



REPUBLIC OF KENYA



**Liberty Life Assurance Limited v Bendeus (Civil Appeal 301 of 2019)  
[2023] KEHC 1201 (KLR) (Civ) (24 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 1201 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 301 OF 2019**

**JK SERGON, J**

**FEBRUARY 24, 2023**

**BETWEEN**

**LIBERTY LIFE ASSURANCE LIMITED ..... APPELLANT**

**AND**

**BENGT ROBERT BENDEUS ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Honourable E. Wanjala (Ms.) (Senior Resident Magistrate) delivered on 9th May, 2019 in Milimani CMCC no. 4469 of 2015)*

**JUDGMENT**

1. The respondent who was the plaintiff in Civil Suit No. 4469 of 2015 before the Chief Magistrate's Court at Milimani Commercial Courts instituted a against the appellant by way of the plaint dated 27<sup>th</sup> July, 2015 and sought for the sum of Kshs.1,200,000/= together with costs and interest thereon.
2. The respondent pleaded in the plaint that he had engaged the defendant with the purpose of securing a life insurance policy cover for a period of 10 years and that he was issued with insurance policy number 81734371 which was set to commence on 12<sup>th</sup> June, 2014 with monthly premiums in the sum of Kshs.300,000/=.
3. The respondent pleaded in the plaint that by the time he was finally issued with the policy document, he discovered that the same constituted an investment policy and not a life insurance policy as per his earlier instructions and as agreed between the parties.
4. It is pleaded in the plaint that by then, the respondent had made payments totaling the sum of Kshs.1,200,000/= towards the policy and which he was claiming a refund of by way of the suit.
5. Upon service of summons, the appellant entered appearance and filed its statement of defence on 26<sup>th</sup> October, 2015 to deny the respondent's claim.



6. At the trial, the respondent testified whereas the appellant summoned two (2) witnesses.
7. Upon filing of submissions, the trial court delivered judgment on 9<sup>th</sup> May, 2019 in favour of the respondent and against the appellant as prayed in the plaint.
8. The aforesaid decision has precipitated the appeal presently before this court, with the appellant filing the memorandum of appeal dated 6<sup>th</sup> June, 2019 featuring the following grounds:
  - i. The learned trial magistrate erred both in law and fact by ignoring that the respondent herein signified acceptance of the counter offer of a lifevest policy by signing the application form for the same.
  - ii. The learned trial magistrate erred both in law and fact in holding that there was misrepresentation and that the terms of the policy were not binding upon the respondent.
  - iii. The learned trial magistrate failed to take into account relevant factors such that the declarations signed by the respondent leading to the order for refund of the premiums paid.
  - iv. The learned trial magistrate erred both in law and fact and arrived at a decision against the weight of evidence before her.
  - v. The learned trial magistrate erred both in law and fact by failing to consider the appellant's evidence and submissions.
  - vi. The learned trial magistrate erred both in law and fact when she took into account irrelevant factors hence entered the judgment against the appellant.
9. The appeal was disposed of through the filing of written submissions.
10. The appellant submit that following negotiations on the policy, the appellant issue the respondent with a fixed life insurance and investment policy entailing a monthly contribution of the sum of Kshs.300,000/= thereby creating a valid insurance agreement between the parties herein.
11. The appellant submits that upon entering into the agreement, the parties were bound by it and were obligated to perform their respective duties therein, citing the case of *Fidelity Commercial Bank Limited v Kenya Grange Vehicle Industries Limited* [2017] eKLR where the court held that:

“The traditional view was expressed quite persuasively in the decision of Lord Craighead in the House of Lords’ case of *Chartbrook Limited v Persimmon Homes Limited* [2009] UKHL 38 as follows;

“...the very purpose of a formal contract is to put an end to the disputes which would invariably arise if the matter were left upon what the parties said or wrote to each other during the period of their negotiations. It is the formal contract that records the bargain, however different it may be from what they may have stipulated for previously.”
12. It is therefore the submission by the appellant that in the circumstances, the trial court could not interfere with the terms of the insurance policy contract entered into between the parties.
13. It is also the contention by the appellant that there was no misrepresentation of the terms of the contract in order to entitle the respondent to a refund of the premium sum paid, borrowing from



the case of *Antony Kimani v CIC General Insurance Ltd. & 2 others* [2015] eKLR in which the court determined thus:

“However in my view the fact that the Plaintiff did not reject the same policy document and proceeded to execute the same shows that the Plaintiff had ratified the policy document with all its terms and conditions. The Plaintiff cannot now challenge any clause in that insurance policy document.”

14. In view of the above, the appellant urges this court to allow the appeal and to direct that the decretal amount deposited in court be released to the appellant.
15. On his part, the respondent submits that there was misrepresentation in terms of signing the policy document, since the agent of the appellant presented a document of a nature different from the type of policy that the respondent had expressed an intention of taking out.
16. The respondent therefore submits that the trial court acted correctly in finding in his favor and in finding the appellant liable to refund the sum of Kshs.1,200,000/= paid to it by way of premiums.
17. The respondent cites, among others, the case of *Sambayon Ole Semera v Kalka Flowers Limited & another* [2021] eKLR where the court held thus:

“The doctrine of non est factum arises where a party has been misled into executing or signing a document that is materially different from that which he intended to execute or sign. The party therefore raises that defence to argue that the document in question is not his or what he intended to execute or sign.”

18. For all the foregoing reasons, the respondent urges that this court do dismiss the appeal and do uphold the finding by the trial court.
19. I have considered the rival submissions on record alongside the relevant authorities cited. As is the legal requirement for a court sitting on a first appeal, I have re-evaluated the material and evidence which was placed before the trial court. It is clear that the appeal lies against the decision by the trial court allowing the suit to succeed. I will therefore tackle the six (6) grounds of appeal contemporaneously.
20. In his examination-in-chief, the respondent adopted his signed witness statement as evidence and also produced his documents as exhibits.
21. The respondent went on to testify that he took out a life insurance policy with the appellant, for the benefit of his young wife and that he was required to pay monthly premiums in the sum of Kshs.300,000/= until his death.
22. The respondent testified that he paid the abovementioned sum for a period of 4 months and later opted to stop making payments since he had not received the policy document.
23. It is the evidence of the respondent that an agent of the appellant, namely John, subsequently approached him and requested him to sign a document which he later came to discover was a life investment plan and not the life insurance policy he had agreed to take out; by which time he had already appended his signature.
24. It is also the evidence of the respondent that the purported signatures appearing on separate pages of the document do not belong to him; which prompted him to demand a refund of the total sums already paid, to no avail.



25. In cross-examination, the respondent stated that at the time of making the application for a policy, he was aged 70 years and that he signed on pages 1-4 of the policy document but that any other signatures appearing on the said document are not his but are forgeries.
26. The respondent further stated that it took some time for him to comprehend that the product which had been sold to him was not a life insurance policy but an investment policy, despite his specific instructions stating that he desired the former.
27. In re-examination, the respondent testified that he had been made to believe that the document he was signing constituted a life insurance policy.
28. John Nyingi Macharia who was DW1 adopted his executed witness statement as his evidence-in-chief.
29. In cross-examination, the witness gave evidence that the respondent had indeed paid the total sum of Kshs.1,200,000/= towards a policy and that the document was delivered at a later date.
30. The witness further gave evidence that upon discovering the respondent's age, he realized that he did not qualify for the life insurance policy and hence he made him a counter offer to take up a life vest plan.
31. It is the testimony of the witness that the respondent expressed his unwillingness to take up the life vest plan.
32. It is also the testimony of DW1 that following the complaint of misrepresentation by the respondent, the appellant investigated the same and in the end, concluded that the witness had sold him the right product.
33. The witness stated that the respondent was at all material times made aware of the nature of the policy he was taking up, but admitted that the life vest policy is not a life policy but one of the appellant's life products.
34. In re-examination, the witness stated that the respondent raised a complaint with the appellant and claimed a refund of the monies contributed.
35. Jackson Mbuthia Kiboi who was DW2 stated that he is the Deputy Manager-Risk and Compliance. The witness further stated that the respondent was not entitled to a refund of the monies paid since he had surrendered the policy before the end of the first year.
36. In cross-examination, the witness testified that by the time the respondent was issued with the policy document, he had already paid the sums which were sought in the plaint; with the original policy being issued in June, 2014 followed by the terms in November, 2014.
37. Upon hearing the parties, the learned trial magistrate reasoned that notwithstanding the fact that the respondent later on appended his signature on the life vest plan document, the evidence showed that he was clear on the nature of policy he wished and that the parties had earlier agreed that he would enjoy a life policy, with the respondent even making premium payments towards the life policy.
38. The learned trial magistrate was therefore of the view that there had been misrepresentation on the part of the agents of the appellant and hence the respondent is not bound by the terms thereof.
39. For all the foregoing reasons, the learned trial magistrate was satisfied that the respondent had proved his case against the appellant and was therefore entitled to a refund of the premium sums paid.
40. Upon my re-examination of the record, it is not in dispute that the parties herein had entered into a contractual agreement in respect to a policy to be issued to the respondent by the appellant.



- 41. It is also not in dispute that the respondent had at all material times made it clear that he desired to take out a life insurance policy specifically and that following the agreement by the parties, he begun making the agreed premium payments towards the life policy.
- 42. Upon my study of the pleadings and evidence, it is apparent that the appellant’s agent did not exercise due diligence at the onset in terms of ascertaining whether the respondent qualified for a life insurance policy before agreeing to sign him up for one, and that it is not until months later that he discovered that the respondent did not qualify for a life insurance policy cover, by which time the respondent had already contributed towards the cover agreed upon in the sum of Kshs.1,200,000/=.
- 43. Upon considering the evidence tendered, it is apparent that at the time the agent of the appellant (DW1) presented the respondent with the investment policy, no proper explanation was given to the respondent to enable him understand the change in nature of the policy and this would explain his reason for signing the investment policy at first before choosing to reject it and demanding for a refund of the premium sums paid, going by his oral testimony.
- 44. There is nothing to indicate that the respondent intended to take out an investment policy with the appellant and it is therefore more plausible than not that he was misled into signing the life vest policy.
- 45. I associate myself with the reasoning taken by the court in the case of Sambayon Ole Semera v Kalka Flowers Limited & another [2021] eKLR cited in the submissions by the respondent, thus:
 

“The doctrine of non est factum arises where a party has been misled into executing or signing a document that is materially different from that which he intended to execute or sign. The party therefore raises that defence to argue that the document in question is not his or what he intended to execute or sign.”
- 46. In view of the foregoing, I concur with the reasoning by the learned trial magistrate that there is a clear indication of misrepresentation on the part of the agent of the appellant and which would constitute grounds for setting aside the agreement between the parties and further entitle the respondent to a refund of the monies paid.
- 47. Upon my study of the record, there is nothing to indicate that the learned trial magistrate overlooked the appellant’s evidence or submissions in making her finding.
- 48. Overall, I am satisfied that the learned trial magistrate correctly considered the evidence which was placed before her and having done so, arrived at a reasonable finding on the suit. I see no reason to interfere with her decision.
- 49. In view of all the foregoing the appeal is hereby dismissed for lack of merit with costs to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2023.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent

