



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT HOMA BAY**  
**CIVIL APPEAL NO.50 OF 2016**

**BETWEEN**

**WILLIAM OKOTH ABATHA ..... APPLICANT**

**AND**

**PIONEER ASSUARANCE COMPANY LTD..... RESPONDENT**

*Being an appeal from the Judgment and decree of Hon. P. Mayova, SRM in the Chief Magistrate's Court at Homa Bay in Civil Case No.50 of 2010 dated 22<sup>nd</sup> April, 2015)*

**RULING**

1. **WILLIAM OKOTH ABATHA** (the Applicant) has by an application dated 04/10/2016 sought for orders of calculation of the special damages awarded to him with regard to the sum assured and accrued bonuses in the five (5) policies viz. policy **Nos.280001670, 280002406, 280002624, 280002617 and 280003773** together with all the other relevant benefits.
2. Further, that the respondent be ordered to avail all the records of the 5 policies and their calculation of the bonuses and other benefits the applicant is entitled to. Once this is done, he urges the court to order the respondent to pay the same to him forthwith.
3. He also requests the court to review the judgment and award interest on the special damages plus costs.
4. The basis for seeking the orders is that he was awarded special damages together with costs of the appeal and costs of the lower court, but the special damages were not computed. Subsequently, the decree which was issued did not contain a specified amount payable to him and he laments that it will not be easy to execute the decree.
5. He further stated that he had provided the court with copies of the policy documents but interest on the same was not included by Majanja (J) in the judgment and the applicant suggests that it could have been an error of omission.
6. The background to this matter is that the applicant had initially filed a suit in the Chief Magistrate's Court but his claim was dismissed with costs. On appeal the court allowed his prayer for payment of the total sum assured in the five policies together with accrued bonuses.
7. However since the special damages awarded as contained in prayer (a) of the plaint did not indicate a specified amount he is unable to execute the decree unless these special damages are computed.
8. He deposes in the supporting affidavit that the sum payable as per prayer (a) is Kshs.1,136,454 and

further court fees of Kshs.55,803/=.

9. The application is opposed and in the affidavit sworn by the Respondent's counsel he confirms that indeed the appeal was allowed in terms of prayer (a) as contained in the plaint plus costs of the main suit and the appeal.

10. He however points out that during hearing of the original suit and even the subsequent appeal, the issue of the validity of the five policies was not considered, and it was presumed that all the five policies were valid and in force at the time of the insured's death.

11. He explains that it has now come to light that no benefits were payable under policies NO.280001670, 280002624 and 280003773 as the same had lapsed as at the time of the insured's death, so the only policies which were valid and payable were NOS.280002406 and 280002617 and the remainder of sums Kshs.,24982/50 cents payable will mature in August 2017 and a final Kshs.99930 payable in August 2018. He explains that the applicant already received a banker's cheque No.219392 dated 21<sup>st</sup> October 2016 for Kshs.309,022/50 cents leaving a balance of sums payable in the months of August 2017 and 2018.

12. Mr. Okoth deposed that the records of the 5 policies were already provided and the insurer has worked out in detail what is owed and accruing by a letter dated 17<sup>th</sup> October 2016. He pointed out that the judgment dated 5<sup>th</sup> August 2016 had no mention of the actual figure awarded nor did it award interest or special damages.

13. Further that in any event, interest is a discretionary preserve of the court so the omission could not have been an error. It is also argued that in any event the special damages were neither pleaded nor proved and the request that this court should calculate the same is simply an afterthought intended sneak in an appeal by way of review.

14. At the hearing, the applicant submitted that these were education policies and the court ought to award interests on this because the value of the shilling has changed and the rate of inflation has gone up, since filing of this suit 7 years ago. He justifies his prayer by pointing out that the lower court had ordered him to pay further court fees and he had to borrow from financial institution to do so, and now he is repaying the same with interest so the respondent should also be ordered to pay interest.

15. It was his contention that the argument about some policies having lapsed can have no leg on which to stand as Majanja J declined to make a finding on the same because it was never pleaded.

16. He is opposed to any part payments saying the judgment was for the sum assured and bonus due.

17. Mr. Ochieng submitted on behalf of the respondent that the judgment was very clear as to what had been awarded and the judge deliberately left out the issue of interest. He reiterated the position that special damages must be pleaded and proved – and there were no such pleadings.

18. Counsel argued that there was no error in the decision made by Majanja J to warrant review. Counsel admits that the respondent has not sought review of the judgment by Majanja J, but contends that once the applicant introduced the issue about calculating special damages and interest then he opened the lid for respondent to poke holes at the validity of some of those policies and that is the basis of the letter dated 17/10/2016.

19. The applicant's response was that his prayer for calculation was not open so that anything could be calculated.

20. I have read through the entire judgment by Majanja (J) and at paragraph 44 he stated:-

**“The appeal is therefore allowed and judgment is entered in terms of prayer (a) of the plaint.”**

21. Prayer (a) sought payment of the total sum assured in the five policies together with **ACCRUED** bonuses and other relevant benefits payable.

22. To understand the meaning of paragraph 44, one only needs to read the preceding paragraph 43 where the judge stated that it was sufficient to declare that the company had an obligation to pay the policies even though the sums were not specifically pleaded because **“the company has special knowledge of the policies it issued and the amounts owed thereunder.”** This means the company was expected to work out the sums and under each policy and the benefits accrued not the anticipated benefits which would only be realized upon maturity of the policies – that is why the sums were calculated in the letter dated 17<sup>th</sup> October 2016.

23. However I must point out that the letter does not fulfil the spirit of the judgment – the Respondent cannot select which policies to pay using the argument that the other policies were invalid as they had lapsed. That issue was addressed in the judgment at paragraph 39 to the effect that the issue of lapsed policies could not be considered as it was not pleaded in the defence and the judge stated:-

**“... the Company was not entitled to avoid the policies and to decline the payment of the sums due under those policies.”**

24. And for avoidance of doubt the judgment at paragraph 42 reproduced the contents of prayer (a) in the plaint - which listed all the five policies, so the respondent must work out in detail the sums due including the accrues bonuses in all the five policies.

25. The respondents did not seek review of the judgment and cannot attempt to sneak in such review under the guise of fresh calculation.

26. I do not think it would be the place of the court to calculate the accrued bonuses – hence the phrase used in paragraph 43 of the judgment – I can do no better than that. If the Respondent is dissatisfied with the decision the option is to appeal.

27. I am afraid unless the applicant is specific it becomes difficult to determine what records have not been availed to him in the light of the Respondent’s arguments that all records were availed during the trial. I am unable to make a meaningful order on this limb.

28. As regards interest, I doubt that the same was inadvertently omitted – the judge paid keen attention to the prayers – indeed the pleadings included a prayer for interest but he left that one out.

**29. Section 26** of the **Civil Procedure Act** is couched in discretionary terms – that the court may order interest.

30. In this instance the court did not make such orders – exercised under its discretion and I find no reason to interfere with that judgment.

31. Consequently the application has no merit and is dismissed with costs to the respondent.

**Delivered and dated this 20<sup>th</sup> day of March, 2017 at Homa Bay**

**H.A. OMONDI**

**JUDGE**