REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 9 OF 2018

FRANCIS S. WANJII.....APPELLANT

-VERSUS-

DR. JUMA MWANGI T/A

KARATINA MATERNITY & NURSING HOME.....RESPONDENT

(Appeal against judgment and decree in Nyeri Chief Magistrates Court Civil Case No. 64 of 2017 (Hon. P. Mutua, Principal Magistrate) delivered on 30 January 2018).

JUDGMENT

The appellant sued the respondent in the magistrates' court for the sum of Kshs. 1,106,600/= which the appellant is said to have been mistakenly invoiced by the respondent on account of the expenses incurred in the treatment of the appellant's son who had been hospitalised in the respondent's hospital between 14 June 2014 and 30 June 2015.

It was the appellant's case that he was invoiced twice for consultation fees and was also billed for expenses which were catered for by his two insurance companies; National Hospital Insurance Fund (NHIF) and British American Insurance Company Limited(Britam). Besides the double billing, the respondent's statement of account purporting to show the amount due and payable was erroneous, in any event. The cumulative figure arising from these errors was Kshs. 1,106, 600/= which is the amount that appellant was seeking to be reimbursed.

The defendant denied the appellant's claim; in his defence dated 3 April 2017, he denied receiving any payment from Britam but acknowledged having received payment from NHIF but limited to a specific number of days of the entire period that the appellant's son spent in the hospital. This payment, according to the respondent, had been duly accounted for.

In his judgment, the learned magistrate entered judgement for the appellant in the sum of Kshs. 120,000/= which, in his respectful view, is the only sum that the appellant was able to prove as erroneously paid and to which, therefore, the appellant was entitled.

Being dissatisfied with the judgement, the appellant filed the present appeal and in his memorandum of appeal, he raised five grounds against the judgment the first of which is that the trial magistrate erred in law and in fact in failing to properly analyse the totality of the evidence before him and thus misdirecting himself; secondly, he erred in law and in fact in failing to properly direct his mind to the law on the burden of proof; thirdly, he erred in law in making a finding that the appellant had not proved his case yet there was sufficient evidence for a contrary finding; fourthly, the learned magistrate erred in law and fact in holding that the appellant submitted on evidence yet the appellant had adopted his witness statement and a list of documents he had filed in court and, finally, the magistrate erred in fact and in law in failing to shift the burden of proof to the respondent to the extent that it was placed it upon him.

In his testimony, the appellant reiterated that he was claiming the sum of Kshs. 1,106,000/=. It was his evidence that, Britam had paid the defendant a sum of Kshs. 120,000/= but that this payment was not credited to his account in the respondent's bill. Again, there was a sum of Kshs. 286,000/= allegedly paid by the NHIF but which was included in the bill as the amount due from the appellant. Also in the bill was consultation fees, which the appellant paid directly to the consultant. There were other billing errors amounting to Kshs. 265,000/=.

In answer to questions put to him during cross examination, the appellant admitted that his son was admitted at the respondent's health facility for a period of over a year from 13 June 2014 to18 September 2015. Previously, he had been hospitalised at Tumutumu hospital. While in this latter hospital, NHIF had covered part of the expenses incurred to the extent of the insurance cover. He admitted that while in that hospital, his son had exhausted his cover and indeed, he had sought for extension of the cover for another 180 days. Even then, he could not tell whether the respondent was paid by the NHIF and if so how much was paid. As far as Britam is concerned, he had no idea whether it had paid the premium due. According to him, it was the respondent who was to follow up the payment.

Despite his reservations about the bill, the appellant admitted in his evidence that the final bill did not contain consultation charges; as a matter of fact, he conceded that the bill was accurate and represented a true account of the respondent's expenses incurred on his son while

he was admitted at his facility.

Lucy Wamuyu Wanjiru, the respondent's accounts clerk testified that during the entire period that the appellant's son was hospitalised at their hospital, the appellant would come to the hospital for interim bills to solicit for funds from well-wishers and for this reason the bills included the consultancy fees that wasn't payable to the hospital. The final bill, however, did not include consultancy fees. The bill that was legitimately due, amounted to Kshs. 1,511,819/= which the appellant paid. Of this amount, the sum of Kshs. 222,200 was paid by the NHIF; Kshs. 334,593/= came from well-wishers and appellant himself paid the sum of Kshs. 1,511,819/=. She admitted, however, that the interim bills had errors.

The respondent himself testified that hospital raised invoices only for the services rendered. The consultancy fees, was paid directly to the consultant himself, whom he identified as Dr. Kariuki. As far as Britam is concerned, it never paid any money apparently because the claim for the premium was raised after the expiry of the period within which it ought to have been submitted. The NHIF paid for 185 days of the entire period that the deceased spent in hospital.

All I can say about the appellant's appeal is that the burden was on him to prove his case on a balance of probabilities. My own assessment of the evidence leads me to the conclusion that he did not discharge this burden. It does not come clearly from his evidence what he really was claiming for. Just to appreciate what I mean, it is necessary that I reproduce here what the appellant said in his testimony:

> ***"NHIF paid money at Tumutumu hospital. There was no communication that my son had exhausted his 2014 allocation. I confirm it says my son had exhausted his allocation for 2014. I agree I sought extension of further 185 days exhausting the 180 days. I do not know how much the defendant was paid from NHIF. I do not know if defendant was paid by NHIF for only 185 days. Britam gave up a limit of 30 days i.e. the claim was to be made within 30 days from date of receipt. The letter was received after five days. I took it there. I do not know if Britam did not honour the claim. I am not supposed follow up. I also sought permission from the office of the president to solicit for funds from members of public. To support that I had to get interim bills from the hospital. It is true bills included money owed to Dr. Kariuki. (referred to bill dated 31/12/14). It is true the bill included consultation charges by Dr Kariuki for Kshs. 300,000/=. <u>The final bill does not contain consultation charges. The final bill is proper and contains proper charges incurred by my son</u>."*** *(Underlining mine)*

And perhaps for the avoidance of doubt, the appellant had indeed paid the respondent the sum of Kshs. 1,511,819/= in settlement of this final bill. Prior to this payment, he had on 29 September 2015 acknowledged in writing and, in no uncertain terms, that he not only owed the respondent the said sum but he also undertook to settle it on or before 15 December 2015. Over and above the acknowledgment, he offered the title to his land identified as LR. Magutu/Gathehu/506 as security for payment of the money owed.

To compound the appellant's case even further, his learned counsel conceded in his submissions that the appellant had not proved any error in the calculation of the final bill. He submitted that what the appellant was owed was not the sum of Kshs. 1,106,600/= stated in the plaint but the sum of 406,000/=. In effect, he has now sought for judgment against the respondent in the sum of Kshs. 286,000/= over and above what the subordinate court had awarded his client. I need not say anything on this save to state that I still find the learned counsel's submissions inconsistent with his client's own testimony; in any event, if this was the appellant's claim from the very beginning, he ought to have amended his pleadings in the lower court accordingly.

In light of the evidence presented before the trial court and in light of the submissions by the learned counsel for the appellant I am not satisfied that the appeal has any merits. I am inclined to dismiss it; it is so dismissed with costs to the respondent.

Signed, dated and delivered this 4th day of May 2020

Ngaah Jairus

JUDGE