



(BEING AN APPEAL FROM THE JUDGMENT AND DECREE OF MRS. WEWA, RM,
DATED 10TH FEBRUARY 2009 IN KISII CMCC NO.311 OF 2002)

BETWEEN

BRITISH AMERICAN INSURANCE CO. LTD. APPELLANT

AND

ZAVERCHAND PADAMSHI K. SHAH RESPONDENT

JUDGMENT

The respondent filed a suit against the appellant and stated, *inter alia*, that:

- “3. By a policy of Insurance No. 01864103 dated 1st September 1996 made between the plaintiff and the defendant (“the policy”) the plaintiff, in consideration of a premium of Kshs. 3,865/= paid on monthly basis to the defendant, the defendant agreed to insure the life of the plaintiff in the sum of Kshs. 500,000/= together with a sum of Kshs. 125,000/= to accrue to the said policy by way of bonus on 1st September 2001, payable to the plaintiff.**
- 4. The bonus as agreed forcing the plaintiff to determine the contract by way of its notice dated 25th November 2001 given to the defendant and demanded for the refund of premium paid.**
- 5. The plaintiff’s claim against the defendant is for the sum of Kshs. 239,630/= being the contribution made as premium paid from the month of September 1996 until November 2001.”**

The appellant filed a statement of defence and denied the contents of paragraphs 4 and 5 of the plaint. In response to paragraph 3 of the plaint the appellant stated as hereunder:

“2. Save that the plaintiff was a holder of policy No. 01867103 with the defendant for a consideration of Kshs. 3,865/= monthly premium the defendant avers that all other terms of the policy were as per the insurance contract and were conditioned upon the plaintiff’s continuance remittance of the consideration of Kshs. 3,865/=. Consequently, the defendant puts the plaintiff to strict proof of the allegations contained in paragraph 3 of the plaint.

4. Further and without prejudice to the foregoing, the defendants state that the plaintiff’s bonus on policy No. 01864103 was due in September 2001. The same was paid to the defendant vide cheque No. 201683 dated 31st December 2001 being Kshs. 120,638.50.

5. The defendant avers that the plaintiff determined and/or lapsed policy No.201683 by discontinuing payment of the policy, the plaintiff is in the circumstances only entitled to a cash surrender value and not a refund of premium.”

At the hearing, the respondent produced the policy as **P. Exhibit No. 1**. The same stipulates various provisions and conditions which I will revert to at a later stage. He testified that five years after commencement of the same he was entitled to a bonus of Kshs. 125,000/= and the same was payable on 1st September 2001. He was paying the premium by way of monthly standing orders through his bank, Barclays Bank of Kenya, Kisii Branch. According to him all the premiums payable had been effected. However, the expected bonus was not paid on its due date and on 25th November 2001, through his advocates, M/s Nyamweya Osoro and Nyamweya, he sent the defendant a demand letter. Through the same letter he also terminated the policy. The letter, which was produced as **P. Exhibit 3**, read as hereunder:

**“British American Insurance Co. (K) Ltd.
P.O. Box
KISII.**

Dear Sir,

REF: ZAVERCHAND P.K. SHAH HOLDER OF POLICY NO. 01864103.

Under instructions from our above named client we address you as hereunder:-

That by a policy of life insurance dated 1st September 1996 made between you and our client for a period of 20 years with 5 years bonus for value of Kshs. 500,000/= by way of monthly premiums of Kshs. 3,865/= you agreed to pay the first Bonus of Kshs.125,000/= on 1st September 2001.

However, you have breached the terms of the said policy by failing to pay the said bonus as agreed, despite our client frequent verbal requests. (sic) In the circumstances our client does not wish to continue with the said policy and therefore demands from you forthwith the sum of Kshs. 125,000/= now due as bonus and all the premiums already paid to you. Full particulars whereof are well within your knowledge.

TAKE NOTICE therefore that unless we received the said sum of Kshs.125,000/= together with all sums paid for the said policy within the next FIFTEEN (15) days from the date hereof, we have firm and mandatory instructions to institute legal proceedings against you to recover the same at your risk as to costs and consequences. This shall also be without prejudice to our client’s rights to claim damages for breach of contract.

Yours faithfully,

Kennedy Bosire Gichana

Advocate

For: NYAMWEYA OSORO & NYAMWEYA ADVOCATES

CC

Z.P. Shah

P.O. Box 1118,

KISII.”

The respondent further testified that the cheque for the bonus was sent on 31st December 2001. It was in the sum of Kshs.120,683.50. By then he had terminated the standing orders. By that time he had paid premiums amounting to Kshs. 239,630/= . He blamed the appellant for having breached the

Insurance contract.

In cross examination, the respondent stated that the policy terms and conditions were not shown to him when he entered into the said contract with the appellant. Asked whether he was aware that by 1st September 2001 his bank had on three separate months, failed to remit to the appellant's bank premiums for three months, the respondent said that the appellant had not notified him of any such default. However, if that was the case, the appellant was entitled to recover the unpaid premium and treat it as a loan against policy, he state.

The appellant testified through **Evans Gekonge Makori, DW1**, who was the appellant's Agency Administrator at its Kisii Branch. He admitted that the respondent was entitled to a bonus of Kshs. 125,000/= on 1st September 2001. However, as at that date there were outstanding premiums for three months. The arrears of premiums together with interest thereon amounted to Kshs. 12,798.20. The three months for which premiums were not received were June, 2000, September, 2000 and May 2001. He produced the appellant's bank statements to prove the same. He further testified that the policy provides that after premium payments have been made for three years, the policy acquires cash surrender value and in the event of default in payment of the

premiums, the appellant may charge the amount so unpaid against the surrender value. He added that the appellant had not breached the Insurance contract, it was the respondent who had terminated the same by stop remittance of monthly premiums.

In cross examination, DW1 said that the appellant did not pay the bonus as at 1st September 2001 because the respondent was in arrears. However, he admitted that upon receipt of the aforesaid demand letter from the respondent's advocates the appellant forwarded a cheque for the bonus less the three months premiums and interest thereon. He denied that the respondent was entitled to refund of the premiums paid.

The trial court held that the appellant had breached the insurance contract by failing to pay the bonus on the agreed date. The court proceeded to enter judgment in the respondent's favour and ordered the appellant to refund to him all the premiums paid. The costs of the suit were also awarded to the respondent.

The appellant was dissatisfied with the said judgment and preferred an appeal to this court. The grounds of appeal are as follows:

- “1. The learned trial magistrate erred in law and in fact in finding that the appellant was in breach of the terms and conditions of the policy of insurance which finding is contrary to the evidence on record.**
- 2. The learned trial magistrate erred in law and in fact in finding that the appellant is liable to refund the premium contributions the respondent had made which decision is**

against the terms and conditions under the policy of insurance between the parties.

3. The learned trial magistrate erred in not taking into account that it is the respondent who was in breach of the terms and conditions under the policy of insurance thereby arriving at a wrong decision.

4. The judgment is not supported by evidence on record.

5. The judgment is irregular for want of compliance with the provisions of order XX rule 1, Civil Procedure Rules.”

The appellant prayed that the appeal be allowed and the trial court's judgment be set aside and the respondent's suit be dismissed with costs to the appellant.

The 1st issue that requires determination is whether the appellant's delay in payment of the bonus amounted to a breach of the Insurance contract which in turn necessitated termination of the same by the respondent.

It is trite law that in all types of contracts time will not be considered to be of the essence unless:

- (a) The parties expressly stipulate that conditions as to time must be strictly complied with.**
- (b) The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence, or**
- (c) A party who has been subjected to unreasonable delay has given notice to the party in default making time of essence.**

The above conditions are stipulated in **VOLUME 9, HALSBURY'S LAWS OF ENGLAND**, 4th Edition, Page 338 Para. 481. See also **SAGOO -VS- DOURADO** [1983] KLR 365 at page 372.

It is not in dispute that the appellant did not pay to the respondent the bonus sum on its due date, that is 1st September 2001. As a result the respondent sent a notice dated 25th November 2001 vide which he demanded payment of the same. He also notified the appellant that he did not wish to continue with the said policy. Thereafter he stopped remittance of the monthly premiums.

I do not think that the appellant's delay in payment of the bonus sum *per se* constituted breach of the Insurance contract between the parties that necessitated termination of the contract without any notice by the respondent. The contract between the parties did not expressly stipulate that time must be strictly complied with and the respondent did not give any notice to the appellant making time of the essence. I believe that the right action which the respondent ought to have taken was to give notice to the appellant that if the bonus sum was not paid within a stipulated period of time he would sue for breach of the contract and demand any appropriate relief under the policy.

The insurance policy stipulated that after premium payments had been made for at least 3 complete policy years, the respondent was entitled to elect one of the following options:

- (a) Cash surrender value where the policy may be surrendered to the appellant for its cash value,**

in which case the policy would become void,

(b) Paid-up policy where the policy could be changed to a fully paid-up policy for a reduced amount of insurance.

It appears to me that the contract did not provide for termination of the policy at the instance of the respondent and demand for refund of all the premiums paid as well as the bonus of Kshs.125,000/=. One may say that the terms of the contract were unfair to the respondent. However, terms of a contract are agreed upon by parties themselves and courts of law only come in to construe the contracts and arbitrate any disputes arising therefrom. It is not the function of courts to alter or re-write contractual terms for parties. See **KENYA COMMERCIAL FINANCE COMPANY LTD. -VS- NGENY & ANOTHER**,[2002] 1 KLR 106.

As regards the appellant's delay in payment of the bonus sum, I do not agree that the respondent's default in payment of premiums for three separate months ought to have provided any justification for its failure to remit the cheque within the stipulated period of time. This is because the premium sums were automatically payable from the cash surrender value of the policy. The amount so paid would have been treated as a loan together with interest thereon and be deducted from the bonus sum.

That notwithstanding, it was not proper for the learned trial magistrate to order the appellant to refund all the premiums paid

by the appellant, having paid the bonus sum of Kshs.120,000/=.

Lastly, there is no dispute that the learned trial magistrate, having concluded the hearing of the case on 21st August 2008, delayed in delivery of the judgment until 20th of April 2009. That was far beyond the 42 days period stipulated under **order XX rule 1** of the **Civil Procedure Rules**.

For the aforesaid reasons, this appeal is allowed and the trial court's judgment set aside. I substitute therefor an order dismissing the respondent's suit before the trial court. I hope the appellant will consider paying the respondent the cash surrender value of the policy that may be payable over and above the bonus sum of Kshs. 120,638.50/=, if any. As the respondent's suit before the trial court was filed due to the appellant's unwarranted delay in payment of the bonus sum, I am of the view that the appropriate order as regards costs of the suit before the trial court and the appeal is that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF MARCH, 2010.

D. MUSINGA
JUDGE.