



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 37 OF 2000**

**MARGARET NDUTA KAMITHI**

**GEORGE NJENGA KAMITHI**

**(Suing as personal representatives of the Estate of**

**STEPHEN KAMITHI (Deceased) ..... PLAINTIFFS**

**VERSUS**

**KENINDIA ASSURANCE COMPANY LIMITED ..... DEFENDANT**

**JUDGMENT**

The plaintiffs are mother and son respectively. They are also the administrators of the estate of the late Stephen Kamithi who died at the Nairobi Hospital on 11.4.1999. Before his death the deceased together with his wife the 1st plaintiff had effected a joint Life Insurance Policy with the defendant under which the defendant agreed in consideration of the premiums paid by the two insured to insure their lives in the sum of Shs.4 million.

Upon the death of the deceased which I think the defendant accepts as having occurred while the policy was still in force, the 1st plaintiff made a claim for the sum assured but the defendant in its letter to her dated 8.8.1999 repudiated the claim. The reason for repudiation of liability was said to be gross non-disclosure of material facts by the deceased which were listed in the said letter as follows:-

- “1. Maturity onset diabetes – previously diagnosed.***
- 2. Coronary artery disease since 1990 resulting i n CABG in 1996***
- 3. Hypertension***
- 4. Intermittent bronchospasm***
- 5. Hospitalisation in 1995 for pneumonia***
- 6. Particulars of previous policies with other Insurance Companies viz Alico and Mercantile***
- 7. Particulars of proposal submitted to Alico in December 1998 which was declined by them.”***

With regard to the alleged non-disclosure the defendant stated in the letter (mentioned above) that had the undisclosed facts been disclosed in the proposal form, the defendant would have offered insurance “as per the reinsurers underwriting rules”. I read that statement to mean that the defendant would not

necessarily have declined to issue the policy but that the policy would have been loaded to cover the additional risk arising from the undisclosed facts.

Be that what it may, the 1st plaintiff did not accept that the defendant were entitled to repudiate the claim and she together with the 2nd plaintiff have accordingly instituted this suit to recover the sum assured. In the plaint, they aver that by failing to pay the sum assured, the defendant acted wrongfully and in breach of the joint policy of insurance.

In its defence, the defendant avers that in the Proposal Form for Life Assurance (Exh. 2) (hereinafter referred to as the Proposal Form), the deceased and the 1st plaintiff declared that all the statements and answers given by them in the Proposal Form were true, full and complete in every particular and that they had not withheld any information. It is further averred in the same defence that:-

(a) the deceased and the 1st plaintiff declared that the statements in the Proposal and the declaration therein should be the basis of the contract of assurance between them on the one hand and the defendant on the other;

(b) the deceased and the 1st plaintiff agreed that if any untrue averment was contained in the Proposal Form or declaration, the contract of assurance should be null and void and that all monies which should have been paid in respect of the contract should stand forfeited to the defendant.

The defendant claims that the deceased and the 1st plaintiff made the following statements with regard to the deceased:-

***(a) That he did not have a usual medical attendant.***

***(b) That no member of the family of the deceased, living or dead suffered from any hereditary disease (e.g. diabetes, stroke, mental disorder, heart disease, high blood pressure).***

***(c) That no illness, accident or medical condition had prevented the deceased from carrying out work and that the deceased had not remained absent from his work due to such condition in the last five years***

***(d) That no other Life Insurance was then in force over the deceased life.***

The defendant further claims that the information given in the Proposal Form and the declaration on the strength of which the joint policy was issued, was not true because:-

***“(a) The deceased had since 1990 been under the care and medical treatment of Dr. D. K. Gikonyo.***

***(b) The deceased had been suffering from Ischaemic heart disease.***

***(c) The deceased was suffering from mature onset diabetes mellitus.***

***(d) The deceased was suffering from moderate primary hypertension.***

***(e) The deceased has suffered from pneumonia and been hospitalised in 1995.***

***(f) The deceased underwent heart surgery in October, 1996.”***

The defendant also states that at the time of the Proposal to the defendant, there were Life Insurance Policies in force in respect of the deceased with Alico (K) Limited and Mercantile Life and General Assurance Co. Limited and accordingly by virtue of the false information and false declaration made by the deceased and the 1st plaintiff, the defendant was entitled and did repudiate liability. Because of that, it is finally averred by the defendant, no sum is due from the defendant to the plaintiffs or the estate of the

deceased.

The plaintiffs filed a reply to the defence on 21.2.2000 in which they stated that the statements, answers, information and/or declaration (made by the deceased and the 1st plaintiff) were not material to the policy as they did not go to the root thereof and were completely peripheral and of no consequence. The plaintiff also states that the defendant was or was made aware and had knowledge of the actual and/or true facts regarding the matter prior to the policy and is therefore estopped from denying knowledge of those facts as they actually existed. And in the alternative the plaintiff stated that the defendant by conduct or otherwise led the plaintiffs to believe that it would always honour in full its obligations under the policy subsequent to the deceased's death and consequently it is estopped from recanting its obligations.

As aforesaid the material facts which the deceased and the 1st plaintiff are alleged not to have disclosed arise from questions raised in the Proposal. The questions were as follows:-

***1. QUESTION: State the Name and Address of your usual Medical Attendant.***

***ANSWER: None.***

***2. QUESTION: Does any member of your family, living or dead, suffer or has suffered from any hereditary disease (e.g. diabetes, stroke, mental disorder, heart disease, high blood pressure etc?) If yes, please give details***

***. ANSWER: None.***

***3. QUESTION: Has any illness, accident, or medical condition prevented you from carrying out your work or have you remained absent from your work due to such a condition in the last 5 years?***

***ANSWER: None.***

***4. QUESTION: What other insurance is currently in force in your life? Please give the name of the company, year of commencement of insurance, Amount and Policy Number.***

***ANSWER: None.***

At the top of the Proposal the following words besides others, are printed:-

***“All material facts shall be stated. If there is any doubt whether certain facts are material, then such facts shall also be disclosed.” And at the last page of the Proposal there is a declaration that:- “the statements and answers have been given by me/us after fully understanding the questions and the same are true, full and complete in every particular and that I/we have not withheld any information and I/we do hereby agree and declare that these statements and this declaration shall be the basis of the contract of assurance between me/us and KENINDIA ASSURANCE CO. LTD. (hereinafter called “the company”) and that if any untrue averment be contained therein, this contract shall be absolutely null and void and all moneys which shall have been paid in respect thereof shall stand forfeited to the company.***

***I/we have read any answers completed in other than my/our own handwriting and confirm that they are correct.”***

It is the contention of the defendant that the answers given by the deceased and the 1st plaintiff to the above questions are all untrue and that they amount to non-disclosure of material facts which in terms of

the policy entitle the defendant to repudiate the policy. It is settled law that a contract of insurance is *ubirramae fides* and any undue disclosure of material facts in the proposal form by the insured will entitle the insurer to repudiate the policy. There are numerous authorities on the matter but I will confine myself to a few.

In the Law of Insurance by R. Colivaux 5th Edition para. 5.01 at page 92 it is stated:-

***“in the case of certain contracts, however, the law demands a higher standard of good faith between the parties, and “there is no class of documents as to which the strictest good faith is more rigidly required in courts of law than policies of assurance.” “As the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make a full disclosure to the underwriters without being asked of all the material circumstances, because the underwriters know nothing and the assured knows everything.***

***This is expressed by saying that it is a contract of the utmost good faith – uberrima fides”.***

And in Mc Gillivray on Insurance Law, 9th Edition paragraph 17 at page 390 the learned author states: “Insurance is one of certain contracts expressed by the law to be contracts of the utmost good faith – *uberrimae fidei* – and as a consequence each party is required to disclose material facts before conclusion of the contract. The general principles upon which the duty of disclosure is based were stated by Lord Mansfield in the well - known leading case of *Carter v. Boehm*.

***“Insurance is a contract of speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the assured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist. The keeping back such circumstances is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived and the policy is void; because the risk run is really different from the risk understood and intended to be run at the time of the agreement ...***

***The policy would be equally void against the underwriter if he concealed ... Good faith forbids either party, by concealing what he privately knows, to draw the other into a bargain from his ignorance of the fact, and his believing the contrary.”***

Also in the case of *March Cabaret Club & Caseno Ltd. v. The London Assurance; March Cabaret Club and Casino Ltd. v. Thompson & Bryan Ltd.*, LLOYDS LAW REPORTS (1975) Vol. 1 page 169 which decision though based on the English Marine Insurance Act 1906 applies to non-marine Insurance as well, it was held:-

***“the assured must disclose to the insurer ... every material circumstances which is known to the assured ... If the assured fails to make such disclosure, the Insurer may avoid contract.”***

The effect of non disclosure is also discussed in The Law of Insurance by R. Colivaux (above) at para 5.02 where the learned author states that:-

***“The duty to disclose is not an implied term of the contract itself. Unlike fraud or a breach of condition, non -disclosure never by itself gives rise to a claim for damages. Avoidance of the whole contract is the only remedy. Once the aggrieved party knows all the facts, and has had a reasonable time in which to make up his mind, he must***

***make his election once and for all. He need not exercise it, however, until he does know all the facts; being put on inquiry is not sufficient.***

***Thus wh ere, although the assured has suppressed or misrepresented a fact, he discloses it to the insurance office before they pay a claim, they cannot after payment recover back the money. Similarly where the insurers receive notice that the risks insured agains t have been misrepresented, concealed or incompletely disclosed and accept further premiums on the same policy, they lose their right to avoid it.”***

As shown above, there are 4 different answers to the questions in the Proposal which the defendant contends amount to non-disclosure of material facts. Regarding that aspect of the matter, the 1st plaintiff in cross examination conceded that the answer to the questions relating to other policies, hereditary diseases, usual medical attendant and whether the deceased had been prevented from carrying out his work by illness, accident or medical condition had all been untrue or incorrect. She admitted that the deceased used to be treated by Dr. Gikonyo who had been his doctor since 1990. She also admitted that the deceased had a heart disease and was off work for 3 weeks when he went to South Africa for a heart operation. At the same time, Mr. Isaac Pitt Ngaru (PW3) an insurance management consultant who testified for the plaintiffs as an expert witness, while of the view that the repudiation of the policy by the defendant was in the circumstances of the matter punitive, accepted that the information sought through the questions referred to above related to material facts. He stated:-

***“I accepted that a person app lying for insurance would be under an obligation to make full disclosure of any fact relevant to the medical condition. If any applicant suffers from diabetes – that would be a material fact to disclose. Also a man suffering from coronary heart disease – that would be material and relevant. Also hypertension – the same with intermittent bronchospasm – hospitalisation for pneumonia – all these are material and I would expect them to be disclosed. The existence of other policies is material and relevant. I agree that any answer saying that there were no policies when there were life policies is a serious omission.”***

The plaintiffs’ response to the defendant’s complaints regarding nondisclosure of material facts has already been adverted to; in brief it is that the facts not disclosed were immaterial and did not go to the root of the policy. With that contention, I do not agree. As aforesaid, it is even contradicted by the plaintiffs’ own witness Mr. Ngaru (PW3). In my view there is the clearest evidence that there was non-disclosure of material facts in this matter.

The clearest case of non-disclosure of material facts relates to the Life Policies with Alico (K) Limited and Mercantile Life and General Assurance Co. Limited. As mentioned above, the existence of those policies at the time of completing the Proposal Form was admitted by the 1st plaintiff. In that respect there can be no doubt that the answer “None” to the question “What Life Insurance is currently in force on your life” was plainly untrue and a gross non disclosure of a material fact.

If any authority were required for the right of the defendant to repudiate the policy in those circumstances, then the case of London Assurance v. Mansel (1879) 11 Ch. D 363 comes to mind. The headnote reads:-

***“In a proposal by M. to an assurance office for an assurance of his life, in answer to the question, “Has a proposal ever been made on your life at any other office or offices? If so, where? Was it accepted at the ordinary premium, or at an increased premium, or declined?” his answer was, “Insured now in two offices for £16,000 at ordinary rates. Policies effected last year.” The proposal was accepted, but the office having subsequently ascertained that the life of M. had been declined by several offices: -***

***Held, that there had been a material concealment, and that the office was entitled to have the contract set aside.”***

Accordingly, having regard to the facts of this case and the law on the matter, I am of the opinion that by reason of non-disclosure of material facts the defendant was entitled to repudiate the policy at the time it became aware of the true position regarding the information it had received from the deceased and the 1st plaintiff. In the event however, the defendant did not repudiate the policy within a reasonable time and instead continued to accept payment of the premiums from the 1st plaintiff. By so doing, it is my view that the defendant lost its right to repudiate the policy.

In paragraph 2(c) of the Reply to Defence, the plaintiffs aver:-

***“alternative to the contents of sub -paragraph 2(a) hereinbefore the plaintiffs state that the defendant by conduct or otherwise led the plaintiffs to believe that they would in all ways honour its obligations vide the said policy in full subsequent to the deceased’s death and is therefore estopped from recanting its said obligations and/or constituted by the representations perpetuated by the said conduct or otherwise.”***

As mentioned above, the deceased died on 11.4.1999 and the death was reported to the defendants on 1.5.1999. From that date up to 5.11.1999, the defendant continued to accept the monthly premium of Shs.42,884/= on the joint policy without raising any query on the matter. In his submission, Mr. Fraser for the defendant said that the premiums were accepted because they were being paid through a banker’s order which the 1st plaintiff had failed to stop upon the death of the deceased. However, I am unable to see what would have obliged the 1st plaintiff to stop payment of the premiums prior to receipt of communication from the defendant of its intention to repudiate the policy and particularly when the defendant was all the while, accepting the payments without any complaint. In any case, the defendant having tendered no evidence whatsoever in this matter regarding that or indeed any other issue, there is nothing to support what Mr. Fraser says.

I say there was no evidence tendered on behalf of the plaintiff notwithstanding Mr. Fraser’s claim to the contrary because what he thought was evidence was in law nothing of the sort. I refer to two documents ‘MFIA’ and ‘MFIB’ which were referred to in the proceedings during the cross-examination of the 1st plaintiff (PW1). (MFIA is subsequently referred to erroneously as Exh. A.)

Mr. Fraser’s submission was that because the two documents were the subject of a notice to admit documents under O. 12 Rule 2(1) of the Civil Procedure Rules and that there was no denial of the documents, they are therefore deemed to have been admitted by virtue of Section 61 of the Evidence Act which provides that:-

***“No fact need be proved in any civil proceeding ... which by any rule of pleading in force at the time are deemed to have been admitted by their pleadings. Provided that the court may in its discretion require the facts to be proved otherwise than by such admissions.”***

He also referred to O. XII Rules 2(1) and (2) of the Civil Procedure Rules which provide:-

***“2(1) Any party to a suit may by notice in writing call upon any other party to admit any document, saving all just exceptions, and if the other party desires to challenge the authenticity of the document he shall, within fourteen days after service of such notice, serve notice that he does not admit the document and that he requires it to be proved at the hearing.***

***2(2) If such other party refuses or neglects to serve notice of non -admission within the time prescribed, he shall be deemed to have admitted the document, unless the court otherwise orders.”***

It was Mr. Fraser’s contention that where documents are the subject of a notice to admit documents and such documents have been admitted, they are (a) admissible in evidence without calling a witness and (b) they are also proof of the contents of the documents and the facts set out thereon.

Although Mr. Fraser referred to Mulla (Code of Civil Procedure) and Sarkar (Law of Evidence) on the matter, he did not cite any specific statement or authority that directly supports what he said. With all due respect, I do not consider his contention to be sound in law. In my view, a document even if not denied, does not become part of the record nor do its contents become evidence unless it be formally admitted in evidence with the consent of the parties or is tendered in evidence through a witness. As to admission of facts, Rule 4 of O. XII makes provision as to how notice to admit facts is to be given and what effect there is of refusal or neglect to admit them. The provisions are clear enough and I do not think I need to add anything in regard thereto.

But whatever the correct construction of O. XII Rules 2(1) and (2) and 4 of the Civil Procedure Rules may be, the major problem with the stand taken by Mr. Fraser is that no notice was actually issued by the defendant either under O. XII Rule 2 or under Rule 4 in the instant case. I say so because having carefully gone through the case file, the only documents I can find relevant to what Mr. Fraser was talking about are:-

**(a) a document headed:- “Plaintiffs List of Documents For Discovery (Order X Rule IIA Civil Procedure Rules)” filed by the plaintiffs’ advocates; and**

**(b) a document headed: “Defendants List of Documents”**

filed by the defendant’s advocates which were presumably done pursuant to the same Rule, namely O. X Rule IIA of the Civil Procedure Rules.

The above two lists cannot in any way be considered to be either Notices to Admit Documents or Notice to Admit Facts as required by O. XII Rules 3 and 5 (see Forms 9 and 10 of Appendix B) and consequently Mr. Fraser’s submission on the matter are in my view misconceived. For all those reasons, I do not consider MFIA and MFIB as either part of the record or evidence in this matter.

It may also be argued on behalf of the defendant that the material facts the non-disclosure of which purportedly caused the repudiation of the policy did not come to the defendant’s possession until after the completion of the investigations lodged following the claim by the 1st plaintiff. However, the position in the matter is that in the statement dated 18.6.1999 made to the defendant’s own investigators, the 1st plaintiff disclosed the existence of the other policies with Alico and Mercantile Finance. Given that fact, it is obvious that from that moment onwards the defendant knew or ought to have known that it was entitled to repudiate the policy on account of non disclosure of that particular material fact. Consequently, by failing to take any steps to repudiate the policy but instead continuing to accept the premiums from the 1st plaintiff for another 5 months after becoming aware of the existence of circumstances which entitled it to repudiate the policy, the defendant lost the right to avoid the policy.

In *Colinvaux* (above) para’ 5-02 it is stated:-

***“The duty to disclose is not an implied term of the contract itself. Unlike fraud or a breach of condition, non-disclosure never by itself gives rise to a claim for damages. Avoidance of the whole contract is the only remedy. Once the aggrieved party knows all the facts, and has had a reasonable time in which to make up his mind, he must make his election once and for all. He need not exercise it, however, until he does know all the facts; being put on inquiry is not sufficient. Thus where, although the assured has suppressed or misrepresented a fact, he discloses it to the insurance office before they pay a claim, they cannot after payment recover back the money.*”**

***Similarly where the insurers receive notice that the risks insured against have been misrepresented, concealed or incompletely disclosed and accept further premiums on the same policy, they lose their right to avoid it.”***

In my view therefore, the position in this matter is clear. The defendant had a right to repudiate the

policy upon the discovery of non disclosure of material facts by the deceased. Accordingly, although the evidence is not very clear when the defendant first became aware of the matter, (the blame for the lack of clarity squarely falls upon the shoulders of the defendant, it having called no evidence in this matter at all) at the very latest it knew by 18.6.1999 that the answer to the question regarding other life policies was untrue and that it had the right to repudiate the policy. In my opinion therefore, the defendant lost the right to avoid the policy by accepting further premiums on the policy from that moment.

For all the above reasons, the plaintiff's claim succeeds. There will therefore be judgment for the plaintiffs against the defendant for Shs.4,000,000/= with interest thereon from the date of filing suit till payment in full. The defendant will bear the plaintiffs' costs of this suit.

Dated at Nairobi this 22nd day of June, 2001.

**T. MBALUTO**

**JUDGE**