Bashir v CIC General Insurance Limited (Civil Case E270 of 2023) [2024] KEMC 30 (KLR) (17 July 2024) (Judgment)

Neutral citation: [2024] KEMC 30 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

CIVIL CASE E270 OF 2023

CN ONDIEKI, PM

JULY 17, 2024

BETWEEN

MARIAM WAIRIMU BASHIR ..... PLAINTIFF

AND

CIC GENERAL INSURANCE LIMITED ..... DEFENDANT

JUDGMENT

Part I: Introduction

1. First, a contract of insurance is the unsurpassed embodiment of the doctrine of uberrima fides. A full and frank disclosure of material facts is not for ornamental reasons. The rationale underlying this position is the fact the contract involves undertaking the risk which would have otherwise befallen the insured and all material facts within the personal knowledge of the insured, which would reasonably and materially impact the decision to undertake the risk ought to be disclosed.

2. Second, the signature rule, prevalently known as the rule in L'Estrange vs. Graucob posits that upon proof that a party to the contract signed the contract document, the party is presumed to have read and thus bound by the contractual terms set out therein. And so, barring any vitiating factor, the person who signed the contract is bound regardless whether the person read the contractual terms of not.

3. Third and finally, whenever a contractual relationship is housed in a document or documents, the parole rule postulates that the intention of parties should be discerned from the document or documents, and renders it generally impermissible to seek refuge in extrinsic evidence, to demonstrate the intention of the parties or to contradict, vary or add to the terms of the document.

Part II: The Plaintiff's Case

4. By way of Plaint dated 1st August 2023 and filed on 8th August 2023, the Plaintiff brought this action against the Defendant seeking Judgment for: (a) A declaration that the Defendant is liable and bound

under the Medical Insurance Policy No. CK100XXXX to pay for the Plaintiff's medical bill up to the full limit of the policy during the entire period of the Plaintiff's admission at Avenue Hospital. (b) Special damages in the sum of Kshs. 354,718.33. (c) General damages for breach of contract. (d) Interest on (b) and (c) above at Court rates from the date of filing this suit until payment in full. (e) Costs of this suit. (f) Any other relief this Court may deem fit and just to grant.

5. The Plaintiff avers that on 21st September 2021, she took out a medical insurance cover with the Defendant at the Defendant's branch in Machakos and entered into a contract Policy Number CK100XXXX dubbed Medisure Family Health Plan. The Plaintiff avers that she paid the full premium. The Plaintiff avers that on 6th January 2022, she was diagnosed with right ovarian cyst by Dr. Nyamu of Reproductive Health Services who recommended that the Plaintiff undergoes a procedure called laparotomy, to remove the cyst. The Plaintiff claims that on 17th January 2022, she was admitted at Avenue Hospital in Nairobi to undergo the said procedure and that the Defendant pre-authorized the procedure via an email dated 17th January 2022. The Plaintiff claims that after the successful procedure, the doctor sent a post-surgery medical report which outlined the prognosis as right solid adnexal mass, right ovarian cyst, left ovarian cyst. The Plaintiff avers that the doctor indicated that the uterine fibroids which were discovered after were not anticipated and the doctor had to remove the fibroids as part of his duty of care. The Plaintiff claims that after filling the claim form on 21st January 2022, the Defendant declined to honour its duty to pay the bill and the Plaintiff was thus detained by the hospital and the bill kept rising. It is claimed that on 24th January 2022, the Plaintiff's advocates addressed a demand to the Defendant and in its response, the Defendant undertook to pay Kshs. 200,000 out of the total bill of Kshs. 345,356. The Plaintiff claims that her employer came to her rescue after the bill had hit Kshs. 354,718.33 and settled it.

6. At the hearing of the Plaintiff's case, the Plaintiff was the sole witness. She adopted her witness statement dated 1st August 2021 and filed together with the Plaint as her evidence-in-chief. In the said witness statement, the Plaintiff rehashed the substance of the Plaint. In buttressing the claim, the Plaintiff exhibited the following: (i) a copy of the Policy Document as the Plaintiff's Exhibit 1; (ii) a copy of a letter from the Reproductive Health Services dated 6th January 2022 as the Plaintiff's Exhibit 2; (iii) a copy of the pre-authorization by the Defendant dated 17th January 2022 as the Plaintiff's Exhibit 3; (iv) a copy of the email thread dated 17th January 2022 as the Plaintiff's Exhibit 4; (v) a copy of a letter from Reproductive Health Services dated 22nd January 2022 as the Plaintiff's Exhibit 5; (vi) a copy of email thread dated 24th January 2022 as the Plaintiff's Exhibit 6; (vii) a copy of letter from the law firm of BM Mung'ata dated 24th January 2022 as the Plaintiff's Exhibit 7; (viii) a bank deposit slip dated 25th January 2022 evidencing payment by the Plaintiff's employer as the Plaintiff's Exhibit 8; and (ix) a copy of a letter from the law firm of BM Mung'ata & Company Advocates as the Plaintiff's Exhibit 9.

7. In cross-examination of the Plaintiff, she stated that she signed the Policy Document in September 2021. She stated that she was seen by Doctor Nyamu in January 2022. She stated that before she signed the contract in September 2021, she was under her father's medical cover which was issued by the same insurer. She stated that Dr. Nyamu recommended laparotomy to remove an ovarian cyst but after the procedure, the doctor found a right solid adnexal mass, right ovarian cyst, left ovarian cyst. She conceded that there was a medical report from German Medical Centre dated 13th July 2020 which revealed that she had a right adnexal mass a simple left ovarian cyst. She stated that the said medical report from German Medical Centre dated 13th July 2020 was not part of her list of documents. When she was referred to clause 1.1 of the medical insurance Policy Document (the Plaintiff's Exhibit 1), she stated that the Proposal Form (the Defendant's Exhibit 2) was incorporated into the insurance Policy Document but she was not properly advised. She stated that she was new in the process and she was

not guided well. She stated that the policy covered future conditions and not pre-existing conditions. She stated that the waiting period was one month. She stated that the sum insured was Kshs. 200,000.

8. In re-examination of the Plaintiff, she stated that CIC did not take her through the document. She stated that she did not have a pre-existing condition before she took the cover. She stated that the Defendant pre-authorized the procedure. She stated that the waiting period was 30 days.

9. In his written Submissions dated 17th May 2024 and filed on even date, Mr. Munyao instructed by the Firm of Messieurs BM Mung'ata & Company Advocates representing the Plaintiff, has rehashed the substance of the claim and the Plaintiff's evidence.

10. For the Plaintiff, it is submitted that the Plaintiff has proved her case on a balance of probabilities. It is submitted that the Plaintiff having fulfilled her obligation under section 156(1) of the *Insurance Act* by paying the requisite premium, the Defendant is liable and bound under the Medical Insurance Policy No. CK10053500 to pay for the Plaintiff's medical bill up to the full limit of the policy during the entire period of the Plaintiff's admission at Avenue Hospital.

11. This Court is urged to grant all the prayers sought.

Part III: The 1st Defendant's Case

12. In its Statement of Defence dated 25th August 2023 and filed on 28th August 2023, the Defendant every material fact averred by the Plaintiff and put the Plaintiff to strict proof thereof.

13. Without prejudice to the foregoing, the Defendant admitted that the Plaintiff took out a medical cover on 21st September 2021 which had a waiting period of 365 days. The Defendant averred that the Plaintiff breached fundamental principles of the contract namely good faith and non-disclosure of material information. In particular, the Defendant avers that Plaintiff failed to disclose the fact that she had a pre-existing condition when she was filling the Proposal Form (the Defendant's Exhibit 2) and thus rendered the contract voidable and unenforceable.

14. Joseph Borome, the Defendant's Underwriting Manager-Medical, was the sole defence witness. He adopted his witness statement dated 3rd November 2023, which was filed on 10th November 2023, as his evidence-in-chief. In his said statement, he rehashes the substance of the statement pf defence. In addition, he states that the Plaintiff failed to disclose a material fact that in 2020, she was diagnosed at German Medical Centre with the same condition which was the subject of the procedure on 17th January 2022 and which qualifies as a pre-existing condition within the context of the Proposal Form and the Policy Document. He states that although the Defendant authorized the procedure on 17th January 2022, it came to light later that the Plaintiff had a pre-existing which she failed to disclose in the said Proposal Form. Further, he states that the waiting period of 365 days had not expired. In buttressing this defence, he exhibited the following documents: (i) CIC Family Medisure Brochure as the 1st Defendant's Exhibit 1; (ii) the Proposal Form the Plaintiff filled as the Defendant's Exhibit 2; (iii) the Policy Document dated 24th September 2021 as the Defendant's Exhibit 3; (iv) the Reproductive Health Services Report dated 6th January 2022 as the Defendant's Exhibit 4; (v) admission and pre-authorization approval request form dated 17th January 2022 as the Defendant's Exhibit 5; (vi) a discharge summary from Avenue Hospital dated 18th January 2022 as the Defendant's Exhibit 6; (vii) the Plaintiff's Pelvic Ultra-Sound Scan from German Medical Centre dated 13th July 2020 as the Defendant's Exhibit 7; and (viii) the Defendant's response to the Plaintiff's demand letter as the Defendant's Exhibit 8.

15. In cross-examination of Mr. Borome, he stated that he authorized the admission of the Plaintiff at Avenue Hospital. He stated that the Defendant was aware that surgery was to be conducted. He stated

that they authorized the surgery. He stated that the Defendant declined to pay the bill for the surgery after getting further information about non-disclosure of material facts. He denied that the Defendant was negligent in handling the claim. He stated that the diagnosis by Dr. Nyamu was ovarian cyst. He stated that after authorization, it came to their knowledge that the Plaintiff had the same pre-existing condition before taking the medical cover.

16. In his written Submissions dated 9th May 2024 and filed on even date, learned counsel Mr. Maina instructed by the Firm of Messieurs Kithu Mbuthia Advocates representing the Defendant, has rehashed the substance of the defence and urges this Court to find that the Plaintiff breached her duty of disclosure of material information, placing reliance upon Newsholme Bros. vs. Road Tranport and General Insurance Co. Ltd (1929) 2 K.B. 356; Sita Steel Rolling Mills Ltd vs. Jubilee Insurance Co. Limited [2007] eKLR; Maragaret Nduta Kamithi & George Njenga Kamithi vs. Kenindia Assurance Company Limited [2001] eKLR; UAP Insurance Company Limited vs. Canadian Baptist International [2019] eKLR; UAP Insurance Company Limited vs Lemmy Mutua Kavii [2018] eKLR; and Co-operative Insurance Company Limited vs. Daniel Wachira Wambugu [2010] eKLR.

17. This Court is thus urged to dismiss the claim with costs to the Defendant.

Part IV: Questions for Determination

18. Gleaning from the Plaint, the Statement of Defence, the Reply to the Defence and the rival written submissions, this Court has distilled four questions for determination as follows:

    i. Whether – on a balance of probabilities -the Plaintiff has proved that there is a valid contract of medical insurance between the Plaintiff and Defendant.

    ii. Whether – on a balance of probabilities – the Plaintiff has proved that the Defendant repudiated the said contract.

    iii. Whether - on a balance of probabilities – the Plaintiff has proved that the Defendant has breached the said contract of medical insurance. The derivative question is whether the Defendant was entitled to repudiate the contract.

    iv. Which party should shoulder the costs of this suit?

Part V: Analysis of The Law; Examination of Facts; Evaluation of Evidence and Determination

19. The principal duty of this Court is to examine facts, evaluate evidence, subject the proven facts to the law and reach a determination, on a preponderance of probabilities. See Lakhamshi vs. Attorney-General (1971) 1 EA 118, per Spry V-P, Lutta and Mustafa JJA, as they then were) Spry, V-P, (as he then was); Ferdinand Nd ung'u Waititu vs. Independent Electoral & Boundaries Commission (IEBC) & 8 Others (2014) eKLR, per Warsame J.A.; and Abbay Abubakar Haji vs. Marain Agencies Company & Another (1984) 4 KCA 53.

20. I now embark on analysis, interrogation, assessment and evaluation of each of the four questions, in turn.

(i) Whether – on a balance of probabilities -the Plaintiff has proved that there is a valid contract of medical insurance between the Plaintiff and Defendant

21. Although this fact was denied in the said Statement of Defence, it was not contested in evidence. In fact, both parties exhibited a common Medical Policy Document (as the Plaintiff's Exhibit 1 and the Defendant's Exhibit 3). This question is thus answered in the affirmative.

(ii) Whether – on a balance of probabilities – the Plaintiff has proved that the Defendant repudiated the said contract

22. Although this fact was denied by the Defendant in its Statement of Defence, it was admitted in evidence by the Defendant. This Court reaches a conclusion that this fact has been proved.

(iii) Whether - on a balance of probabilities – the Plaintiff has proved that the Defendant has breached the said contract of medical insurance. The derivative question is whether the Defendant was entitled to repudiate the contract

23. The Plaintiff claims that the Defendant breached its duty to settle the medical bill she lawfully incurred at Avenue Hospital, Nairobi, after she underwent a procedure of laparotomy, which was duly authorized by the Defendant. Further, the Plaintiff claims that the Defendant misrepresented facts. In this connection, the Plaintiff claims that she was misled into signing the medical Policy Document (the Plaintiff's Exhibit 1). The Plaintiff claimed further that in relation to the fact that the Proposal Form (the Defendant's Exhibit 2) was incorporated into the insurance Policy Document, she was not properly guided and/or advised, since she was new in the process.

24. Although the Defendant admits that it repudiated the contract, the Defendant denies that it breached the contract maintaining that the Plaintiff breached the contract by material non-disclosure of information about a pre-existing condition. Further, the Defendant takes a position that in relation pre-existing conditions, the policy was yet to mature.

25. It's now settled law that a contract of insurance is contract of undertaking risk. Certain material facts affect the risk. In this connection, uberrima fides (utmost good faith) is the lifeblood of such a contract. In this connection, in entering into such a contract, an insured is legally obligated to disclose to the insurer all material facts and circumstances within the personal knowledge of the insured at the time, which is highly likely to materially affect the risk. See Bullen and Leake Precedents of Pleadings, 14th Edition, Vol. 2, where it is stated that: "Contracts of insurance are contracts of utmost good faith. This gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run." This principle was adopted in Co-operative Insurance Company Limited vs. Daniel Wachira Wambugu [2010] eKLR.

26. A contract of insurance is thus deemed to be the best illustration of the doxtrine of uberrima fides. In Sita Steel Rolling Mills Limited vs. Jubilee Insurance Co. Ltd [2007] eKLR, Maraga, J. (as he then was) rendered himself as follows: "The contract of insurance is perhaps the best illustration of a class of contracts described as uberrimae fidei, that is, of the utmost good faith. That being so the potential parties to such contract are bound to volunteer to each other, before the contract is concluded, information that is material. This principle imposes on the proposer or insured the duty to disclose to the insurer, prior to the conclusion of the contract, but only up to that point, all material facts within his knowledge that the latter does not or is not deemed to know."

27. A full and frank disclosure of material facts is not for ornamental reasons. The rationale for this obligation proceeds on the premise that since the insurer is assuming a risk, it should be supplied with all material facts which can reasonably expected to influence the risk to enable the insurer make an informed choice. The nature of a contract of insurance and the rationale underlying the full and frank disclosure of material facts by the insured was elucidated in three celebrated English decisions namely Carter vs. Boehm (1766) 97 ER 1162, 1164; Newsholme Bros. vs. Road Transport and General Insurance Co. Ltd [1929] All ER 442; and Seaton vs. Heath [1899] 1 QB 782, all of which have been

cited by superior Courts in Kenya with approval. The sole reason for the disclosure obligation is the acknowledgement that there's information asymmetry between the insured and the insurer, where all material facts necessary to assess the magnitude of the risk lie within the knowledge of the insured. In the locus classicus case on the doctrine of uberrima fides namely Carter vs. Boehm (1766) 97 ER 1162, 1164, Lord Mansfield elegantly explained the rationale this principle as follows: "Insurance is a contract of speculation... The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstances in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist... Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary." Also, in Seaton vs. Heath [1899] 1 QB 782, the Court stated that "Contracts of insurance are generally matters of speculation, where the person desiring to be insured has the means of knowledge as to the risk, and the insurer has not the means or use the same means." The explanation in Newsholme Bros. v Road Transport and General Insurance Co. Ltd [1929] All ER 442 at 444, was cited with approval in Paul Mutisya v Jubilee Insurance Company of Kenya Limited [2018] eKLR that "...The contract of insurance requires the utmost good faith; the insurer knows nothing; the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk."

28. And so, in British American Insurance Co. Limited & another vs. Isaac Njenga Ngugi [2019] eKLR, Mwongo, J. was of the view that "It is not contested that the insurance contract is premised on "uberrimae fides", the principle of good faith and full disclosure, that the contract of insurance requires that the assured knows everything about the risk he wants to insure and he must disclose to the insurer every fact material to the risk." So did the Court of Appeal observe in Co-operative Insurance Company Ltd vs. David Wachira Wambugu [2010] 1 KLR 254 that "... a contract of insurance is one of uberrimae fidei. The insurer is entitled to be put in possession of all material information possessed by the insured. In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is uberrimae fidei, if you know any circumstances at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy...Contracts of insurance are contracts of utmost good faith and this gives rise to a legal obligation upon the insured, prior to the contract being made, to disclose to the insurer all material facts and circumstances known to the insured which affect the risk being run."

29. See also Maragaret Nduta Kamithi & George Njenga Kamithi vs. Kenindia Assurance Company Limited [2001] eKLR; UAP Insurance Company Limited vs. Canadian Baptist International [2019] eKLR; UAP Insurance Company Limited vs. Lemmy Mutua Kavii [2018] eKLR, et alia.

30. The first exception to this obligation is whenever the material facts were not within the knowledge of the insured at the time of entering into the contract since the insured is only expected to disclose what was within his/her knowledge. It follows that an innocent non-disclosure outside the knowledge of the insured is accepted from this obligation. See Elius Gachii Karanja vs. Concord Insurance Company Limited [1997] eKLR where the Court held that "The law is already sufficiently tender to insurers who seek to avoid contracts for innocent non-disclosure and it is not unfair to require insurers to show that they have suffered as a result of non-disclosure. Of Course they suffer if the risk matures but that is the risk accepted by every insurer."

31. The second exception to this obligation is whenever the insurer fails to ask the question or fails to design the Proposal Form in a manner that captures the question. See BMK vs. AIG Kenya Insurance

Ltd [2020] eKLR, where the insurer declined to pay a medical bill for the insured on basis of non-disclosure of a material fact namely a pre-existing fact that she was diabetic for 30 years preceding the proposal. Whereas the Court acknowledged that the insured (the Plaintiff in that case) had an obligation to disclose material facts, the Court found for the Plaintiff only because the Proposal Form was designed in such a way that it did not have such a question. Odero, J. rendered herself as follows: "(36) There is therefore the expectation that the insurer will ask material questions necessary to enable it reach an informed decision on whether or not to offer insurance. It is also expected that the insured will honestly answer said questions. Given that no such questions were asked in the application form, the Plaintiff had no opportunity to reveal her past medical history and thus cannot be said to have deliberately withheld that information." This is contradistinguished from this case where the form was clearly designed with such a question."

32. The net legal effect of failure to so disclose is to render the contract voidable at the election of the insurer and unenforceable. In other words, since the contract is rendered voidable as opposed to void, the insurer is left with two options on the table which is to repudiate the contract or choose to honour it for whatever reason.

33. What is the tenor of being voidable? The Black's Law Dictionary (Black's Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black, M. A., Ninth Edition), at page 1709, defines "voidable" as follows: "...Valid until annulled; esp., (of a contract) capable of being affirmed or rejected at the option of one of the parties. This term describes a valid act that may be voided rather than an invalid act that maybe ratified." The same dictionary, at page 374, defines a "voidable contract" to mean "A contract that can be affirmed or rejected at the option of one of the parties; a contract that is void as to the wrongdoer but not void as to the party wronged, unless that party elects to treat it as void." P.S. Atiyah, An introduction to the Law of Contract 37-38 (3d ed. 1981) defines a "voidable contract" as follows: "A voidable contract is a contract which, in its inception, is valid and capable of producing the results of a valid contract, but which may be 'avoided', i.e. rendered void at the option of one (or even, though rarely, of both) of the parties."

34. The onus of proof is on the person alleging that he/she/it is entitled to refuse or decline. In the event of refusal or repudiation by the insurer on basis of non-disclosure or misstatement of material facts, the burden of proof thus lies on the shoulder of the insurer. See British American Insurance Co. Limited & another vs. Isaac Njenga Ngugi [2019] eKLR, where the COA stated that "19. On this there are authorities to the effect that where the declination is by the insurer, he is bound to prove the basis of the repudiation..."

35. Whenever there are documents governing a contractual relationship, the parole rule applies. In this context, in Fidelity & Commercial Bank Ltd vs. Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal stated thus: "So that where the intention of parties has in fact been reduced to writing, under the so called parol evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it."

36. Relatedly, in Attorney General of Belize Et Al vs. Belize Telecom Ltd & another (2009), 1WLR 1980 at page 1993, the Court cited Lord Person in Trollope Colls Ltd vs. North West Metropolitan Regional

Hospital Board (1973) I WLR 601 at 609, where the Court stated that "The Court does not make a contract for the parties. The Court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the Court thinks some other terms could have been more suitable."

37. The signature rule, prevalently known as the rule in L'Estrange vs. Graucob postulates that upon proof that a party to the contract signed the contract document, the party is presumed to have read and is bound by the contractual terms set out therein. And so, barring any vitiating factor, the person who signed the contract is bound regardless whether the person read the contractual terms of not. See L'Estrange vs. F Graucob Ltd [1934] 2 KB 394), which has been adopted in Kenya in inter alia Joel Phenehas Nyaga & Joseph Nyaga Nzau (Suing as the Chairperson and Treasurer of Kemagui Electrification Self Help Group) v Aloysius Nyaga Kanyua & Julia Gicuku Nyaga [2020] eKLR.

38. On this footing, it is instructive to conduct a deep excavation of the primary document governing the contractual relationship between the Plaintiff and the Defendant namely the Policy Document - exhibited as the Plaintiff's Exhibit 1 and the Defendant's Exhibit 3 - with a view of establishing whether the Defendant is guilty of any factor which is capable of vitiating a contract including but not limited to misrepresentation of facts by the Defendant as asserted by the Plaintiff. This Court will also examine the Proposal Form (the Defendant's Exhibit 2) to determine whether the Plaintiff failed to disclose material facts.

39. Was the Plaintiff misled that the Proposal Form (the Defendant's Exhibit 2) does not form part of the contract by incorporation? Clause 1.1 of the Policy Document sets a crucial term of the contract as follows: "The Proposal Form shall be incorporated in and be an integral part of this contract." This question is thus answered in the negative.

40. Was the Plaintiff misled that the insurance contract she signed covered pre-existing conditions without qualification? Clause 1.3 provides that "The following shall be conditions precedent to any liability of CIC Insurance." One of the conditions precedent is housed in Clause 1.3.2 which provides "The truth of the proposal." The other condition precedent relevant to this suit is Clause 3.1.2.6 thereof, which defines a pre-existing condition as follows: "pre-existing condiction: Pre-existing condition is a medical condition which can be medically proven that a member had or was known by the member to exist prior to the commencement date or prior to upgrading, whether or not treatment or advice or diagnosis was sought and received. It is any condition diagnosed before expiry of 90 days from the commencement date." In supplementing this, Clause 3.1.2.2 provides that the cover will take care of sickness which will arise from the date of the contract and provides as follows: "sickness: Illness or disease which first manifests itself while the policy is in force to the member whose sickness is the basis of a claim and includes all complications arising there from and all related conditions and recurrences thereof."

41. Did the Plaintiff fail to disclose material facts in the Proposal Form (the Defendant's Exhibit 2)?

42. A cursory examination of the said Proposal Form, reveals that in filling part C of the form - Confidential Medical History of the Applicant and Dependents Listed - the Plaintiff ticked all questions under that part "No". In particular, on the question numbered 3 under that part, on pre-existing conditions, the Plaintiff ticked "No."

43. The basic question is whether the diagnosis of 13th July 2020 at German Medical Centre, fit this bill of a pre-existing condition. While under cross-examination, the Plaintiff conceded as follows. First, she filled the medical insurance Proposal Form (the Defendant's Exhibit 2) and signed the medical insurance Policy Document in September 2021. Second, that approximately two years before she filled

the said Proposal Form in September 2021, precisely on 13th July 2020, she had been diagnosed at German Medical Centre with had a right adnexal mass and a simple left ovarian cyst and a medical report was prepared to that effect (the Defendant's Exhibit 7). However, while filling the said Proposal Form, the Plaintiff ticked "No". Third, before she filled the said Proposal Form and signed the medical insurance Policy Document in September 2021, she was under her father's medical cover which was issued by the same insurer, but while filling the said Proposal Form, she ticked "No". Further, while under cross-examination, the Plaintiff conceded that the contract was to cover future conditions and not pre-existing conditions.

44. It is thus settled that on 13th July 2020, approximately two years before she filled the said Proposal Form, the Plaintiff was diagnosed at German Medical Centre with had a right adnexal mass and a simple left ovarian cyst and a medical report (the Defendant's Exhibit 7).

45. What was the Plaintiff diagnosed with on 6th January? On 6th January 2022, the Plaintiff was diagnosed with a right ovarian cyst by Dr. Nyamu of Reproductive Health Services who recommended that the Plaintiff undergoes a procedure called laparotomy, to remove the cyst.

46. What was finally removed on 17th January 2022? On 17th January 2022, after the procedure, Dr. Nyamu sent a post-surgery medical report in form of a Discharge Summary (the Defendant's Exhibit 6) which outlined the prognosis as right solid adnexal mass, right ovarian cyst, and left ovarian cyst. The prognosis thus introduced a right solid adnexal mass and a left ovarian cyst.

47. Gleaning from the foregoing established facts, this Court reaches a conclusion that the diagnosis of 13th July 2020 at German Medical Centre, having matched with the diagnosis of 6th January 2022 and having been the subject of the laparotomy procedure of 17th January 2022, fits the bill of a pre-existing condition and in filling the Proposal Form (the Defendant's Exhibit 2), the Plaintiff failed to disclose this material fact in circumstances where the Proposal Form had an express question about it. It would have been different if the Defendant failed to provide for this question in the Proposal Form as was the case in BMK vs. AIG Kenya Insurance Ltd [2020] eKLR, where the insurer declined to pay a medical bill for the insured on basis of non-disclosure of a material fact namely a pre-existing fact that she was diabetic for 30 years preceding the proposal. Whereas the Court acknowledged that the insured (the Plaintiff in that case) had an obligation to disclose material facts, the Court found for the Plaintiff only because the Proposal Form was designed in such a way that it did not have such a question. Odero, J. rendered herself as follows: "(36) There is therefore the expectation that the insurer will ask material questions necessary to enable it reach an informed decision on whether or not to offer insurance. It is also expected that the insured will honestly answer said questions. Given that no such questions were asked in the application form, the Plaintiff had no opportunity to reveal her past medical history and thus cannot be said to have deliberately withheld that information." This is contradistinguished from this case where the form was clearly designed with such a question."

48. Was the Plaintiff misled about the waiting period for pre-existing conditions? The other key condition precedent is the waiting period which is provided under Clause 3.1.3.5 which reads as follows: "waiting period: Waiting period is the period of time set by the insurer that a member will not get services upon approval of membership. The waiting period applies to specific illnesses, procedures and medical treatment. Waiting period will be waived where renewals are affected with another insurance service provider within one month of expiry." Although the Defendant may under certain conditions pay for pre-existing conditions, the waiting period in that regard is provided under Clause 4.1.1.2.1 which provides that "CIC Insurance will pay for the insured person's hospitalization expenses arising from Pre-existing conditions, subject to the policy schedule after one year of cover. A pre-existing condition is medical condition which can medically proven that a member had or was known by the member to exist prior to the commencement date or prior to upgrading, whether or not treatment or advice

or diagnosis was sought and received. It is any condition diagnosed before expiry of 90 days from the commencement date. " This question is thus answered in the negative. In accord with Clause 4.1.1.2.1, had the contract matured by 17th January 2022? No. By 17th January 2022, one year had not expired.

49. Consequently, this Court reaches a conclusion that - on a balance of probabilities – the Plaintiff has failed to prove that the Defendant has breached the said contract of medical insurance, the Defendant having amply demonstrated that the Plaintiff failed the test of uberrima fides - having failed to disclose in the Proposal Form (the Defendant's Exhibit 2) the fact she had a pre-existing condition – the consequence of which entitled the Defendant to lawfully so elect to repudiate the contract. In any event, limited to pre-existing conditions, by 17th January 2022, the subject contract of medical insurance had not matured.

(iv) Which party should shoulder the costs of this suit?

50. Regarding costs, upon considering the cause of action and circumstances unique to this case, this Court has found no good cause to depart from the general proposition of the law that costs follow the event and accordingly, this Court exercises its discretion in favour of the Defendant.

Part VII: Disposition

51. On force of the foregoing reasons, this Court finds the Plaintiff's claim without merit and dismisses it with costs to the Defendant.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 17TH DAY OF JULY, 2024

.....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

Advocate for the Plaintiff:.....

Advocate for the Defendant:.....

Court Assistant:.....