Odek (Suing as the Legal Representative of the Estate of Jayne A Okatty - Deceased) v National Social Security Fund Board of Trustees (Commercial Appeal E077 of 2021) [2025] KEHC 5866 (KLR) (Commercial and Tax) (9 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5866 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E077 OF 2021

NW SIFUNA, J

MAY 9, 2025

BETWEEN

THOMAS OKEYO ODEK (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JAYNE A OKATTY - DECEASED) ..... APPELLANT

AND

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES ..... RESPONDENT

JUDGMENT

1. By way of a Plaint dated 16th April 2019 in Nairobi Cmcc No. 2656 Of 2019 Thomas Okeyo Odek For The Estate Of Jayne A. Okatty (deceased) V. National Social Security Fund Board Of Trustees), the Appellant herein sued the Defendant for a declaration that there is no pending loan owed to the Defendant by the deceased's estate. Judgement in the matter was delivered on 30th July 2021. The court entered judgement for the Defendant against the Plaintiff for a sum of Ksh1,972,867=, with interest.

2. The Plaintiff being aggrieved with the judgment and decree lodged the present appeal by filing Memorandum of Appeal dated 24th August 2021 against the whole of the said decision on the following grounds:

    a. That the Magistrate erred in law and fact by misinterpreting the contract between the parties and relying on an assumption that since the Appellant had obtained a loan from the Defendant before, she had knowledge that a medical examination report was mandatory.

    b. That the Magistrate erred in law and fact in placing the obligation of finding out about the medical examination on the Appellant despite making a finding that it could not be established whether the insurance brokers informed the Plaintiff about the medical examination.

c. That the Magistrate erred in law and fact in ignoring evidence showing that only the Respondent was in communication with the insurance company and not the insured.

d. That the Magistrate erred in law and fact in expecting the Appellant to have known about the condition for a medical report despite the Respondent not tabling any evidence showing such communication.

e. That the Magistrate erred in law and fact in ignoring evidence that without prejudice to the question of submission of the medical report, the Appellant was entitled to a free cover limit of Kshs.1,400,000/ = pursuant to the Group Mortgage Protection Assurance Policy.

f. That the Magistrate erred in law and fact in ordering the Plaintiff to pay a sum of Kshs, 1,972,867/ = with interest which is not ascertained because the Respondent did not produce any document to ascertain at what interest rate the loan was granted.

g. That the Magistrate erred in law in reaching a determination without regard to the documents, submissions and the evidence led on behalf of the Appellant during the hearing of the case.

h. That the Magistrate erred in law in making orders that violated *the Constitution* and the due proper administration of Justice and further failed to handle the matter for the purpose of attaining a just determination thereof.

i. That the Judge erred in law in making orders that violated the Appellant's property rights guaranteed under Article 40 of *the Constitution*. The decision is an unjust and a gross denial of justice to the Appellant

j. That in the circumstances if this case, justice was perverted.

3. The Appeal prayed that:

a. The Appeal against the Judgment and Decree of the Chief Magistrate's Court Hon. L.L Gicheha (Mrs) dated 30th July 2021 in CMCC No. 2656 of 2019, be allowed.

b. The Judgment and Decree of the Chief Magistrate's Court Hon. L.L Gicheha (Mrs) dated 30th July 2021 in CMCC No. 2656 of 2019, be set aside.

c. Judgment be entered for the Plaintiff as prayed in the Plaint dated 16th April 2019.

d. The costs of this Appeal be awarded to the Appellant.

The Parties' Submissions

4. The Application proceeded by way of written submissions. The Applicant submitted that the trial court erred in holding that since the first loan was settled, then it is on that basis that the deceased should have known that medical examination was a requirement in the second loan. That each contract has its own unique terms and conditions, and that although the deceased had taken two loans from the Respondent, each contract was separate and distinct from the other.

5. Further that the trial court was therefore wrong in making the assumption that the two loans had the same terms and conditions. That the fact that the first loan was settled, does not mean the second one had the same terms and conditions and the deceased ought to have been aware. Further that each contract is separate and distinct from another unless shown otherwise.

6. It he reiterated that it is a settled principle of law that however alleges must prove. The Respondent alleging that the deceased did not go for medical examination as was required. That it was upon them

to prove that indeed this requirement was communicated to the deceased and she refused to go; and that therefore, the court erred in placing the obligation of finding out about medical examination on the Appellant despite making a finding that it could not be established whether the insurance brokers informed the Plaintiff about the medical examination.

7. He further stated that the Respondent refused to produce the Tenant Purchase Agreement/Contract between themselves, and the deceased despite being served with a Notice to Produce Application. Further that the excuse by the Respondent that due to effluxion of time they cannot trace the Contract is clearly false.

8. AGRICOLA KAVAYA the Respondent's witness confirmed that all the communication from the insurance company to the members were done by them and that there was no direct communication between the insurance company and the insured. Therefore, the trial court erred in law and fact in ignoring evidence showing that only the Respondent was in communication with the insurance company and not the insured.

9. It was the Appellant's further submission that the learned Magistrate erred in law and fact in ignoring evidence that without prejudice to the question of submission of a medical report, the Appellant was entitled to a free cover limit of Ksh1,400,000= pursuant to the Group Mortgage Protection Assurance Policy. The trial court in its judgement at page 3 paragraph *3* (page 409 of the record of Appeal) confirmed that the deceased paid the insurance premiums in full by having the same deducted from her salary. Under the Group Mortgage Protection Assurance Policy (page 373 of the record of Appeal) the Insurance Company was under obligation to settle the claim to the amount of Free Cover Limit.

10. The Appellant further argued that at the time of the deceased's death, the outstanding loan was only Ksh1,972,867=, the Ksh1,400,000= would have settled a substantial loan balance leaving the estate with a balance of Ksh 572,000= only even if the deceased did not go for medical examination.

11. Since there was an insurance policy in place as at the time of the deceased death. Upon her death the same crystalized and the Respondent could not charge any more interest. The debt as at the deceased's death was Ksh1,972,867= The same would have been paid by the insurance company fully or to the tune of Ksh1,400,000= under the free cover limit.

12. There is no ascertainable interest rate that has been shown to this court and any payment to be made by the Appellant if any cannot be with interest since there is no interest rate. The trial court therefore erred in ordering that the amount of Ksh1,972,000= be paid with interest yet there was no known interest rate. The Appellant was guided by the decision in the case of Anne N Parmena v. Housing Finance Company of Kenya Limited [2015] eKLR.

13. The Respondent submitted that it had proved that the Tenant Purchaser had defaulted on the terms, and had not been making payments over a period of 6 months (October 2000-April 2001). It was also not challenged that the Tenant Purchaser requested to make the monthly installment payments from other sources of income, and as such her salary was not deducted to meet the installment payments alongside the annual insurance payments. Further, it was not contested that the Tenant Purchaser thereafter failed to make the monthly payments, and the payments towards the insurance premiums.

14. There was evidence on record that the Respondent opted to reinstate check- off in April 2001, a few days before the Tenant Purchaser's demise and that payment towards the insurance premiums was regularized after the Tenant Purchaser's demise. On account of these facts presented to the Court, the Trial Court was correct in finding that on a balance of probabilities, the Tenant Purchaser failed to comply with the requirement to provide her medical record as requested by the underwriter.

15. With regard to the free cover limit, the Respondent argued that amounts below the Free Cover Limit of Ksh 1,400,000= were not required to submit any evidence prior to commencement of cover. The amount advanced be the Respondent to the Tenant Purchaser (the value of the Suit Property) was Ksh 2,500,000=. Consequently, the Tenant Purchaser fell above the threshold and therefore evidence was required prior to commencement of the cover.

16. The Appellant interpreted the provision that upon demise, the underwriter was obligated to pay Ksh1,400,000=, irrespective of the circumstances. This interpretation does not reconcile with the plain meaning communicated by the provision and is erroneous, and as such the Tenant Purchaser was not entitled to settlement of Ksh1,400,000=, irrespective of whether satisfactory evidence was availed or not.

17. It was the Respondent's submission that the trial court's findings that the Tenant Purchaser's Estate is liable to pay the Respondent the outstanding amount of Kshs.1,972,867/= together with interest should not be disturbed as the same is based on a proper examination of the evidence presented by the Respondent at trial.

Analysis and Determination

18. This being a first appeal, the court has a duty to re-evaluate the evidence tendered before the trial court and reach its own conclusions in line with Selle v. Associated Motor Boat Company Ltd [1968] EA 123.

19. I have considered the Appeal the submissions as well as the record of Appeal and the issues for determination are:

    a. Whether there was a requirement for the medical report to be availed by the deceased?

    b. Whether there was an insurance cover for the deceased? and

    c. Whether there are any outstanding amounts?

20. The Appellant argued that almost ten years after the death of his wife, he received a letter from the Respondent demanding payment of Kshs.4, 488, 693.64 on the basis that that the insurance did not pay the loan since the deceased failed to comply with the requirement of medical examination as was required. It is also notable that upon the death of the deceased, the Appellant was informed via a letter dated 12th July 2001 that the insurance cover was in order and fully paid and the Respondent even went ahead to process the deceased's terminal dues.

21. It is also not in dispute that the loan was insured by ICEA and the deceased was required to pay for the insurance alongside the monthly instalment. The Respondent also confirmed that the insurance premiums were paid in full since they were debited from the deceased's salary.

22. The contention that arose was the medical certificate and on this the insurance stated that the deceased had failed to comply with the medical examination which was a pre-condition for approval of the cover. The premiums were then refunded to the board in November 2008.

23. The insurance vide a letter dated 27th September 2007 while responding to the Respondent's letter dated 12th September 2007 argued that the deceased's second loan was not covered since she did not comply with medical examination which was necessary for the provision of the cover.

24. Further, the insurance through a letter dated 10th December 2008 explained that their intermediaries Azari Insurance Brokers Ltd were responsible for sending members for medicals. However, no

documentation was availed supporting this argument that the deceased was indeed informed and was required to go for the medical examination. In addition, the insurance went ahead to accept premiums which were dully paid.

25. However, it was the Defendant's testimony through its witness AGRICOLA KAVAYA that the members did not communicate to the insurance company directly but through the Defendant. DW1 also admitted that the company Azari Insurance Brokers who were to inform the deceased of the requirement for medical examination was no longer in business and this means that the company could not be called upon to confirm whether the medicals were done or not.

26. Evidently, the trial court erred by acknowledging that it could not be confirmed whether the deceased was informed by the insurance brokers of the medical examination requirement yet went on ahead to state that the insurance was right in repudiating liability as the deceased failed to comply by not going for medical examination.

27. In light of the above, the court has failed to find on record evidence which on a balance of probability would prove that the deceased borrower did not present herself for medical examination; moreover, there was no evidence on record to prove on balance of probability that the deceased borrower had been made well aware that the insurance company would only provide cover after she had made available the results of her medical examination. The insurance brokers could also not confirm the status of the same.

28. The other issue was whether there is any outstanding amount. The Respondent is now claiming Ksh 6, 529, 197/23 being accrued arrears. In contrast, the Appellant stated that the outstanding debt as at the time the deceased died was at 1, 972, 197.23. Equally, the Respondent's letter dated 17th August 2010 confirmed that the outstanding loan at the time of the deceased's death was Ksh1,981,000=.

29. In the cases of Mary Wambui Muturi v. Housing Finance Company Limited Nairobi HCCC No. 346 of 2006 (2012) eKLR and Anne N Parmena v. Housing Finance Company of Kenya Limited [2015] KECA 476 (KLR), where the court was faced with similar issues.

30. The Court of Appeal in Anne N Parmena v. Housing Finance Company of Kenya Limited [2015] eKLR held that:

> " In addition, we cannot ignore the fact that a borrower can be deceased and there is no one with legal capacity to notify the lender; it would be unfair to the insurance company for the outstanding sum to continue accruing interest and other charges until an unknown date when an unknown person shall notify the lender that the borrower is deceased. A mortgage protection policy makes certain the event that crystallizes and matures the policy; this is the date of death. From this date, the liability of the insurance company crystallizes and the monies due and payable under the policy become determinable. The significance of the notification of death is that it enables the lender to activate the process of realization of the mortgage policy by making a death claim."

31. The court went on to add that:

> " The record of appeal shows that the Insurance Company made payment to the respondent of Kshs.1,185,159/=. Payment of this sum was credited to the deceased mortgage account in August 2002 as per the respondent's bank statement. It is apparent that there was a delay between 20th April 1999 and August 2002 for this sum to be paid by the Insurance Company. The delay is for a period of approximately forty (40) months. The issue at hand is who should pay interest, if at all, on the outstanding monies for the forty (40) month

delay? Counsel for the respondent submitted that interest charged on the mortgage amount from the date at which the appellant reported the death of the deceased should be removed from any outstanding amounts. We have stated that interest from the date of death is not payable in the event that a mortgage protection policy is in place. In the instant case, we are comforted as we note that the learned judge appreciated the consequence of delay when he stated that "by waiting for almost two years .... the respondent allowed the debt to grow." We adopt the same reasoning and state that by waiting for forty months, the respondent allowed the debt to grow.

The trial judge dealt with this issue from the perspective of the interest due from the appellant; in the judgment it was held "that from 15th November 2001 (when the respondent told that applicant that Dr. Parmena was not insured) the respondent ought not to have charged interest on the balance outstanding. The judge was correct in this holding as he appreciated that as between the appellant (as the legal representative of the deceased) and the respondent, it was the respondent who ought and should have known if at all an insurance policy existed. However, in addressing the issue of interest in isolation without making a finding as to whom between the respondent and the deceased borrower had the obligation to ensure that a life policy was in existence, the judge erred."

32. This court reiterates that the holding in the above cases and it is only fair that the interest on the balance of the loan stopped accruing the moment the borrower was deceased. Going by the Respondent's letter dated 17th August 2010 confirmed that the outstanding loan at the time of the deceased's death was Ksh1,981,000=.

33. This then brings us back to the fact that the insurance was supposed to cover the loan and they indeed continued accepting premiums only for the insurance company to retract and allege that the deceased was never covered.

34. As things stand it is not possible for the deceased to tell the court whether she underwent the medical examination or not. Further, the insurance broker was also not brought on board to prove whether the deceased underwent the medical examination or not. Therefore, it cannot be determined with certainty that the deceased did not comply with the medical examination requirement yet went ahead to pay the premiums as required by the insurance.

35. It was upon the Respondent in collaboration with the insurance to prove that that the deceased did not comply and this could have been ascertained had the Respondent brought the insurance broker as one of its witness which it did not do.

36. I find that the Respondent cannot now claim Ksh 6, 529, 197/23 as accrued arrears, yet it allowed the loan interest to accrue over the period of over ten years. See Anne N Parmena v. Housing Finance Company of Kenya Limited (supra).

37. In addition, the Respondent via a letter dated 12th July 2001 represented to the Appellant that the insurance cover was in order and fully paid. This was the presentation made to the Appellant for a period of 10 years. It is the court's considered view that the Appellant should not be compelled to pay any amount.

38. In the end, I find the Appeal to have merit, and hereby allow it accordingly. The Appellant shall have the costs of the Appeal, as well as those for the suit in the trial court.

DATED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF MAY 2025.

PROF (DR) NIXON SIFUNA

JUDGE