UAP Insurance Company Limited v Karanja (Civil Appeal E797 of 2021)
[2025] KEHC 1166 (KLR) (Civ) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1166 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E797 OF 2021

REA OUGO, J

FEBRUARY 27, 2025

BETWEEN

UAP INSURANCE COMPANY LIMITED ..... APPELLANT

AND

JANE NJERI KARANJA ..... RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Nairobi, before Hon. A.N Makau (PM) delivered on the 5th November 2021 in Nairobi Milimani Commercial Courts, CMCC No. 7184 of 2018)

JUDGMENT

1. The respondent herein was the plaintiff at the subordinate court. Through a plaint dated 3.08.2018, the respondent sued the appellant stating that the appellant by a contract of insurance contained in a policy number 8613524-00 formerly 7230958-00 agreed to provide the respondent medical insurance and in particular to indemnify her against losses resulting from any medical policy to the tune of Kshs 6,000,000/-.

2. The appellant had agreed to provide insurance cover for; Treatment outside the country, Inpatient exercises related to acute conditions or accidents (Kshs 3,000,000/- only), Cancer treatment (Kshs 500,000/-), Gynaecological Surgery (Kshs 350,000/-).

3. On 6/6/2016, she was diagnosed with a bulky uterus with uterine fibroids and advised to have a surgical operation to remove the fibroids slated for 23/6/2016 at M/s. International Centre for Minimal Access Surgery (ICMAS).

4. The respondent further averred that on or about 5.07.2016 she developed severe complications following the surgery and was admitted at Mombasa Hospital and it was revealed that the respondent

had a paralytic ileus with a radio-opaque foreign body at the ileo-caecal region and upon discovery, she was referred to India for the removal of the foreign body. In line with the terms of the contract of insurance on or about the 22nd day of June 2016, she notified the appellant of the said referral. At all material times since the notification of the claim the appellant had been informed that the respondent was covered by a valid Medical Insurance Policy.

5. On the 20th of July 2016, the respondent travelled to New Delhi in India and was admitted to Indraprastha Apollo Hospital. It was confirmed that a foreign body (gauze) on the right iliac fossa and necrosis of the right side of the abdomen skin was caused by an electrical fault during the previous operation carried out at ICMAS. The respondent claimed that the Appellant breached the terms of the contract by refusing, neglecting, and/or refusing to refund the Kshs. 2,009,609.015, failing to give the respondent timely advice on which medical facilities to attend and failing to provide a professional undertaking on the medical fees covered under the policy. The particulars of special damages were as follows:

    a. Treatment at ICMAS at the cost of Kshs 889,545/-

    b. Treatment cost at M/s Indraprastha Apollo Hospital Kshs 2,009,609.0154

    c. Air tickets to India Kshs 156,244/-

    d. Accommodation expenses in India Kshs 232,000/-.

    e. Further medical cost of plastic surgery USD 6,000/- (Kshs 660,000/-)

    f. Medical report Kshs 5,000/-

6. The respondent sought an order compelling the appellant to pay Kshs 3,952,398/-, a declaration that the appellant breached the contract of insurance with the respondent, special damages plus costs of the suit.

7. The appellant denied the respondent's claim through its statement of defence dated 25th February 2019. The appellant stated that the Afaya Imara Policy document 2013, it agreed to provide health insurance for an overall of Kshs 3,000,000/-. It was averred that the appellant had agreed that;

    i. The company would indemnify the insured subject to the provided cover limits in respect of the medical expenses incurred as the direct result of an insured falling ill or sustaining accidental bodily injury during the period of insurance,

    ii. the maximum amount payable by the appellant for medical expenses in respect of the period of insurance for medical expense claims shall not exceed the limit or sub-limits, the sub-limits are payable for the benefits of Inpatient expenses related to acute conditions or accidents is Kshs. 3,000,000, gynaecological surgery is Kshs. 350,000 and cancer treatment for one year of cover is Kshs. 500,000.

    iii. Injury is defined as bodily injury caused by an accident while the policy is in force and includes all injuries resulting from such accident and complications arising therefrom.

    iv. Proximate cause/original cause refers to the action in chain of events usually the initial action that caused a loss.

    v. The benefits as per the policy provided covered for treatment/medical expenses whether in the country or outside the country.

8. The Appellant claimed that the proximate cause of the complications developed by the plaintiff was the surgical operation for removal of the fibroids and was not as a result of a bodily injury caused by accident and thus not covered under the policy. The plaintiff had already exhausted her cover limit of Kshs. 350,000 for gynaecological surgery in Kenya, and the limit for Cancer treatment was Kshs. 500,000.

9. The appellant averred that it had requested the respondent to provide original receipts, claims forms for the treatment done at ICMAS, and medical reports detailing the treatment in India to enable the Appellant to guide the respondent on the benefit limits applicable. The appellant paid for the respondent's removal of fibroids by refunding her Kshs. 350,000 towards the medical expenses incurred at ICMAS, and the cover's benefit limit was thus exhausted. On the medical expenses incurred in India, the Appellant could only refund Kshs. 500,000/- towards the cancer-related benefit upon receiving the original bill/receipts.

10. Finally, the appellant claimed that the air tickets and accommodation were part of the medical bill and that the medical costs of the plastic surgery were not payable because the policy only provided payment of medical costs arising from illness related to the plastic surgery that occurs after three years waiting period. In this case, the plastic surgery was due to negligence on the part of ICMAS.

11. The trial court therefore, had to determine whether the defendant had an obligation to settle the bills, how much it was to pay and for what reason. The trial magistrate in his judgment, found that the respondent was operated at ICMAS at a cost of Kshs 889,545/-. It held that the Appellant had not satisfactorily proved why they failed to pay the amount. Furthermore, the subordinate court entered judgment in favour of the respondent and compelled the appellant to pay Kshs. 2,009,609.15/- for treatment at Indraprastha Apollo in India, Kshs. 5,000/- for the medical report together with the cost of the suit.

12. The appellant, being dissatisfied with the said judgment, filed an Appeal through a memorandum of appeal dated 2.12.2021 based on the following grounds:

    1. The learned Magistrate erred in law and fact in finding that the Appellant was liable to pay treatment costs of Kshs. 889,545.00 incurred by the respondent for gynaecological surgery at the International Centre for Minimum Access Surgery (ICMAS) despite the policy providing a sub-limit of Kshs. 350,000 for gynaecological surgery.

    2. The Learned Magistrate erred in law and fact in finding the appellant liable to pay treatment costs of Kshs. 889,545.00 at ICMAS while failing to consider the uncontroverted evidence that the surgery was gynaecological surgery for which the policy sub-limit was Kshs. 350,000 which sum was paid by the Appellant and which payment was, in any event, not taken into account in the judgement to offset and or reduce the said total treatment cost of Kshs. 889,545.00.

    3. The learned Magistrate erred in law and fact in finding that the Appellant was liable to pay costs of Kshs. 2,009,609.00 incurred by the respondent for cancer treatment in India despite the finding that the treatment related to Cancer for which the respondent was covered under the policy to the tune of Kshs. 500,000 and thereby failing to lay basis for the award of Kshs. 2,009,609.00.

    4. The Learned Magistrate erred in law and fact in finding that cancer, for which the respondent was treated in India, was a chronic condition when cancer is not, and no basis was laid that cancer is, a chronic condition and when, in any event, the policy provided a sub-limit of Kshs. 500,000 for chronic conditions which was not considered in the judgement.

5. The learned Magistrate erred in law and fact in failing to consider and find that the respondent had failed to submit documents and receipts for the treatment in India to enable payment per the policy.

6. The learned Magistrate erred in law and fact in failing to evaluate the evidence in its totality and to consider the submission of the Appellant and thereby arrived at the wrong conclusions on the amount payable in treatment at ICMAS and cancer treatment in India as per the policy.

7. The Learned Magistrate failed to give a good or proper basis for the said wards and the same is manifestly excessive and not in line with the policy document signed by the Appellant and Respondent.

8. The Appellant further prays the appeal to be allowed with costs, and that the judgment and decree delivered on 5.11.2021 be set aside whereafter this court dismisses the primary suit with costs to the Appellant.

13. Parties canvassed their arguments through written submissions.

14. The Appellant submits that the appeal raises three issues for determination; whether there was a contract of insurance between the Appellant and the respondent, whether the Appellant breached the contract of insurance, and whether the Respondent is entitled to the reliefs claimed.

15. On the first issue, the Appellant argued that the contract they provided the respondent was for Health Insurance for an overall cover of Kshs. 3,000,000/-. Therefore, what is in dispute is only the terms and the circumstances under which the policy could be invoked. It was submitted that the policy contract only covered causes of illness in the initial action and for which there was a proximate cause. The burden of proof rested on the respondent to prove the proximate cause arose out of the risks insured against it. The appellant argued that a court of law cannot rewrite a contract between two parties. Reliance was made in the decisions in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Limited and Another [2001] eKLR and Pius Kiamayo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR. On the second issue of determination, the Appellant argues that the cause of the respondent's treatment in India was not covered by the medical policy executed by the parties, thus, they did not breach the terms of the contract of Insurance entered between them.

16. The appellant further contends that the awards granted were punitive and excessive and the same failed to adhere to the policy terms. The Appellant claims that the award of Kshs. 889,545 is unjustified and it should be set aside as it refunded Kshs. 350,000 to the respondent as per the Policy document terms which the court disregarded. The appellant submits that the award of Kshs. 2,009,609 incurred in India should be set aside as they are only bound to refund the amount spent on cancer treatment to a limit of Kshs. 500,000. The Appellant also contends that the award of Kshs. 138,122 as costs for travel (air tickets) and her accompanying person for her treatment in India together with the award of Kshs 5000 paid to Dr. Wokabi for the Medical report, to be unjustified. The Appellant prays that this court dismisses the respondent's primary suit with cost to the Appellant.

17. The respondents in her submissions heavily relied on the Afya Imara Policy document dated 9.10.2015 (page 219 of the record). Hereinafter referred to as "the policy document". The policy document excludes medical expenses incurred by a member at a non-appointed medical provider or under a non-appointed medical practitioner. The respondent claims that the Appellant's witness (DW-1) in her testimony confirmed that the Appellant did not, before execution of the policy document, provide her with any list of the so-called Appellant's appointed medical provider(s) and or medical practitioner(s). That information was within the Appellant's knowledge and it was its duty to disclose before the execution of the policy document by the parties was that of the defendant.

18. The respondent relied on the decision of the court in Sita Steel Rolling Mills Limited v Jubilee Insurance Company Limited [2007] eklr, which stated thus;

> " The contract of insurance is perhaps the best illustration of class of contracts described as "uberima fidei", that is, of 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" (underlining supplied). The respondent further relied in Beatrice Muriuri Kamau v A.I.G Insurance Limited (2020) eKLR and William Akoth Abatha vs. Pioneer Assurance Company Limited [2016]."

19. The respondent further stated that Clause L of its general conditions, the policy document, made it mandatory to first, notify the company ,for the company to provide authorisation. The respondent submits that she did so on the 8th day of June 2016 by notifying the defendant of her upcoming surgery and seeking directions (Plaintiff's Exhibit 6). That, DW-1 also confirmed that the plaintiff notified the defendant on time, but the request led to no response from the Appellant. The respondent claims that she also notified the Appellant of the urgent surgery at the Agha Khan Hospital in Nairobi on 22.6.2016 (Respondent's Exhibit 5). However, the Appellant responded on 23.7.2016 at 9.57, denying that Dr. Parker was not in its panel (Exhibit 7) and that they supplied the respondent with a list of doctors on their panel later on 23.6.2016.

20. On the surgery issue, the respondent claims, that she presented herself at ICMAS for treatment on 23.6.2016 (Respondent's Exhibit 27) for Kshs. 889,545/- and was transferred to Mombasa Hospital where it was revealed that a foreign object had been left in her body during the previous operation at ICMAS. The Appellant paid the bill to the tune of Kshs. 200,000/-. After the discovery of the problem, the respondent travelled to India for treatment according to Clause 7 of the policy document where she incurred a travel cost of Kshs. 78,122 (Respondent's Exhibit 33). The respondent claims payment of; Kshs. 150,000/- for benefits of illness related to reconstructive/plastic surgery, Kshs. 500,000 Cancer treatment, Kshs. 500,000 for Chronic conditions treatments and Kshs. 3,000,000 for inpatient expenses related to acute conditions.

21. The respondent also submits that the Appellant has always had all relevant documents necessary to satisfy her claim (Respondent's Exhibit 8,13,18,22). The respondent thus prays this court further award them a total of Kshs. 33,000 for special damages and further dismiss the appeal with costs and interests from the date of its filing.

Analysis And Determination

22. This being the first appeal, the Court must reconsider and reevaluate the evidence and draw its conclusion. However, the Court must make due allowance for the fact that it has neither seen nor heard the witnesses. These principles were set out in Selle and another v Associated Motor Boat Company Ltd.& Others [1968] EA 123.

23. Jane Njeri Karanja (Pw1) adopted her witness statement filed in court on 8/8/2018. She testified that sometime in March 2016, she was diagnosed with uterine fibroids, and on 23/6/2016, she was admitted at ICMAS. At the said hospital, she was diagnosed with carcinoma ovary (stage 111B) and advised to opt for a total Laparoscopy Hysterectomy and BSO, Segmented Resection of Small Bowl, Infra Colic Omentectomy, Appendectomy and Excision of peritoneal nodule surgical operation. Pw1 returned to Mombasa, but she suddenly developed complications related to paralysis of the intestines and was rushed to Mombasa Hospital. The appellant refused her admission at Mombasa Hospital. At the hospital, it was revealed that a radio-opaque foreign body had been left at the right iliac fossa. She was

advised to travel to India for further surgery to remove the foreign body, and she notified the appellant. She testified that she spent Kshs 156,244 on travel costs and Kshs 232,000/- to cover the costs of the caretaker and accommodation. At Indraprastha Apollo Hospital, she was advised to undergo a plastic surgery procedure on the necrotic area at the cost of USD 6,000.

24. Dr Washington Wokabi (Pw2) testified that he is a consultant surgeon and produced the medical report of Pw2. He testified that the complications suffered by the respondent were a result of a foreign object left in her body.

25. Judy Wangechi Njuguna (Dw1) testified that she was a claims manager and adopted her witness statement. She testified that on 6/6/2016, the respondent was diagnosed with a bulky uterus with uterine fibroids and advised to proceed with a surgical operation. She exhausted her cover limit of Kshs 350,000/- for gynaecological surgery which was refunded. However, she developed complications that were not occasioned as a result of bodily complications caused by an accident. Dw1 testified that they could only refund up to Kshs 500,000/- for the treatment incurred in India being the limit cover for the cancer-related benefit.

26. After considering the appeal, submissions, and the evidence on record, the key issues for determination are; whether the appellant breached the insurance contract and whether the respondent sufficiently proved she was entitled to the damages awarded by the trial court.

27. The respondent sought treatment at ICMAS at the cost of Kshs 889,545/-. The appellant availed the Citi Account Statement Details Report that revealed that on 25/8/2016, it transferred Kshs. 350,000/- to the respondent which was the limit for gynaecological treatment.

28. However, the treatment received by the respondent at ICMAS was for both gynaecological and cancer treatment. Pw1 also testified that she was diagnosed with carcinoma ovary (stage 111B). Dw1 in cross-examination testified that the procedure at ICMAS was for the treatment of cancer. Therefore, the appellant also had to apply their policy to gynaecological and cancer treatment.

29. The limit for cancer treatment as per the policy document was Kshs 500,000/-. In addition to paying Kshs 350,000/- to the respondent, the appellant was also required to pay an additional Kshs 500,000/-, but it failed to do so. The failure to pay an additional Kshs 500,000 for the treatment received at ICMAS amounted to a breach of contract.

30. However, the respondent's problems only worsened after surgery, necessitating the need to seek further treatment in Mombasa and India. The trial magistrate entered judgment in favour of the respondent for the appellant to pay for treatment costs in India.

31. The appellant however argues that complications developed as a result of the negligence of the doctors. The proximate cause of the complications developed by the respondent was the surgical operation for the removal of the fibroids and not as a result of bodily injuries caused by an accident. Therefore, the treatment was not covered by the policy.

32. On whether the appellant was obligated to reimburse the respondent costs incurred upon further treatment in India, the same was addressed under the general conditions of the policy in clause (p). It reads:

> "(p) Evacuation
>
> (i) ...
>
> (ii) Overseas referral

> The Company will indemnify the insured for any costs incurred for medical condition that warrant referral for treatment overseas provided that the treatment is not available in Kenya and is certified by the Company's appointed independent medical practitioner as being necessary. The Certification shall be in advance of any such travel and treatment. The Company shall issue a pre-authorization and approval letter prior to the travel and treatment.
>
> Air travel costs for an economy return ticket for the patient shall be catered for on reimbursement. Travel cost of one accompanying person will be reimbursed up to a maximum of Kshs 60,000 per annum. Hotel expenses and other non-medical expenses are excluded..."

33. It is not contested that the policy covered inpatient expenses related to acute conditions or accidents. The respondent contends that the appellant was to reimburse her cost of treatment in India, air ticket and accommodation expenses. The appellant on the other hand, argues that this was not an accident but medical negligence.

34. According to the Oxford Dictionary, an accident is an unfortunate incident that happens unexpectedly and unintentionally, typically resulting in damage or injury. Law Salmond and Heuston on the Law of Torts 9th Edition noted:

> " Negligence is a conduct, not state of mind – conduct which involves an unreasonable great risk of causing damage; negligence is the omission to do something much a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something, which a prudent and reasonable man would not do."

35. The case summary of Dr. Shuaib Zaidi of Indraprastha Apollo Hospital, regarding the respondent was that a foreign body (gauze) was found in the right iliac fossa and necrosis on the right side of the abdomen skin caused by an electrical fault during the operation. According to the summary, the report implies that the respondent's condition was caused by an accident, specifically, an electrical fault during the operation.

36. On the other hand, the respondent also relied on the medical report of Dr. Wokabi. According to Dr. Wokabi, leaving a piece of gauze within the abdomen is always considered negligent in that there is a time-tested procedure of counting all items on the operating tray. He explained that the count is done more than 3 times at the start and after any surgical abdominal or other procedures. If an item is missing at the final count, all efforts to locate it are made, and the patient cannot leave the theatre if such an item is not located. Dr. Wokabi was of the opinion that leaving the swab in the abdomen was negligent.

37. Having considered the two reports, I find that I am constrained to agree with the report of Dr Wokabi relating to how the respondent sustained injuries while in surgery at ICMAS. There was some negligence on the part of the medical practitioners and the hospital at ICMAS; therefore, the same could not be said to be an accident.

38. However, the inpatient covered both acute conditions or accidents. Therefore, this court must proceed to consider whether the injuries sustained by the respondent were a consequence of an acute condition or an accident. An acute condition according to the policy document has been described as "the medical condition or an illness or medical problem that begins and progresses rapidly and ends quickly and has a definite cure."

39. In this case, the injuries sustained by the respondent following treatment at ICMAS the respondent developed a medical problem that progressed rapidly and was treatable. However, the policy required the respondent to seek certification before the travel and treatment. The respondent via the email of 15/07/2016 informed the appellant that she had been referred to India. The respondent did not get any feedback from the appellant despite her acute medical condition and her being in dire need of medical treatment. On 29/07/2016, she informed the appellant that she had travelled to India. On 8/8/2016, the appellant requested for the report so that it could give guidance on the benefits applicable. Interestingly, vide the letter dated 24/8/2017 in the respondent's supplementary list of documents, Joseph Mwai, the appellant's senior legal officer, the appellant wrote as follows:

> " In relation to the figures incurred in India the sum of Kshs 1,131,462.25 is acknowledged and is payable do therefore forward to us your banking details to enable make the transfer."

40. The appellant on 9/10/2017 wrote to the respondent's advocate as follows:

> " Dear Dorothy,
>
> Please find attached documents indicating the claims that we did not consider for reimbursement due to lack of payment proof (receipts) I have discussed this with Mr. Kanyi. Kindly share with him to enable him collate the receipts and share with us for settlement..."

41. The respondent in response wrote back as follows:

> " We refer to your email letter dated 9th October 2017.
>
> We attach herewith the requested certified copy of invoices receipts from M/s Indraprastha Apollo Hospital (Apollo Cancer Institutes) and Shree Rangnathjee Pharmaceuticals for your urgent attention.
>
> The total amount in Indian Rupees amount to 1,182,112.95 which is equivalent to Kshs 2,009,609.015
>
> The total expenses incurred at ICSMAS amounts to Kshs 889,545/-.
>
> Please note that the estimated costs for plastic surgery is $6000 @ Rate of 104 = 624,000/-."

42. According to the correspondence from the parties, provisions of clause p (ii) of the General Conditions of the Policy regarding overseas referrals were varied. The appellant varied the need to have approval for the travels and likewise, the respondent varied the need to be reimbursed for the travelling expenses.

43. The Court of Appeal in Nairobi Civil Appeal 155 of 1992 Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 others [1993] eKLR in considering the effect of variation of the contract both prior to reducing it to writing and after observed:

> " Evidence of negotiations is never admissible to vary the terms of the written contract. However, where there is a latent ambiguity, extrinsic evidence may be given of surrounding facts to explain the ambiguity. But certainly, no evidence or correspondence on prior negotiations may be admissible. It is assumed that the intentions of the parties to a written contract are embodied in a written contract itself. I have used the phrase "priority negotiations" because subsequent correspondence may affect the written contract where it is clear from the wording that the parties intended such subsequent correspondence to affect the written contract. For instance, subsequent correspondence may vary the terms of the

written contract if it is clear from the correspondence that the parties intended to vary the contract."

44. The appellant had conceded that there was a need to pay the respondent the treatment costs incurred in India and the same was availed showing that the respondent paid Indian Rupees in the amount of 1,182,112.95 which was equivalent to Kshs 2,009,609.015/-. Similarly, through their correspondence, the respondent was not seeking compensation for the travel expenses and costs of plastic surgery. Therefore, the trial magistrate was in error when it made awards under the two heads. The special damage claim of Kshs 5,000/- paid for Dr Wokabi's medical report was pleaded and proved.

45. Therefore, I find the appeal partly successful and set aside the judgment of the trial magistrate and substitute it with the following award in favor of the respondent:

    1. That the appellant pays Kshs 500,000 for treatment at the International Centre for Minimal Access Surgery.

    2. That Kshs 2,009,609.015/- be paid to cover the treatment costs in India.

    That Kshs 5,000/- be paid to cover the costs of the medical report.

    The total is Kshs. 2514609.015.

{{>#arguments_para_3}}.

46. Consequently, having found that the appeal is partially successful, the appellant shall have half the costs of the appeal.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 27TH DAY OF FEBRUARY 2025

R.E. OUGO

JUDGE

In the presence of:

Mr. Lundi -For the Appellant

Mr. Achoka -For the Respondent

Wilkister - C/A