

**IN THE HIGH COURT OF TANZANIA  
COMMERCIAL DIVISION  
AT MWANZA**

**COMMERCIAL CASE NO. 12 OF 2012**

**TARIME GOODWILL FOUNDATION HEALTH  
SERVICES HURUMIA WATOTO -----PLAINTIFF  
VERSUS  
THE LIQUIDATOR PROSPERITY LIFE CARE  
INSURANCE TANZANIA LIMITED -----DEFENDANT**

**JUDGEMENT**

**B.K. PHILLIP, J**

The plaintiff herein lodged this case against the defendant praying for judgement and decree as follows:-

- i. Payment of Tshs. 91,171,798/= being cost and value of services rendered and remain unpaid to date for breach of contract.
- ii. Payment of interest at commercial rate from the date of filing this suit till payment in full after judgment.
- iii. Costs of the suit.
- iv. Any other relief this court may deem just to grant.

It is alleged in the plaint that on 24<sup>th</sup> May 2017 the plaintiff and the defendant entered into a written agreement for provision of health service, (henceforth "the contract") whereby the plaintiff provided health services to the defendant's health insurance Scheme at prices indicated in the

annexture to the contract. Furthermore, it is alleged that, during the subsistence of the contract the plaintiff provided health services to the defendant's medical scheme and health services as agreed and invoiced the defendant for the amount due for payments, but for unknown reasons the defendant declined to pay the same thus, leaving unpaid amount to a tune of Tshs. 91,171,798/=.

The plaintiff alleged that, the defendant deliberate denial to pay the amount due has caused untold hardship to the plaintiff's business. That despite oral and written demands to the defendants, for payment of the amount due, the defendant has deliberately neglected to pay the same to the detriment of the defendant.

In its defence, the defendant did not deny the existence of the contract for provision of health service, however, it stated that under the contract, the plaintiff was required to provide prescribed medical services in accordance to known medical practice, principles and standards. The defendant disputed the claimed amount and averred that the same was rejected because the claims presented to the defendant contained serious inconsistencies. The defendant alleged that some of the claims were rejected on ground of over prescribing, over charging on medications and some of the services included in the claims were rendered prior to the commencement of the contract. The defendant alleged further that all of the above shortcomings pertaining to the plaintiff's claim were brought into the attention of the plaintiff.

Also, revealed in the written statement of defence the defendant alleged to have paid in full the correct amount due by cheque in four installments that is a total Tshs. 12,898,800/=.

The learned advocates Mashaka Fadhili Tuguta and Sylivatus Sylvivanus Mayenga appeared for the plaintiff and defendant respectively.

At the Final Pretrial Conference, the following issues were framed;

- i. Whether there is a breach of the agreement for the provision of prescribed medical services by either party and to what tune or extent.
- ii. What relief, if any are parties entitled to.

During the hearing of this case, the plaintiff brought in court two witnesses; The first witness was Sylicheria Machela ("PW1"). In her testimony in chief, PW1 testified as follows; That she is the managing director of the plaintiff. In 2005 the plaintiff and the defendant entered into an agreement for provision of medical service to the defendant's members. PW1 tendered in court Newspaper cutting dated 8<sup>th</sup> July 2006 which was admitted as Exhibit PE-1. PW1 proceeded to testify that she had a conversation with the defendant's officer in her office on the continuation of provision of medical services. PW1 tendered in court the agreement for provision of medical services between the plaintiff and Prosperity Life Care Insurance Tanzania Ltd dated 4/4/2007 which was admitted as Exhibit PE-2 and proceeded to testify that according to the agreement, the defendant was supposed to pay the plaintiff monthly as per the invoices



issued and payments were not supposed to be delayed for more than a month. PW1 tendered five invoice books which were admitted collectively as exhibit PE-3(a)-(e), a document titled "Hurumia watoto reconciliation, 2011" which was admitted as Exhibit PE-4 and copies of demand letter which were admitted as Exhibit PE-5 collectively.

Upon being cross examined by the defendant's advocate, PW1 told this court the following; That, the defendant owes the plaintiff approximately a sum of Tshs. 85,600,000/= .That this figure was arrived at after removing the errors. PW1 said further that paragraph 5 of the plaint shows the claimed amount to be Tshs. 91,191,798/= but that figure was later on corrected. PW1 proceeded to say that in 2005 they were engaged by Medex which later was changed to Prosperity Life Care Insurance Tanzania Ltd (herein after to be referred to as 'Prosperity'). PW1 contended that Exhibit PE-1 shows the relationship between Medex and the defendant. It was PW1's testimony that the defendant and Medex breached the contract as they are one and the same, since all Medex bills were to be covered by Prosperity and there was only one contract which covered all bills, be it for Medex or Prosperity. Furthermore, PW1 told this court that Prosperity took over Medex's liability and its management. Also, PW1 told this court that the invoices show all what is required for clause 4.2 of the contract.

The second witness was Saimon Anditi Nguka, (PW2). This witness was formerly working with Prosperity and Africarriers Ltd. He told this court that he knew the plaintiff for a longtime when he was working with Medex



(T) Ltd later on Prosperity. He said in 2000 he was working with Medex and in 2006 he was transferred to Prosperity. Furthermore, PW2 told this court that Prosperity owned Medex and all Medex's employees were also working for Prosperity. Medex's and Prosperity's offices were the same. the managing Director of Medex also served as the Managing Director of Prosperity and the Directors of the two companies were the same. PW2 proceeded to testify that, in 2006 Prosperity took over Medex. All the agreements entered into by Medex were taken over by Prosperity and that he went throughout the country educating the public on the services provided by Medex and Prosperity. Also, PW2 told this court that he was the one who prepared the contract draft between Medex and the defendant which later was signed and became binding. PW2 said that Medex's unpaid amount ( debts) payable to the plaintiff were all taken over by Prosperity. In addition to the above, PW2 told this court that he did the reconciliation of the accounts of the plaintiff and Prosperity, and found that the unpaid balance was around Tshs. 11,171,000/= . PW2 recognized Exhibits PE-4 and said that the claims as shown in Exhibit PE-4 are genuine and that he sent the same to Prosperity for payment. Furthermore, PW2 told this court that in case of any defects in the claim, normally the claim is returned to the service provider for rectification of the defects and then brought back again for payment.

During cross examination PW2 told this court that, he worked with Medex as a clerk, then service provider relationship officer. That Medex company was providing medical insurances and Prosperity was also providing

medical insurance. Moreover, PW2 said that, according to the notice, that is, Exhibit PE-1 Prosperity took over the management and all activities performed by Medex. PW2 told this court that he has never seen the contract between Medex and Prosperity. That the debts claimed by the plaintiff are for the period between 2005 – 2007, the same were not paid due to mismanagements. According to PW2's testimony, reconciliation was done in 2009 under the directive issued by Prosperity. Furthermore, PW2 told this court that he knew Stanleys Muturo, he was employed by Medix and Prosperity as an Insurance Consultant and Selestine was senior operations officer. PW2 stated further that the procedure for claiming payments for a service provider was to fill in claim form and attach the invoice thereto.

The defence witness was Noel Benard Sabuni ("DW1"). In his testimony in Chief DW1, told this court that he is an accountant by professional, he worked with the defendant's company as a finance manager. His duties were to take care of finance matters, also to advice the chief executive Officer on financial issues. DW1 testified further that he is one of the signatories of Exhibit PE-2 which is a contract between the plaintiff and Prosperity. That he recognized a debt to a tune of 16,700,000/= to be genuine claims payable to the plaintiff, the rest of the claims were not genuine. Furthermore, DW1 testified that according to Exhibit PE-2, the service provider was supposed to fill in and submit a claim form, signed by the one who received the service from the service provider, together with

the invoice. DW1 denied the allegation that Prosperity did take over Medex's debts.

DW1 tendered in court the following documents; remittance and bank statement in respect of account number 01203018284 of Prosperity which were admitted as Exhibit D-2 collectively, documents titled "prosperity life and bank statement for account number 01210301824 for period from 01/4/2006 to 18/08/2012" which were admitted as exhibit D-3 collectively, documents titled "Prosperity life and bank statement no. 032007116 from 1/8/2010 to 9/9/2010" which were admitted as exhibit D-4, collectively, documents titled "Prosperity life and Bank Statement for account No. 1213018284 from 01/4/2006 to 18/8/2012" which were admitted collectively as Exhibit D-5, documents titled "Prosperity life and bank statement in respect of account no. 012103018284 from 1/4/2006 to 18/8/2012" admitted as Exhibit D-6, bank statement for account no. 012103018284 from 01/4/2006 to 18/8/2012 admitted as Exhibit D-7, Bank statement for account no. 0302007116 from 01/5/2011 to 31/5/2011 which was admitted as exhibit D-8.

DW1 testified further that Prosperity is a different company from Medex, each one was incorporated separately. That the unpaid money due to Prosperity was Tshs. 16,700,000/= and out of that amount the outstanding amount is only Tshs. 2,300,000/= which was not paid because it was for services which were not in the contract.



Upon being cross examined by the plaintiff's advocate, DW1 told this court that Prosperity Life Care Insurance Tanzania was incorporated in 2005 and in the same year he started working with Prosperity as a Finance Manager. That he was also once employed by Medex as a finance manager and when he left Medex it had its office at PPF house, Dar Es Salaam. DW1 told this court that he knew Simon Nguka as a receptionist at Medex, who later on joined Prosperity as a relations manager. That, Medex's offices were located at PPF House wing 'B', Dar Es Salaam while Prosperity's office were at the same building ( PPF House) wing 'A'.

Pursuant to rule 66 of the High Court (Commercial Division) procedure Rules 2012 both counsels filed final submissions as ordered. Having analyzed the evidence adduced let me proceed with the determination of the issues.

Starting with the first issue, that is **whether there is a breach of the agreement for the provision of prescribed medical services by either party and to what tune or extent.** It is a common ground that in May 2007, the plaintiff entered into a contract with Prosperity (Exhibit PE-2) for provision of prescribed medical services on request from defendant's beneficiaries. Clause 4.3 of Exhibit PE-2 stipulates that the scheme , that is Prosperity, was obliged to pay the service provider fees for the service rendered within 45 days from the date of the receipt of the claim.

The defendant admits that the plaintiff did provide the agreed medical services. DW1 admitted in court during cross examination that the plaintiff used to be paid by installment and also contended that the unpaid fees was Tshs. 2,300,000/= only which was rejected as the claim were defective, however, DW1 did not give clear explanations on how he obtained that figure. Exhibits D-1 – D-8 inclusive, show the money deposited at bank but no claims forms were tendered in court to show the details of the plaintiff's claims so that they can be compared with what was deposited at the bank, and also to show the rejected claim alleged not to be genuine. On the other side, the testimony of PW1 during cross examination indicates that, the unpaid amount is Tshs. 85,600,000/=. PW1 told this court that amount was arrived at after correction of errors.

In his final submission, Mr. Mayenga submitted that the new figure for the claimed amount was not pleaded, it only emerged during PW1's testimony in chief and no evidence was tendered in court to explain the claimed reconciliation or corrections of errors on the claimed amount from Tshs. 91,171,798/= appearing in the plaint to the new figure. In addition to the above the Mr. Mayenga contended that the testimony of PW1 does not indicate clearly at what time did she realize that the actual claim of unpaid fees was Tshs. 91,171,798.

Mr. Tuguta in his final submission indicated that the claimed unpaid fees to be Tshs. 85,000,000/= and submitted that the amount was arrived at after errors were corrected during the hearing of the case, and that the claimed

amount should read Tshs. 85,000,000/= Mr. Tuguta also noted that, though the amount due is not certain from the evidence of PW2 and DW1, he invited this court to analyze the evidence tendered in court to determine the exact amount due.

Let me point out right here that, with due respect to the learned advocate Mr. Tuguta, amendment of pleadings is clearly provided under rule 24 of the High Court (Commercial Division) Procedure Rule, 2002, thus a party cannot amend the pleadings during his/her testimony or submissions as it has been the situation in the instant case. The position of the law is that parties are bound by their pleadings, thus during the hearing they are expected to bring evidence to support what they pleaded. In the case of **Yara Tanzania Limited vrs Charles Aloyce Msemwa t/a Msemwa Junior Agrovet & two others Commercial Case No. 5 of 2013**, Mwambegele J, had this to say on the variance between what is pleaded and what is averred during the hearing;

*"In the same token, I am not convinced by DW1's allegation that he actually overpaid the plaintiff by Tshs. 37,580,000/=. I say so because DW1 did not plead so in the joint written statement of defence. The assertion just surfaced in the witness statement; that is in the examination in chief as the witness statement was admitted in lieu of examination in chief as dictated by the provisions of rule 49 (1) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012. it is a cardinal principal of law of civil procedure founded upon prudence that parties are bound by their pleadings.*



....if I may be required to add another persuasive authority from Nigeria, I would add **Adetoun Oladeji (Nig) Ltd vs Nigeria Breweries PLC (2007) LPELR-SC.91/2002** (sourced through <http://nigerialaw.org/adetoun%20Oladeji%28Nig%29%20Ltd%20Ltd%20Nigerian%20Breweries%20Plc.htm>); also cited as **Adetoun Oladeji (Nig) Ltd. Vs N.B. Plc(2007) 5 NWLR (Pt.1027) 415]** in which it was also categorically stated that it is settled law that parties are bound by their pleadings and that no party is allowed to present a case contrary to its pleadings.

*That is the position of the law in Nigeria as well as in this jurisdiction - see **Peter Karanti and 48 others Vs Attorney General and 3 others, Civil Appeal of No. 3 of 1988** (Arusha unreported)*”

I have also noted that the plaintiff’s evidences on the amount of the unpaid fees is contradictory to each other because PW1 told this court that the unpaid fees is approximately Tshs. 85,600,000/=, Exhibit PE-4 that is the reconciliation report and Exhibit PE-5 (the demand letter) indicate that the unpaid fees is Tshs. 91,171,798/= , the same amount is indicated in the plaint. But, PW2 in his testimony mentioned the unpaid amount as Tshs. 11,171,000/=. The above demonstrated contradiction creates doubts on the correctness of what has been testified in court and lowers the evidential value of the plaintiff’s evidence.

It is also worthy pointing out at this juncture that in the absence of the claim forms it is not possible to get a proper and meaningful interpretation of the tendered Exhibits PE-3 (a)-(e) inclusive and Exhibits D1 – D8

inclusive, in particular for the purpose of ascertaining the genuine claimed fees/ unpaid fees. Clause 4.2 of Exhibit PE-2 provides as follows;

*"4.2 The service provider shall submit claim as follows:-*

*4.2.1 All claims submitted to the scheme must be accompanied by an invoice or debit note containing a minimum of the following information:-*

- a. Name of service provider*
- b. Address of service Provider*
- c. Contact number of service provider*
- d. Date of submission of claims*
- e. Period of claims (from and to treatment date of attached claims)*
- f. Total number of claims attached*
- g. Total value of claims attached*
- h. Authorized signature of service provider*

*4.2.2 All claims/debit notes submitted to the Scheme must contain a minimum of the following information:-*

- a. Membership number*
- b. Surname and initials of the member*
- c. Full names of the patient*
- d. Date of Birth and age of the patient*
- e. Date of treatment*
- f. details of treatment; full details of consultative, diagnostic and surgical services.*

*Full details of drugs, including quantity, dosage and route of administration price/costs of drugs and/ or treatment*

*g. Disease code: in order to adhere to the medical code of conduct, the service provider shall use disease code based on the ICPC (International coding for Primary Care) as per listing provided by the Scheme.*

*h. Signature of the patient.*

*i. Signature of the doctor/medical practitioner”.*

From what is quoted herein above, it is evident that the claim form is the one which provides the details used by the scheme in ascertaining the correctness of what is claimed and/ or the amount to be paid. After checking thoroughly Exhibit D1 – D8 inclusive, I have noted that some of the claims indicate that were rejected and a reject code filled therein, however, without the details of what was indicated in the claim form, this court cannot know whether the rejection was correct or wrong. Not only that, in some instances the amount claimed that is indicated in Exhibits D1 – D8 inclusive are different from the amount that appears in the Exhibits PE-3 (a)-(e) inclusive. What I am trying to show here is the importance of the claim form. It is the claim form that can prove whether the amount that is claimed to be unpaid by the plaintiff was actual presented to the defendant for payment or not.

During cross examination PW1 told this court that the claim forms were not tendered in court as exhibits because the original claim forms originate from the defendant and after filing the same were returned back to the defendant. I am of a settled view that the plaintiff's failure to tender the claim form in court is not justifiable. PW1 said further that the invoice show



all what is required in clause 4.2 of the contract (Exhibit P-2). Frankly speaking, the invoices do not show all what is stipulated in clause 4.2 of the contract (Exhibit P-2), since they only indicate the amount claimed, the year and the name of the payer (in this case the scheme).

On top of what I have discussed herein above, there is another important issue to be looked at, that is the period within which the plaintiff claims to have provided the medical services. PW1, in her testimony in chief told this court that the claimed unpaid fees covers the period between 2005-2007 while the contract with the defendant was signed in 2007 (Exhibit P2). During cross examination PW1 said that in 2005 they were engaged by Medex which later on was taken over by Prosperity, that is, defendant in this case. PW1 relied on Exhibit PE-1 which is a newspaper cutting dated 8/7/2006 containing an advertisement titled "**Change in Health Care Management Solutions**". The said advertisement was issued by the group chief executive officer of Prosperity Group. Also, she told this court that she got assurance from PW2 who told her that Medex has been taken over by the defendant. PW1's testimony in respect of this issue is supported by PW2's testimony, who told this court that, all Medex's employees were transferred to Prosperity and that the Chief Executive officer of Medex was also the Chief Executive of Prosperity. Thus, PW1's and PW2's testimonies were to the effect that Medex and Prosperity were one and the same company.

In his final submission Mr. Tuguta submitted that Exhibit PE-1 announced to the general public that Prosperity Life Care Insurance Tanzania Limited

was appointed as officer receiver of Medex and that proves that Prosperity took over all the liabilities and management of Medex. To cement his argument Mr. Tuguta also submitted that according to PW2's testimony, all Medex's employees were also Prosperity's employees and that their offices were the same as well as the directors of the two companies were the same, so he was of the view, that proves that the defendant took over all the debts that were supposed to be paid by the Medex.

On the other side Mr. Mayenga submitted that the advertisement/notice in Exhibit PE-1 states that Prosperity Group was taking over the management responsibilities of Medex not the debts. Mr Mayenga submitted further that Exhibit PE-2 was signed by Haruna Maarifa, the Managing Director and Noel Sabuni as Finance Manager of Prosperity and not Prosperity Group. Mr Mayenga contended that during cross examination, PW1 failed to tell exactly which part of the notice shifted Medex's liabilities to the defendant. Mr. Mayenga insisted that PW1 in her testimony failed to prove the existence of the contract with Medex which would justify the shifting of liabilities from Medex to Prosperity.

I think I do not need to reproduce the contents of Exhibit PE-1 as it will make this judgment unnecessarily long, but suffice to say that I have read the said notice in Exhibit PE-1 between the lines, honestly that notice does not indicate in any way that Medex liabilities or debts have been taken over by the defendant herein, thus I am inclined to agree with the submission made by Mr. Mayenga that Exhibit PE-1 did not shift Medex's debts to the

defendant herein and since PW1 failed to prove the existence of the contract between the plaintiff and Medex, then the issue of shifting Medex's liabilities to the defendant is baseless and cannot exist.


Let me also point out here that all testimonies on the employees of Medex being transferred to Prosperity and the directors of Medex and Prosperity being the same cannot rescue the plaintiff's case because as per the evidence adduced there is no doubt that Medex and Prosperity are two different companies, being legal entities, in my considered view, a decision to take over the liabilities and debts of another Company has to be passed by a proper board resolution. Also, the contract (Exhibit PE-2) was signed in 2007 after the publication of the notice in Exhibit PE-1, under normal circumstances Exhibit PE-2 would have included the alleged arrangement of Medex's liabilities being taken over by prosperity. No plausible explanations have been given by the plaintiff as to why Exhibit PE-2 does not indicate that Prosperity took over the debts that were supposed to be paid by Medex. From the foregoing, it is evident that the claims for period between 2005 – 2006 against the defendant which were included this case were wrongly made as the contract between the plaintiff and the defendant started in 2007. The claims for the 2007 have not been proved as elaborated earlier in this judgment. Therefore it is my finding that the plaintiff has failed to prove that there was a breach of agreement for the prescribed medical services.



Coming to the last issue on the reliefs the parties are entitled to, since the plaintiff have failed to prove the 1<sup>st</sup> issue on the breach of the agreement I hereby dismiss this case in its entirety with costs.

Dated at Dar es Salaam this 5<sup>th</sup> day of April 2019



  
**B.K. PHILLIP**  
**JUDGE**