REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HCCA NO. 573 OF 2014

AAR INSURANCE KENYA LTD (Previously known as

AAR HEALTH SERVICES LTD.....APPELLANT

-VERSUS-

SUSAN WARUGURU KAMAU (Suing as the administrator of the estate **of**

JOHN NJARAMBA MUGAMBI.....1ST RESPONDENT

SAWASAWA.COM LTD.....2ND RESPONDENT

[Being an Appeal from the Judgment of Hon. M.Murage (CM) in the Chief Magistrate's Court

at Nairobi (Milimani Commercial Courts) Civil Case No.1027 of 2011,

delivered on 2nd December 2014].

JUDGEMENT

INTRODUCTION

1. The Respondents sued the Appellant in the lower Court, pursuant to a contract of insurance, for payment of Kshs.1,604,610.67/=, costs of the suit and interest.

2. The claim was made up as follows; Kshs. 1,554,610.67/= was for the hospital bill incurred by the 1st Respondent's deceased son at Aga Khan Hospital and Kshs. 50,000/= was for funeral expenses as provided for in the policy.

3. The Appellant filed a statement of defence in which it denied any liability. The matter was eventually heard and judgment was entered in favour of the Respondents.

4. Aggrieved by the entire judgment, the Appellants filed this Appeal and listed 6 grounds which I have condensed into 4. They contend that the learned magistrate erred in law and fact by;

a. ***Finding that the 1st Respondent had the requisite capacity to file suit in the absence of her co-administrator and when there was no privity of contract between the 1st Respondent and the Appellant and without regard to the submissions of the Appellant on the issue.***

b. ***Finding that there was a medical cover for the child at the time of admission in total disregard of the contractual provisions on membership for purposes of medical cover with the Appellant and without regard to the evidence and submissions of the Appellant on the issue.***

c. Finding that there was no misrepresentation on pre-existing condition entitling the Appellant to decline cover and failing to find that there was a pre-existing condition that entitled the Appellant to decline cover for the child in terms of the contractual provisions on the issue and disregarding the evidence on record and submissions of the Appellant.

d. Finding that the Appellant was notified when the child was admitted in hospital in disregard of the evidence on record and the submissions of the Appellant on the issue and thereby failed to consider and find that the contractual provisions on the issue of pre-authorization entitled the Appellant to decline cover.

5. Parties agreed to canvass the appeal by way of written submissions but at the time of writing this judgement none of them had complied. I will nevertheless execute my duty as required.

DUTY OF COURT 1ST APPELLATE COURT

6. The duty of the first Appellate Court is to subject the whole of the evidence to a fresh exhaustive scrutiny and make any of its own conclusions about it bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. See the case of **SELLE & ANOR –VS- ASSOCIATE MOTOR BOAT CO. LTD 1968 EA 123.**

7. I will consider the grounds of appeal against the evidence on record.

CAPACITY

8. The Appellant *(herein after 'AAR')* contends that the 1st Respondent did not have capacity to file the suit in the absence of her co-administrator. In my view, this issue is neither here nor there. PW1 was Susan Waruguru Kamau, the 1st Respondent *(herein after 'Susan')*.

9. She testified that the deceased minor was her son and produced a limited grant as exhibit 1. The grant was issued to PW1 and her husband, Peter Mugambi, by the High Court in Nairobi.

10. To the best of my understanding, the legal requirement is that an estate with a minor should have at least two administrators. I am however not aware of a requirement, legal or otherwise, that all such administrators must be parties to the suit.

11. With regard to privity of contract, Susan testified that the 2nd Respondent *(herein after 'Sawasawa Ltd')* was her boss. PW2, the business development director of Sawasawa Ltd testified that they had an insurance cover with AAR for their employees and they used to pay premiums for one year.

12. She produced the policy document as exhibit 7(a). She said that the inpatient cover was for the period 12/05/2010 to 20/02/2010 *(I believe that was a typographical error because the policy document indicates that the benefit period would run from 26/02/2010-25/02/2011)*.

13. PW2 proceeded to testify that Susan was entitled to the benefits of the cover and it also had provision for Dependants. That Susan applied to have her son included in the Cover and Sawasawa Ltd took the necessary steps to process the inclusion.

14. DW1, Dr. Osore Jared testified that he worked with AAR. That Sawasawa Ltd were their members and there was a contract between AAR and Sawasawa Ltd for the cover.

15. The doctrine of privity of contract stipulates that only the parties to the contract can enforce it's terms. I have seen clause 20 of the policy document [Exh *7(a)]* ***which provides that 'the policy is between the company and the employer and does not create any legal relationship between the company and the employee'.***

16. However, the Court of Appeal has already pronounced itself on the issue of privity of contract and acknowledges that there are exemptions to this rule.

17. I find it relevant to reproduce a paragraph from the ruling of the Court of Appeal in **Aineah Liluyani Njirah –Vs- Agha Khan Health Services (2013) eKLR;**

> ***"Throughout its development, however, this doctrine has provoked much criticism and debate.[3]In the year 2008, the report of the Law Reform Commission of Ireland on "The Privity of Contract and Third Party Rights "recommended that, subject to certain limitations, the privity of contract rule should be reformed so that a third party who the contracting parties clearly intended to benefit from their agreement would be able to rely on and enforce the agreement if it is not carried out properly. [4] That Commission confirmed its view, and indeed the view of the majority of the Commissioners, legal consultants[5] and academicians,[6] that the doctrine of privy of Contract is ripe for reform."***

18. In our case, Sawasawa Ltd and AAR clearly intended that Susan and her dependants would benefit from their agreement thus effectively exempting her from the rigidity of privity of contract. Susan was aggrieved when AAR refused to pay the hospital bill for her deceased child and it is my considered view that she had the requisite capacity to move Court for resolution of the dispute. This ground of appeal lacks merit and should fail.

Whether there was a valid medical cover for the deceased minor

19. Susan testified that her cover with AAR was effective from 29/10/2010 and produced the card as exhibit 3(c). That the child was initially covered by UAP from 04/10/2007 and then Blue Shield, 2009-2010. That the Blue Shield cover was courtesy of her husband but he was laid off and she had to find a new cover for her son. She produced the cards from UAP and Blue Shield as exhibits 3(a) and (b).

20. PW2 testified that Susan applied to have her son included in her cover on 24/12/2010 and Sawasawa Ltd prepared a cheque of Kshs. 2,236.36/= on the same day. That they had an insurance broker but the cheque was written to AAR. That they had previously terminated covers for three employees and would be credited for the unutilized cover. That she received a card from AAR saying that the card was valid from 29/12/2010. The letter forwarding the card was produced as exhibit 10.

21. According to PW1, the minor fell sick on 27/12/2010 and was admitted at Kenyatta National Hospital on 28/12/2010. He was then transferred to Aga Khan Hospital on 29/12/2010 and admitted at the ICU and later HDU. He however deteriorated and passed away on 13/01/2011.

22. DW1 testified that the application to include the deceased as a member was made on 24/12/2010 but received by AAR on 30/12/2010. That commencement date means the date when application is approved.

23. He produced a payment receipt as exhibit 3 showing that Sawasawa Ltd paid Kshs. 2,236.35/= on 29/12/2010. That they gave an allocation schedule showing that membership had been accepted. Further, he stated that receipt for allocation was dated 30/12/2010 and membership was allocated on 06/01/2011.

24. I have looked at the oral as well as the documentary evidence. AAR contends that the minor was not covered at the time of admission. The cheque for payment of the premium is dated 24/12/2010 and there is an acknowledgement from AAR that it received the payment on 29/12/2010.

25. Exhibit 3(c) is the AAR card for the minor which clearly indicates that he was a member since 29/12/2010. The policy document defines a member as "…*any person entitled to policy cover as set out in this scheme rules including any dependants of such principal person.'*

26. It therefore follows that the minor was entitled to the policy cover because he was already a member at the time of admission. It is akin to putting a cart before the horse for AAR to claim that membership was allocated on 06/01/2011 yet there is a membership card showing that the minor was a member since 29/12/2010.

27. It is actually illogical. That membership card was never disowned. The upshot is that the medical cover was in force at the time of admission and the learned trial magistrate correctly found as much.

PRE-EXISTING CONDITION

28. DW1 testified that when Susan filled the form to have the minor included in the medical cover, she stated that he had no previous medical conditions. That the medical report showed that the minor had been treated for upper respiratory infection 2 months prior to the admission. He denied knowing that the minor had been treated at their clinic for the respiratory infection.

29. According to the medical report, the minor "…***was well till 2 months prior to admission when he developed upper respiratory tract infections for which he was treated repeatedly as an outpatient."*** The policy document defines a pre-existing condition as ***"a medical condition which a member knew or ought reasonably to have known and can be medically proven they had prior to becoming a member of the company for the first time or prior to upgrading from one health plan to another and which has been medically inferred either prior to membership or subsequently to have existed." (emphasis mine).***

30. First, the medical report does not give a diagnosis of what the minor's illness was prior to his death. Secondly, there is evidence to show that the minor used to be treated at the AAR clinic at Sarit Centre as an outpatient.

31. This was courtesy of his father's medical cover where AAR was the insurer. In her evidence, Susan admitted not telling AAR that the minor used to attend their clinic however, the letter from Sawasawa Ltd dated 11/02/2011 (Exhibit 11) clearly brought the information to the attention of AAR and even invited them to investigate the minor's file.

32. The defence was filed on 10/08/2012, more than one year after the letter from Sawasawa Ltd. It only talks about pre-existing conditions but does not say exactly what they were. DW1 testified on 19/08/2014, more than three years after the letter from Sawasawa Ltd. He said that he was not aware that the minor had been treated at their clinic.

33. Now, my view is that at the time of filing the defence and testifying, the Appellant was in possession of the minor's medical history and if there was any pre-existing condition, nothing would have been easier that to plead as much and eventually lead the evidence in Court.

34. Further, it is my view that the onus of proving that a member was aware of a pre-existing condition was on AAR. In our case, this burden was not discharged basically there was no such condition. I agree with the learned trial magistrate that the deceased was admitted to the hospital for a different condition other than the one treated as an outpatient at the AAR clinic.

NOTICE

35. The Appellant contends that it is entitled to decline the cover because they were not notified about the admission and pre-authorization was not obtained.

36. PW2 testified that upon being informed by Susan that the minor had been taken ill, she called the broker *(options brokers)* and told him to inform AAR. That was on 28/12/2010. On cross examination, she said she was not aware that the broker did not inform AAR.

37. On cross examination of DW1, he stated as follows; "***I am not aware of broker. In D exh 4, there is options insurance brokers. We pay brokers…..D exh 6 letter confirm and plaintiff informed broker."*** The payment allocation schedule *(exh 4)* has a column for 'Rep on record' where the name 'options insurance brokers' is inserted.

38. From the foregoing, it is my considered view that there is enough evidence to show that options insurance brokers were agents of AAR. These brokers have not denied that they were informed about the admission. Consequently, the principal (AAR) is estopped from denying notice. The law of agency is very clear and I need not belabor the point.

39. As for pre-authorization, the policy document provides that "*in the event of an emergency, the pre-authorization must be obtained from the company within 24 hours of such admission."* This case was clearly an emergency and having opined that AAR had the requisite Notice; it was up to them to react accordingly.

40. If indeed the broker did not pass the information, AAR is vicariously liable for their errors and omissions. It would be a travesty of justice to visit such errors and/or omissions on a member who is already burdened by the loss of a loved one.

41. Furthermore, DW1 confirmed that Aga Khan Hospital was in their list of service providers. This ground of appeal lacks merit and should fail.

CONCLUSION

42.The court thus finds the appeal has no merit and is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED THIS 14TH DAY OF DECEMBER, 2018 IN OPEN COURT.

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HON. C. KARIUKI

JUDGE