?

76. On the issue as to whether the plaintiff has proved his case to the required standard, it is apparent that the Plaintiff’s claim against the 1st Defendant is founded on breach of contract, while the claim against the 2nd Defendant is founded on fraud and/or collusion and alleged violation of the deceased’s Human Rights.

77. The ingredients to be established in a claim for breach of contract were aptly laid out in the case of Dormakaba Limited v Arcitectural Supplies Kenya Limited [2021] KEHC 210 (KLR) thus:

“...a Plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the defendant; and (c) the Plaintiff suffered damage (loss) as a result of the defendant’s breach. The Plaintiff ‘is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct



was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics.’ A Plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the onus of proving that there was no such probability. The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff. This implies that the Plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff.”

78. From an examination of the record, it is not in dispute that the deceased and the 1st Defendant at all material times enjoyed a contractual relationship pursuant to the policy agreement.
79. It is equally not in dispute that the 1st Defendant did not settle or fully settle the deceased’s medical bills incurred by the deceased at the 2nd Defendant’s facility, thereby resulting in loss/damage to the deceased.
80. I find that the 1st defendant had no basis for declining to pay the bill since the deceased had a valid policy.
81. I find that the plaintiff has proved that the 1st defendant was in breach of contract, having pre-authorized admission of the plaintiff to the 2nd defendant’s facility and having declined to pay the bills.
82. I further find that this amounts to unconscionable dealing (*Margaret Njeri Muiruri (Being The Administrator of The Estate of The Late Joseph Muiruri Gachoka (Deceased) v Bank of Baroda (Kenya) Limited* [2014] KECA 319 (KLR)) that by definition take a wide variety of forms and are not susceptible to being comprehensively catalogued, and include sickness.
83. However and with respect to the 2nd Defendant, the Plaintiff did not tender any credible evidence to support the allegations made against the 2nd Defendant as pertains to fraud and/or collusion with the 1st Defendant.
84. Further, no evidence was tendered to show that the plaintiff was held at the facility against her will. In any case there is evidence that she was discharged before the hospital bill was fully settled. Consequently, the Plaintiff’s claim against the 2nd Defendant automatically fails.
85. Concerning the second issue, from an examination of the record, it is apparent that the Plaintiff’s admission at the 2nd Defendant’s facility was effected pursuant to the policy agreement between herself and the 1st Defendant, with the latter being held responsible for settling all medical and related expenses in line with the said policy.
86. I therefore find that the 2nd defendant’s bill was to be settled by the 1st defendant not the plaintiff.
87. The plaintiff had a valid policy with the 1st defendant and it should settle the claim. Consequently, the 2nd Defendant’s amended counterclaim equally fails.
88. On the third and fourth issues being whether the Plaintiff is entitled to the reliefs sought as well as costs of the suit, in view of the fact that the Plaintiff has succeeded on his case as against the 1st Defendant, I am inclined to award the reliefs sought against the said Defendant.
89. Regarding the general damages sought, I am persuaded by the case of *S.M Thiga v Phoenix E.A Assurance Co. Ltd* [2016] KEHC 8135 (KLR) cited in the Plaintiff’s submissions, where the court



awarded a sum of Ksh. 1 million on general damages for consequential loss resulting from breach of an insurance contract, I will award a sum of Ksh. 2 million under that head.

90. In the end therefore, the plaintiff is entitled to the following remedies:

- i. That a declaration be and is hereby issued that the 1st Defendant is duty bound to honour the terms of Policy No. INDO112736 between the deceased and the 1st Defendant and specifically that the 1st Defendant is liable to clear all the outstanding charges levied by the 2nd Defendant in respect to the deceased's admission and treatment at The Nairobi Hospital.
- ii. That the plaintiff be paid general damages of ksh. 2 million by the 1st defendant.
- iii. That the plaintiff's claim against the 2nd defendant has not been proved and the same is dismissed with no orders as to costs.
- iv. That the 2nd defendant's amended counterclaim against the plaintiff is equally dismissed with no orders as to costs.
- v. That judgment be and is hereby entered in favour of the plaintiff against the 1st defendant in the sum of ksh. 2 million plus costs and interest from the date of this judgment until payment in full.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 4TH DAY OF DECEMBER, 2024.

A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 1st Defendant

..... for the 2nd Defendant

