



Alfred Mdeizi t/a Medicare Maternity & Nursing Home v National Hospital Insurance Fund (Civil Appeal 22 of 2017) [2023] KECA 53 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 53 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 22 OF 2017
W KARANJA, AK MURGOR & S OLE KANTAI, JJA
FEBRUARY 3, 2023**

BETWEEN

ALFRED MDEIZI T/A MEDICARE MATERNITY & NURSING HOME APPELLANT

AND

NATIONAL HOSPITAL INSURANCE FUND RESPONDENT

(Being an Appeal arising from the Judgement and Decree of the High Court at Kisii (Nangila, J.) delivered on 30th September 2016 in Kisii HCCC 137 of 2005)

JUDGMENT

1. The appellant, Alfred Mdeizi is the owner of Medicare Nursing & Maternity Home, (the hospital) and the respondent is the National Hospital Insurance Fund*(NHIF). On February 15, 1995, the appellant was accorded an accreditation, declaration and gazette of the hospital under section 30 of the [National Hospital Insurance Fund Act](#), (the NHIF Act) to enable him receive reimbursements of claims after provision of medical and boarding services to members of the Fund. All was well until sometime in 2003 when the respondent suspended the appellant's accreditation and refused to reimburse the claims. The appellant claimed that by this time, the respondent owed him Kshs 3,895,513 being outstanding and unpaid claims which had been submitted. The appellant further claimed that, despite demand for payment having been made, and notwithstanding the existence of the consents, no payments had been made or received.
2. As a consequence, in an amended plaint, the appellant sought for; i) unpaid claims as per paragraph (a) foregoing with interest at prevailing market rate ii) Cost of the suit and interest on (a) above.
3. On its part, the respondent filed a written statement of defence where it stated that it was a material condition of any approval and accreditation that abuse of the claims payment system would result in the cancellation of the approved status, and subsequent loss of licence under the [Medical Practitioners](#)



and Dentists Act. The respondent denied that it acted in total breach of the provisions of the *NHIF Act* and contended that all the appellant's bonafide and regular claims that were compliant with the provisions of the Act and rules of the respondent were duly processed and paid to the appellant; that Kshs 3,895,513, if at all it existed, comprised unpaid claims submitted to the respondent for reimbursement, but fell into a category of rejected and unjustified claims; that, it had not disregarded any laws as alleged by the appellant.

4. It was further contended that the appellant had filed another suit being Judicial Review Application Miscellaneous Civil Application No 118 of 2003 between the same parties at the High Court of Kenya at Kisii which arose out of the same subject matter, and which was pending for determination; that it intended to move the court to strike out the suit for being *res judicata*.
5. During the hearing, the appellant testified as PW1. He stated that the hospital was a medium level medical facility with about 100 beds occupancy catering for all medical services including surgery, laboratory, minor theatre, maternity, outpatient, and inpatient services, counselling and medical outreach programme. He produced a licence from the Ministry of Health dated August 21, 1995 and a licence to operate as a private medical institution. He further stated that after the hospital was accredited, the claim forms for reimbursement were paid as and when submitted to the respondent, after it was prepared by a patient in duplicate for submission. He explained that a statement is attached to the claim form with a patient's copy of the NHIF card and identity card; that the sum claimed would appear in the statement, and upon payment, the appellant would return the statement to the respondent. It was his case that the dispute with the respondent emanated from a letter dated July 29, 2003, and received on August 11, 2003 suspending his hospital from accreditation from the NHIF reimbursement scheme on allegations of his having submitted a number of fraudulent claims; that as a result of the suspension he went out of business and was left with an outstanding debt of Kshs3,895.513. He went on to state that he instituted judicial review proceedings in Kisii High Court Misc. Application 50 of 2004, and obtained orders of stay of execution from the suspension, but did not receive any money from the respondent, despite the court order. Due to non-compliance, he contended that he filed an application for contempt of court, and when the application came up for hearing, the parties recorded a consent. He complained that the respondent did not implement the terms of the consent, and upon expiry of 30 days, his advocate wrote a letter to the respondent's advocate requesting for payment of Kshs3,895,513 which the respondent had acknowledged as due to the hospital. He further stated that he served the respondent with the contempt of court application, but was advised to file a fresh suit for recovery of amounts owed as a normal debt.
6. DW1, Bii Kibet Wesley, is a Senior Benefits Officer with the respondent. He testified that once a hospital is accredited, it is gazetted after which a contract is entered into between the respondent and the hospital. He went on to state that once a patient has been admitted to hospital, the hospital must confirm that the patient is a genuine contributor or dependant of a contributor. That the hospital is required to identify the patient with an NHIF card and number, together with a national identity card or passport; that should the patient be a dependant, a birth certificate of the patient, birth notification or child welfare card /immunization card can be used to verify their dependency. He further stated that before paying out the claims, the respondent undertakes a surveillance of the claims and collects data. Where fraud is suspected, a form or a copy is left at the hospital; that the surveillance officers collect the in-patient's name identity card or membership number, the relationship of the contributor to the patient, date of admission and date of discharge which information is then forwarded to the respective branch. He testified that the claims comprising submission forms are arranged in batches of 12 which when received, are processed; that if the claims raised have queries, they are placed under investigations, after which it could be rejected or processed for payment. A branch committee of the respondent, was responsible for notifying the relevant hospital within 90 days that the claim stands rejected and would



not be paid. He further explained that if the hospital wanted to appeal, it could do so by way of a letter to either the branch or the Chief Executive.

7. The witness asserted that the respondent used to submit claims in respect of its patients until May 1995, when the first fraudulent claim was raised; that it was rejected, while the remaining claims were processed for payment; that the appellant continued filing claims, with some being rejected after they were found to be fictitious following surveillance and investigations. But the respondent had duly paid all the genuine claims; that the appellant did not appeal against any of the rejected claims. The witness concluded his evidence by stating that cheques being settlement of the claims were issued to the appellant and that no claims against the respondent were pending.
8. Upon considering the parties' evidence and submissions, the trial judge dismissed the appellant's claim having found that he had not proved on a balance of probabilities that the respondent owed him the sum claimed.
9. Dissatisfied with the judgment, the appellant filed an appeal on grounds that;
 1. The learned trial judge erred in law in failing to enter judgment against the respondent for the sum of Ksh. 3,895,513/= as claimed in the Plaintiff on the basis of the 2 consent orders filed herein by both parties in this suit.
 2. The learned trial judge misdirected himself and/or failed to properly address his mind to the issue of alleged fraudulent claims that the Respondent would be entitled to reject as per the consent dated June 15, 2004 which claims, if any, of the Respondent never intimated to the Appellant of the same within the given timelines and therefore ended up making a wrong finding over the same.
 3. The learned trial judge erred in law in shifting the burden of proof to the Appellant to prove payment by their cheques or direct transfer to his claim or part thereof.
 4. The learned trial judge erred in law in deciding the case against the weight of evidence on record.
 5. The learned trial judge erred and misdirected himself in concluding that the Respondent had paid some of the claims whereas the evidence tendered by the said Respondent did not specifically point out which claims in particular had been paid.
 6. The learned judge misdirected himself by laying a lot of emphasis that the Appellant did not present any claim for years 1996, 1997, 1998, 1999 and 2002 whereas there is sufficient evidence to contrary from both the Appellant and even the Respondent.
10. The appellant filed written submissions which learned counsel for the appellant, Mr Keriario highlighted during a virtual hearing before us. Counsel submitted that 2 consents were recorded by the parties in Kisii Miscellaneous Application No 52 of 2004, *Walter Muga Guya t/a Robert Silver Nursing Home v NHIF*, and whose terms also applied to HCCC Misc Application No 50 of 2004, *Alfred Mdeizi v NHIF*; that the consents provided sufficient evidence that the respondent owed the appellant Kshs 3,895,513 as claimed; that the learned judge misdirected himself and or failed to properly address his mind to the fraudulent claims alleged by the respondent; that further the record showed that the respondent did not at any time indicate that the appellant had submitted fraudulent claims within the timelines specified by the consent dated June 15, 2004. Counsel went on to submit that the duty and or onus of proving whether the appellant's claims as set out at P. Exhibit 23 were actually paid, lay with the respondent, as the fact of payment becomes of "special knowledge" to the respondent according to section 112 of the *Evidence Act*; that the respondent had the legal burden of proving that the payments were made. It was argued that the respondent did not discharge the burden



- of proof to show that it actually reimbursed the appellant as there was no evidence of receipt of the cheques or the existence of any acknowledgments. Counsel concluded that the appellant had proved his case to the required standard.
11. The respondent also filed written submissions which learned counsel, Miss. A. Onsongo highlighted. Counsel submitted that central to the appeal and the entire suit, is the enforcement of the terms of the consent recorded in Kisii Miscellaneous Application No 52 of 2004, *Walter Muga Guya t/a Robert Silver Nursing Home v NHIF*, and whose terms also applied to HCCC Misc Application No 50 of 2004, *Alfred Mdeizi v NHIF*, the parties in the instant suit; that the appellant had also filed another suit, that is, Kisii High Court Miscellaneous Application No 114 of 2003, comprising the same parties; that all these suits arose from the same cause of action in which the appellant claimed for unpaid dues, which is what formed the basis of the objection in the respondent's defence, in the nature of *res judicata*; that though the issue was not canvassed by either of the parties in the High Court, the appellant was seeking enforcement of the terms of the consents, which was in total disregard of section 34 of the *Civil Procedure Act*, which provision was to the effect that, the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit; that, the trial court did not have jurisdiction to entertain the consents filed in a separate suit or to implement the decree of another suit. It was submitted that though not previously raised, a question on jurisdiction could be raised at any time, including on appeal, or at the earliest opportunity. Counsel cited the case of *Kenya Ports Authority v Modern Holdings (EA) Limited* [2017] eKLR in support of that proposition.
 12. Next, counsel turned to address the question of whether the appellant proved his case on a balance of probabilities. It was submitted that though the appellant sought to enforce the terms of the consents, the nature of the relief sought in this suit was special damages that required the appellant to specifically plead and prove its claims; that the appellant simply demanded for payment of Kshs 3,895,513 and the entire suit was anchored on paragraph 6 (a) of the amended plaint where it was claimed that the money owed arose from outstanding claims for reimbursement; that the claim did not comply with order 2 rule 4 as read with order 42 of the Civil Procedure Rules which requires parties to specifically plead the claims and to provide particulars; that no particulars relating to the patient and holder of the NHIF card, the membership number, its validity, the date the patient was treated, or the date of admission and discharge was provided; that instead, the appellant presented a blanket claim of Kshs 3,895,513 and did not establish a basis for his claim. He therefore failed to discharge the burden of proof. The respondent cited the cases of *Linus Frederick Msaky v Lazaro Thuram Richoro & another* [2016] eKLR and *Peter Mark Gershom Ouma v Nairobi City Council* [1976] eKLR for the proposition that special damages must strictly plead the amounts assigned to each specific damage, which must also be specifically proved.
 13. On the appellant's complaint that the learned judge shifted the burden of proof to him to demonstrate that he had not received the cheque payments listed in the respondent's payment summary, that was produced, it is trite that in civil matters, the burden of proof lies with the person who alleges the existence or non-existence of any fact as stipulated in sections 107 and 108 of the *Evidence Act*. With regard to the handwritten list divided into four columns that was belatedly produced, counsel submitted that the list was insufficient since it did not contain important particulars such as the names of the persons treated, the contributor, the date the treatment was received, the national identity card numbers of the contributors, date of admission or discharge of the patient and the amount sought by each individual patient; that without this information the appellant's once again failed to discharge the burden of proof and the suit ought to have been dismissed.



14. We have given due consideration to those submissions, the authorities cited before us and the entire record of appeal in keeping with our duty as a first appellate court to re-evaluate and reassess the entire evidence with a view to arriving at our own inferences of fact and independent conclusions thereon. See *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR. We are mindful that we do not have the advantage the trial court had of hearing and observing the witnesses as they testified and are, therefore, generally slow to disturb findings of fact arrived at, to which we pay due respect. In the above regard the issues for consideration are;
- i. Whether the trial court had jurisdiction to hear the suit;
 - ii. Whether the appellant proved his case on a balance of probabilities;
 - iii. Whether the consents were sufficient proof that the respondent owed the appellant;
 - iv. Whether the learned judge evaluated all the evidence;
 - v. Whether the appellant was entitled to the amount claimed in the amended plaint; and
 - vi. Whether the learned judge shifted the burden of proof.
15. As to whether the trial court had jurisdiction to hear the suit, the respondent has argued that the appellant sought to apply the consents that were entered in Miscellaneous Application Nos. 50 and 52 of 2004 to enforce his claim against the respondent in the suit; that by virtue of section 34 of the *Civil Procedure Act*, a decree issued in any matter requires to be enforced by the court entering that decree; that the consents entered in the miscellaneous applications were not capable of being enforced by another court as a new suit, and on this basis, the High Court had no jurisdiction to hear the dispute and should have dismissed it.
16. Section 34 *Civil Procedure Act* specifies;
- “All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”
17. In other words, a consent having been entered in Kisii Miscellaneous Application No 50 of 2004, the respondent’s contestation is that, the appellant ought to have enforced the decree issued pursuant to the consent in the application proceedings, instead of in a new suit.
18. The record discloses that a consent dated June 15, 2004 was entered in Miscellaneous Application No 52 of 2004 in *Walter Muga Guya t/a Robert Silver Nursing Home v NHIF*, and by extension to Miscellaneous application No 50 of 2004 between the appellant and the respondent. And another consent was entered on July 27, 2004. The applications were subsequently withdrawn, and thereafter, the appellant filed another suit, to which this appeal pertains, that is, Kisii HCCC No 137 of 2005 seeking payment of Kshs 3,895,513.
19. In his suit, the appellant claimed that the respondent owed him Kshs 3,895,513 in respect of, “... outstanding and unpaid claims submitted to the defendant for reimbursement to the plaintiff...” The amended plaint then goes on to state that “...demand for payment has been made and consents entered into but no payment has been made...” In other words, the appellant sought to utilise the consents reached in the applications to support its claim against the respondent in the suit it had instituted thereafter.



20. As to whether reliance on the consents in a fresh suit resulted in the contravention of section 34, our view is that, it did not. We say this because, the appellant's suit was in respect of a suit where he claimed Kshs 3,895,513 where it remained incumbent on him to prove his claim against the respondent. It becomes clear that the appellant merely intended to utilise them as evidence to support his claim for reimbursement of Kshs 3,895,513. He was entitled to rely on such evidence as was at his disposal to support his claim. In the circumstances, we are satisfied that, in so far as the appellant sought to rely on the consents to support the claim set out in the amended plaint, we find that, the learned judge had jurisdiction to determine the suit, and to consider them.
21. Having said that, did the appellant prove his case on the balance of probabilities? The appellant's complaint is that, the respondent failed to settle outstanding claims for the reason that they were rejected for having been fraudulent; that subsequently, the parties entered into a consent in the judicial review miscellaneous applications, where the respondent had expressly agreed to pay the sums owed; that this suit was brought because, notwithstanding the existence of the consents, the respondent had declined to pay him.
22. In determining this issue, we consider it necessary to ascertain whether firstly, the appellant established his claim and, whether the consents sufficiently proved that the respondent owed him Kshs 3,895,513 and had agreed to pay the sum claimed.
23. At the outset, we begin by observing that the appellant's suit was with respect to unpaid medical claims submitted to the respondent. The amended plaint specified that the total amount owed was Kshs 3,894,513 which comprised of "...outstanding and unpaid claims submitted to the defendant for reimbursement...under the provisions of the aforesaid Act." Given that the suit was in respect of reimbursements for various claims, culminating in the lumpsum amount of Kshs 3,895,513. In these circumstances it became a claim in the nature of special damages.
24. In the case of *Siree v Lake Turkana El Molo Lodges* [2002] 2EA 521 the Court reiterated;
- "This court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages."
25. Furthermore, in claims in the nature of special damages, parties must specifically plead the amounts claimed, and prove that the sums were due.
26. In the case of *Hahn v Singh* [1985] KLR 716, this Court held;
- "Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."
- And in the case of *Maritim & Another v Anjere* [1990-1994] EA 312 it was succinctly stated that;
- In this regard, we can only refer to this court's decision in *Sande -v- Kenya Cooperative Creameries Limited Civil Appeal No 154* where as we pointed out at the beginning of this judgment, Mr Lakha readily agreed that these sums constituting the total amounts was in the nature of special damages. They were not pleaded. It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed."



27. As such, it was essential that the appellant demonstrate how this amount was arrived at. Under the *NHIF Act* and the regulations, any claim for reimbursement required to be submitted in a specified format. It required to be made up of different claims, for different patients who attended the medical facility. In particular, the appellant would have had to submit a claim form together with a copy of the membership card and identity card the relationship of the contributor to the patient, date of admission and date of discharge, the claim from the hospital, including the date of admission and date of discharge.
28. We have been through the pleadings and the appellant's documents, and though the appellant's claim was with respect to various patient's claims totalling Kshs 3,895,513, the amended plaint does not disclose any individual claims. They were not in any way pleaded or particularised. In addition, there was no documentary evidence produced to show that the amounts claimed were expended, and therefore were due for reimbursement. The only available evidence that was submitted, was a hand written schedule, P Exhibit 23 that listed sums claimed. In our view, this was not sufficient, as, what the appellant was also required to submit was documentation that supported each and every amount that was claimed, which was not the case.
29. Without the claim having been specifically particularised and proved with documentary evidence as required by law, we are not satisfied that the appellant established that he was owed the lumpsum amount claimed.
30. That said, the appellant's case is that, the consents of June 15, 2004 and July 27, 2004, amounted to admissions by the respondent of the amount of Kshs 3,895,513 that was claimed; that the learned judge should have entered judgment in his favour based on the consents, but had instead disregarded them to his detriment.
31. This would lead us into the issue of the consents and whether or not they conclusively established that the respondent owed the appellant Kshs 3,895,513. The consent dated June 15, 2004 that was entered in Miscellaneous Application No 52 of 2004 read;
- "i) The Respondent will accept, process and pay all claims lodged by the applicants in accordance with the requirements of the *National Hospital Insurance Fund Act* with effect from the date of this order.
 - ii) Any claims lodged by the applicant under i) above which fail to meet the statutory requirements will be rejected/notified to the respondent.
 - iii) Within 30 days of the date of this order the applicant will process all claims lodged by the applicants to the date of this order. The respondent will pay out all regular claims that are not rejected.
 - iv) The respondent will notify the applicant of all claims that have been rejected within the same 14 days stipulated above with reasons for their rejection.
 - v) The respondent will compile a list of all claims that it claims were irregular and that led to the respondent action to suspend the applicant setting out the irregularities in the said claims within 30 days of the date of this order.
 - vi) The applicant will within a reasonable period not exceeding 30 days give written response to the allegations of irregularity.



- vii) The parties and/or their Advocates will arrange a meeting upon receipt of the applicants' response to agree on a way forward on the alleged irregularities. In the event no agreement is reached the parties will submit a case stated to the court for determination.
 - viii) Until further orders the respondents will receive and process all claims by the applicant in accordance with the NHIF Act and abide by the court orders of August 13, 2003.
 - ix)...” On July 27, 2004, during the proceedings in Miscellaneous Application No 50 of 2004, the consent that was recorded read;
32. By consent the outstanding amount be paid to the applicant within 7 days.”
- A review of the consents, show that they spelt out modalities for payment, which were as follows;
- i) the respondent accepts, processes and pays all claims lodged by the appellant in accordance with the requirements of the Act;
 - ii) reject claims which failed to meet the statutory requirements;
 - iii) notify the appellant of rejected claims;
 - iv) pay out all regular claims;
 - v) compile a list of all claims that were irregular leading to suspension of the appellant
 - vi) respond to allegations of irregularities and
 - vii) abide by the court orders.
33. In point of fact, the terms of the consent did not establish an unqualified acceptance by the respondent that it owed the appellant Kshs 3,895,513. Neither did it confirm that the respondent had agreed to pay the amount claimed in the amended plaint. To the contrary, the consents simply provided an agreed methodology for payment of all regular claims that were not rejected. It also required the respondent to provide a list of rejected claims, so that, in as much as the appellant was seeking to rely on the consents to support his claim against the respondent so as to have judgment entered in his favour, there being no outright acknowledgement that the respondent owed him Kshs 3,895,513, we find that the consents did not amount to an admission in respect of the claim for Kshs 3,894,500, and the learned judge could not, on that basis, enter a judgment in the appellant's favour.
34. On the assertion that the learned judge disregarded the terms of the consents in conjunction with the appellant's evidence to reach a finding that the appellant had not proved his claim, a consideration of the judgment shows that the learned judge took into account the parties' pleadings, the oral and documentary evidence, and the submissions. And after considering the appellant's and the respondent's itemised schedules, with reference to paid claims, rejected claims and unsubmitted claims, the court concluded that the respondent had fully complied with the settlement terms and the law.
35. We too have considered the evidence that was before the trial court. Besides the consents, the appellant also produced a hand written schedule P Exhibit 23, that listed claims totalling Kshs 3,894,500 and another claim of Kshs 1,013 for the period 1995 to 2002.
36. In response to it, the respondent rebutted the appellant's claims in accordance with the categories identified in the consent, namely, paid claims, rejected claims, and unsubmitted claims. In DW Exhibit 5 it was stated that 39 claims were paid. At pages 16, 17 and 18 of DW Exhibit 6 it was disclosed that 77 claims made in P Exhibit 23, were rejected. And in so far as the rejected claims were concerned, the respondent produced documents showing that the appellant was notified of the rejected claims.



The respondent also produced letters in DW Exhibit 7 including a letter HP/KSM/AD/200/7 dated November 18, 1993, produced as DW Exhibit 3, as an instance where the appellant was notified of a rejected claim and the reason for such rejection. The respondent also testified that there were claims in the appellant's P Exhibit 23 that were not submitted as, they were not traceable within its system. As such, the respondent was unaware of the existence of such claims.

37. When the 39 paid claims, the 77 rejected claims and the unsubmitted claims are deducted from the appellant's computation set out in P Exhibit 23, it becomes evident that the lumpsum amount he claims to be owed was not substantiated or justified. Given this finding, as was the learned judge, we too are satisfied that the lumpsum claim for Kshs 3,895,513, was speculative and without basis, and as such, must be disallowed.
38. Finally, we turn to the allegation that the learned judge shifted the burden of proof to the appellant to rebut the respondent's evidence that he received payments during the period of accreditation, yet the burden always remained with the respondent. In answer to this, it is trite law that a party is bound by its pleadings. The amended plaint that set out the appellant's case was that, the respondent owed him Kshs 3,895,513 arising from unpaid claims. As indicated above, it was incumbent on him to particularise and prove his claim, which he did not. In its evidence, the respondent demonstrated that it had paid the appellant for genuine claims and rejected others and accordingly communicated the rejected claims to the appellant. Against the backdrop of the appellant's unsubstantiated claim, we consider the respondent's evidence to have been sufficient to shift the burden back to the appellant, and he failed to discharge that burden.
39. In sum, we find that the appellant did not prove his case to the required standard. This appeal is unmerited and is dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY 2023.

W. KARANJA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

