REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CIVIL APPEAL NO. 50 OF 2015

BETWEEN

WILLIAM OKOTH ABATHA (Legal representative of

PAMELA ATIENO NYAKONGO (deceased))…..……..…. APPELLANT

AND

PIONEER ASSURANCE COMPANY LIMITED ……..…..…….. RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. P. Mayova, SRM in the Chief Magistrates Court at Homa Bay in Civil Case No. 50 of 2010 dated 22nd April 2015)

JUDGMENT

1. This is an appeal from a judgment and decree dismissing the appellant's claim for payment of assured sums in respect of five policies issued in favour of the deceased by the respondent ("the Company") under which he claimed to be the beneficiary.

2. According to the Plaint and the Amended Plaint filed in the subordinate court, the Appellant averred that during her lifetime, Pamela Otieno Nyakongo ("Pamela"), a businesswoman from Rangwe, took out various life, education and investment policies with the Company. These policies were numbers 280001670, 280002406, 280002617, 280002624 and 280003773. He stated that the deceased died on 13th March 2009 but when he demanded to be paid the sums assured under the respective polices, the Company declined to pay forcing him to file suit.

3. The Company denied the claim and pleaded that the policies were fraudulently obtained by the appellant but not the deceased policy holder. The particulars of fraud pleaded were as follows;

a. Posing as the alleged policy holder.
b. Taking out five policies almost at the same time with the intention of cashing them soon thereafter.
c. Taking out the policies in the name of the deceased long after the deceased had died.
d. Listing himself and his 2 siblings as beneficiaries of the fraudulent policies.
e. Obtaining burial permit and Death Certificate of the alleged policy holder long after the policy holder had died.
f. Falsely obtaining hospital records in respect of the alleged policy holder long after her death.

4. The Company further averred that the appellant and the other listed beneficiaries were not children of the alleged policy holders. The Company also claimed that the policies were obtained in violation of the principle of *uberrimae fides* and were therefore null and void.

5. After hearing the parties and their witnesses, the learned Magistrate dismissed the Appellant's claim. The learned Magistrate held that the Company had established that there was lack of utmost good faith in acquiring the policies hence they were null and void. The Appellant appeals against the judgment and decree on the following grounds set out in the Memorandum of Appeal dated 17th May 2015;
    1. *The learned trial Magistrate erred in law and in fact by failing to consider in his judgment on record.*
    2. *The learned Magistrate erred in law and fact to read the judgment within sixty days provided for in the Civil Procedure Rules, 2010 and instead delivered the judgment one hundred and fifty two days after the close of trial.*
    3. *The learned trial Magistrate erred in law and fact by failing to consider the fact that at all material times the Appellant was a beneficiary in all the five policies and that the premiums in the said policies were promptly paid and the Appellant did not even require letters of administration from court to enable him reap the benefits accruing.*
    4. *The learned trial Magistrate failed to appreciate the fact that the policy holder had validly the Appellant as the beneficiary of all the five policies.*
    5. *The learned trial Magistrate contradicted himself by in the first instance stating in his judgment that the Appellant managed to prove to the court that he indeed is the beneficiary of all the three policies at the same time he stated that by the Appellant paying the premium himself demonstrated lack of utmost good faith which finding was not true without basis and not supported by any evidence at all and hence the learned Magistrate merely relied on speculations as the premiums were only paid by the insured till her death and not afterwards. The Respondent insurance company itself accepted the premiums paid by the policy holder and if they understood it to be lacking in utmost good faith it had the option to decline payment by the policy holder.*
    6. *The learned Magistrate erred by applying principle of uberrima fides wrongly where it should not be applied.*
    7. *The learned trial Magistrate misdirected himself in his judgment by coming up with evidence that was not tendered before him in court.*

6. The appellant reiterated the contents of his Memorandum of Appeal in his oral submissions and relied on his written submissions. He submitted that the Company did not prove the fraud alleged in its defence. He contended that the investigation report produced to support the allegations could not be relied upon by the court. The appellant also submitted that the Company did not prove that the deceased died on 20th July 2008 as it contended. Regarding whether he was the beneficiary, he contended that he was appointed by the deceased and that such a beneficiary was different from the next of kin. He submitted that the Company did not produce the proposal forms to rebut the fact that he was the beneficiary or that there was material misrepresentation.

7. The appellant submitted that the learned Magistrate erred in considering the doctrine of utmost good faith as there was no evidence to support the Company's case. He pointed to the fact that the Company did not produce the proposal forms and that the evidence was contradictory and lacking in weight. The appellant therefore urged the court to allow the appeal.

8. Mr Okoth, learned counsel for the respondent, supported the decision of the subordinate court. He submitted that the Company proved fraud as pleaded and that the policies were null and void as they were not procured in good faith.

9. As this is the first appeal, this court is cognisant of its duty as succinctly summarised by the East Africa Court of Appeal in ***Selle v Associated Motor Boat Company Ltd*** **[1968] EA 123, 126** as follows:

    Briefly put they [the principles] are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either

that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

10. A summary of the evidence is as follows. The Appellant stated that he was the nephew of the deceased and that the deceased took out five insurance policies with the Company. These policies were not disputed by the Company's Life Manager Timothy Wambua (DW 1). The appellant testified that he was a beneficiary of some of the policies and after the deceased died on 12th March 2009, he obtained Death Certificate number 257014. He informed the Company of the deceased's passing by a letter dated 10th April 2009. The Company responded by requesting him to provide documentation including the original policy documents, Death Certificate and police abstract by the letter dated 14th April 2009. By a letter dated 6th January 2010, the Company notified him that it was unable to pay any benefits under the policies in question as it had investigated the claim and found that the same failed the test of utmost good faith. Job Omondi Ogola (PW 2) testified that he was a clerk at the Civil Registration Department at Homa Bay and that the Death Certificate number 257014 was the only Death Certificate issued in respect of the deceased; Pamela Atieno Nyakongo who died on 13th March 2009 of malaria at Kanyirema Sub-location of Homa Bay District.

11. DW 1 confirmed that he was the custodian of the five policies issued by the Company and that the appellant's claim was received by a letter dated 10th April 2009. When he checked the policies, he noted that some of them were not active as premiums had not been paid. The Company got concerned that the 5 policies had been taken in a very short span with two taken in June 2008, three in August 2008 and one in October 2008. Due to the suspicion, the Company engaged a private investigator to find out if the policy holder had died and to verify the authenticity of the documents before the claim could be settled. Following the report by the investigator, the Company took the position that the policies were not obtained in good faith and that they were obtained by fraud.

12. The private investigator, Peter Kakali Merimeri (DW 2), testified that he conducted investigations on behalf of the Company in relation to the deceased. He came to Homa Bay in December 2009 and visited Kanyirema Village where he spoke with, among others, the area Assistant Chief. The Assistant Chief informed him that he had issued a burial permit to the appellant who alleged that the deceased had died on 13th March 2009. He inquired from the locals who informed him that the appellant's father was called Valentine Abatha Owuor and that the deceased had a son, Erick Juma Nyakongo (DW 3), who was 13 years old and in Class 6 at the time. He also discovered that the appellant made the claim without reference to the Agency Office in Homa Bay. His investigations also revealed that the appellant deceived doctors into preparing a fake medical report in respect of the deceased and that there was no evidence that the deceased went to hospital and was treated for malaria. He however testified that both the burial permit and the Death Certificate were genuine but were fraudulently obtained. He also discovered that the deceased was a housewife and not a businesswoman and her actual date of death was 20th July 2009 and that her husband had died in 2007. He produced the investigation report in evidence.

13. DW 3 testified that he was a son of the deceased and that he was born on 4th October 1999 and was the only surviving child of 9 children. His father, Joseph Nyakongo Owuor, a traditional dancer, had passed away in 2005. He stated that the deceased was a tea picker in Kericho and that she died when he was 7 years old. He stated that she died at home on 20th July 2008 after falling sick for about one year. Prior to that she had returned home and was doing peasant farming. He recalled that the appellant was his cousin and that it was DW 2 who informed him about the insurance policies. He testified that the deceased was illiterate and could not read or write.

14. Amos Othoo Deya (DW 4), the Assistant Chief of Kanyirema Sub-location, Kagan West Location testified that he issued a burial permit in respect of the deceased on 16th March 2009 to the appellant. He knew both the appellant and the deceased but he testified that he could not ascertain

whether the deceased was alive when he took over his post in September 2008. He also indicated that he did not have any suspicion regarding the deceased's death.

15. Remgeous Otieno Oloo (DW 5) testified that he was a sales agent for the Company between 2005 and 2010. He recalled that in 2008, the appellant called him and came to his office and informed him that his mother required insurance cover. He went with the appellant to Ndiru, Kagan where he met a woman whom he introduced as Pamela Atieno Nyakongo. She said she was a fishmonger. DW 2 filled the form and he assisted her to sign her name on the form for an endowment policy. She paid KShs. 2,000.00 in cash. On 28th July 2008 a school fees policy was issued and this time the appellant took the form to the policyholder to sign. He brought it back duly signed together with the premium. Another policy was issued on 26th August 2008 and he dealt with it in the same manner as he had done the others. The policyholder took an anticipated endowment policy on 13th August 2008 and a school fees policy on 26th September 2008. Later on he recalled that the appellant informed him that the policyholder had died from Malaria in Homa Bay and he issued him with a death claim form.

16. Dr Ojwang Ayoma (DW 6), at the material time the Medical Superitendant of Homa Bay District Hospital, testified that he received an inquiry from the Company to confirm whether the deceased had been treated at the Hospital as he had filled a certificate of medical attendance which showed that the deceased had been attended to at the Hospital on 4th March 2009 suffering from a headache, fever, chills and general malaise, and that she was last attended to on 12th March 2009. DW 6 stated that he perused the medical records and found that what had been filled was untrue and that there was a paper filled by Joel Suter who was in charge of clinical officers. He could only confirm that the deceased was an outpatient as there was no evidence of her admission.

17. Chief Inspector Richard Mathenge (DW 7) who was the Deputy District Criminal Investigation Officer at Homa Bay from 2009 to 2012 recalled that on 27th October 2010, his predecessor received a report of a case of insurance fraud from the Company's Homa Bay branch. He was instructed to investigate the matter and in that regard he visited Ndiru and went to the deceased's home. He met DW 2 who informed them that the deceased died on 20th July 2008. He was informed that the deceased died at home and that the body was not taken to the mortuary. He also interviewed the Assistant Chief (DW 4) who confirmed that he issued the burial permit after receiving information from the appellant but noted that DW 4 did not visit the deceased's home. He also confirmed that the office of the registrar had issued the Death Certificate. He also confirmed from documents produced by the Company that the appellant, who was a nephew to the deceased, was the beneficiary under the policies. He did not take any further action in the matter due to the pending civil matter.

18. In dealing with this matter, it is important to deal with the issue of burden and standard of proof. The fact that the Company issued five policies in favour of the deceased is not disputed. The Company asserted that they were obtained fraudulently and that there was lack of good faith in disclosing material facts before taking out the policies. As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. This is the law under **Section 107(1)** of the ***Evidence Act (Chapter 80 of the Laws of Kenya)***, which provides:

> ***107. (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

19. In allocating burden of proof, the learned Magistrate relied on **section 117** of the ***Evidence Act*** which states as follows;

> *117. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of*

proving the good faith of the transaction is on the party who is in a position of active confidence.

Although the section is subtitled, *"Proof of good faith"*, such reference to good faith is not in reference to the doctrine of good faith as known in insurance law but rather refers to situations of undue influence where parties are in a relationship of trust and confidence. I have not found any decided cases on this point but **section 111** of the ***Indian Evidence Act***, ***1872***, which is in *pari materia* with our own statute, supports this position as the illustrations demonstrate;

a. *The good faith of a sale by a client to an attorney is in question in a suit brought by the client. The burden of proving the good faith of the transaction is on the attorney.*
b. *The good faith of a sale by a son just come of age to a father is in question in a suit brought by the son. The burden of proving the good faith of the transaction is on the father.*

20. In light of the provisions of the ***Evidence Act*** I have cited above, I hold that the burden of proving fraud and violation of the principle of *uberrima fides* rests on the Company and not the insured. In **J. V. N. Jaiswal, *Law of Insurance*, Eastern Book Company (2008)**, the learned writer at p. 495 states;

> *If the claim is being repudiated by the Insurance Company on the ground that the insured had suppressed the material facts, the burden shall lie heavily on the Insurance Company, who pleads suppression, to prove it.*

Likewise in ***Stebbing v Liverpool and London Globe Insurance Company Ltd*** **[1916-17] All ER 248**, the court held that the burden of proof is on the insurer to show that there was a misrepresentation or non-disclosure of material facts.

21. As regards the standard of proof, I would do no better than quote ***Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others*** **NAI Civil Appeal No. 215 of 1996(UR)** where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that;

> *The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary Civil Case.*

Likewise in ***Rosemary Wanjiku Murithi v George Maina Ndinwa*** **NYR Civil Appeal No. 9 of 2014 [2014]eKLR**, the Court of Appeal held that;

> *Proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud.*

22. Before I consider whether the Company discharged its burden, it is important to understand the nature of the doctrine of utmost good faith in the law of insurance. The principle of utmost good faith, expressed by the Latin maxim *'uberrima fidei'*, meaning fullest confidence, is regarded as a fundamental principle in insurance contracts. The Court of Appeal in ***Co-operative Insurance Company Ltd v David Wachira Wambugu*** **CA Civil Appeal No. 66 of 2008** cited these timeless words of Lord Mansfield in ***Carter vs Boehm*** **(1766) Burr. 1905**;

> *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 and to induce him to estimate the <u>risqué</u> as if it did not exist. The keeping back such circumstance 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 risqué run is really different from the risqué understood and intended to be run at the time of the agreement… The policy would be equally void against the underwriter if he concealed… The governing principle is applicable to all contracts and dealings. 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…"

23. As indicated above, the doctrine of utmost good faith requires that those involved in negotiations for an insurance contract must disclose all relevant information to all the other parties in the negotiation. I am of the view, however, that the circumstances of this case point to something more than just lack of utmost good faith. The lack of utmost good faith can be raised in an insurance contract which would otherwise be binding on the insurer were it not for the fact that the insured failed to disclose some fact within his knowledge which was material to the contract. A typical instance arose in the case of ***Co-operative Insurance Company Ltd v David Wachira Wambugu*** **(Supra)** where the court found in favour of an insurance company in a case where the policyholder had failed to disclose that he had diabetes when taking out a life insurance policy.

24. As I understand it, the Company's case is that the insurance policies were taken by someone else masquerading as the policyholder who was in fact already dead. I think there is a whole world of difference between a situation where the real Pamela signs up for the policy but does not disclose some material fact and a situation where an impostor takes out policies pretending to be the real Pamela who is already dead. If it is proved that the policies were taken by an impostor after the death of the deceased, the case would escalate to fraud rather than mere lack of good faith. Of course in both instances the insurance company would be entitled to avoid the policies.

25. The Appellant produced a Death Certificate showing that the policyholder passed away on 13th March 2009, several months after the policies were issued. In order to prove that the deceased could not have died on the date set out in the Death Certificate, the Company called PW 7 who testified that inquiries he made revealed that the policyholder died in July 2008. The testimony of PW 7 is not direct evidence as required by **section 63** of the ***Evidence Act (Chapter 63 of the Laws of Kenya).*** His testimony and report are based on statements made to him by persons who were not called to testify before the Court. It falls within the quintessential definition of hearsay evidence which is inadmissible to prove the truth of the contents of the statements that were made to him.

26. The church elder who allegedly spoke to DW 7 about the burial arrangements would have been a useful witness if he had been called to testify in person but he never appeared before the court. The testimony of DW 7, being evidence of people he spoke to and were not called as witnesses, suffers the same fate as that of the DW 2 as it is hearsay.

27. DW 3 informed DW 2 and DW 7 that the deceased passed away on 20th July 2008. I have noted, however, that the witness began his testimony by saying that he was born on 4th October 1999 which would place his age at around 15 years at the time he testified in 2014. He indicated in his testimony that he had applied for a National Identity Card and that he had been issued with an acknowledgment slip popularly referred to as a Waiting Card yet he was only fifteen at the time of trial. The question of his age is further compounded by the fact that a copy of an acknowledgment slip issued to the witness on 6th December 2011 and produced by the Company states that he was born on 4th October 1990. This shows that the witness had lied about his age. The witness testified about events that took place when he was only 8 years old and assuming that he was indeed 8 years old when his mother died in 2008, I do not find his testimony credible. Further, it is doubtful that a child of eight would be this certain about time and dates.

28. The testimony of DW 3 appears more doubtful when looked at in light of what he stated when cross-examined. He stated that he had been approached by the Company to help with the case and that he would be paid the proceeds of the insurance policy once the Appellant's claim was

defeated. It appears he was looking forward to being paid and this financial incentive may have clouded his recollection of the facts. It is also likely that the insurance company fed the witness with the narrative to present to court so as to defeat the Appellant's claim. I therefore reject the testimony of DW 3.

29. The Company maintains, therefore, that the Death Certificate, which is genuine on its face and was issued by the Registrar of Births and Deaths, was obtained through the presentation of false information to the Registrar. DW 4 testified that he issued the burial permit on 16th March 2009 after being informed by the Appellant that the deceased had passed away three days earlier. Although he testified that he had known both the deceased and her husband, the witness indicated that he could not confirm whether the deceased was alive by the time he took over as the area Assistant Chief in September 2008. He was unable to confirm whether Pamela was alive in September 2008 or that she was buried on 16th March 2009 since he was not at the funeral and the burial permit he issued was given on the basis of reports by the Appellant.

30. The legitimacy of the Death Certificate is also questioned because it shows the cause of death as malaria without other evidence to confirm the cause of death, such as a postmortem report. I do not think, however, that someone who applies for a Death Certificate must provide a postmortem report or other evidence to prove conclusively the cause of the death that is reported. **Section 16** of the ***Births and Deaths Registration Act (Chapter 149 of the Laws of Kenya)*** provides for the mode of registration of deaths as follows;

> *Every person notifying a death shall, to the best of his knowledge and ability, give the prescribed particulars, which shall be entered forthwith by the registrar in the register, and the person notifying the death shall certify to the correctness of the entry by signing or, if he is illiterate, by fixing his mark to the register.*

31. Although DW 6 confirmed that he issued the report which indicated the cause of death as malaria, he stated that he based this report on medical notes which had untrue information. This fact alone does not prove that the fact that the deceased died on any other date other than that certified in the Death Certificate.

32. On the basis of the testimony and evidence I have outlined, I find that the Company has not discharged the burden of showing that the deceased died on any other date other that the death shown in the Death Certificate. The Death Certificate is regular on its face and it is prima facie evidence as to the time and identity of the person who died. Its contents cannot be displaced by mere suspicion or argument.

33. As I have found that the person name in the Death Certificate died on 13th March 2009, the other issue is whether the person who took out the policies was Pamela or an imposter. Once again, the Company had the burden of proving otherwise.

34. The testimony from DW 5 is crucial in determining the questions regarding the identity of the person who signed up for these policies as Pamela Atieno Nyakongo. DW 5 was introduced by the Appellant to whom he issued a policy. DW 5 went to her business premises at Ndiru to consummate the transaction. This is the only time he met her. Although she signed the documents with assistance, she did not present her identity card. It was only a week later that a copy was delivered to the agency offices. It is the Appellant who brought all the other documents.

35. DW 5 did not testify that the lady he saw was the one whose photo was on the copy of the identity card presented to him. Likewise, there is evidence that the deceased policy holder attended a medical examination before the life policy was issued as confirmed by the Company's letter dated 23rd June 2008. Unfortunately, the Company did not call the doctor who conducted the examination to confirm that the person who appeared before him was the policy holder. As I have found elsewhere, the description of the deceased given by DW 2 was not helpful in light of what I have found regarding the credibility of his testimony. In light of this evidence, I cannot say that

the Company has proved that the person who signed and took out the policies was another person other than Pamela.

36. The Company relied on **section 119** of the ***Evidence Act*** which provides that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. It is common understanding of human conduct that it is doubtful that a single mother would take out life insurance and fail to name her biological child, who was still in school, as a beneficiary of the policy, choosing instead to name her nephews and a niece whom she allegedly adopted. Hence the court could infer that the policies were fraudulent. However, such an inference is not a substitute for proof as required by section 107 of the ***Evidence Act***. The court can only draw inferences once primary facts are established by evidence. Further, such an inference cannot be inconsistent with the established or proved facts. **Section 119** of the ***Evidence Act*** cannot be a substitute for proof of facts necessary to establish a case.

37. The fact that the deceased did not provide for her son may be evidence of fraud but not necessarily decisive in proving fraud. A policy holder has the freedom to choose the beneficiaries of the policy and I am not convinced that this fact alone discharges the Company from its burden of proving fraud.

38. Having found that the Company has failed to discharge its burden of proving fraud, I now turn to the issue of whether the policy holder failed to make full disclosure of material facts. The Appellant argued that given the central place of the proposal form in an insurance contract, a court of law cannot make a definitive finding on the lack of good faith without taking a look at the proposal form. Whereas a proposal form would be important in such an inquiry, I am of the view that it is not mandatory. In this case though, it is not clear what other material facts the policy holder failed to disclose that would have affected the risk taken by the Company. I therefore find and hold that the Company failed to establish or prove breach of the doctrine of good faith by the deceased.

39. DW 1 testified that some of the policies had lapsed as a result of non-payment of premiums. Such a defence is an affirmative defence which must be pleaded and proved (see ***Insurance Company of East Africa v Marwa Distributors Ltd*** **Migori HCCA No. 51 of 2015 [2015]eKLR**). The Company did not plead this in its defence, I will therefore not make any finding on it.

40. Having evaluated all the evidence afresh, I am satisfied that the Company failed to prove that the policies were taken out by fraud or that the deceased policy holder breached the duty of good faith when taking out the policy. I therefore find that the Company was not entitled to avoid the policies and to decline the payment of the sums due under those policies.

41. I now turn to the issue raised by the Appellant regarding the date of delivery of the Judgment. He argues that the judgment was delivered beyond 42 days after the hearing contrary to the provisions of **Order 20 Rule 1** of the ***Civil Procedure Rules*****.** The hearing was completed on 10th December 2014 with judgment scheduled for 25th February 2015. The Judgment was not delivered on that day but was rescheduled to 22nd April 2015. In considering this issue, I reiterate what the Court of Appeal stated in ***Nyagwoka Ogora alias Kennedy Kemoni Bwogora v Francis Osoro Maiko*** **CA Civil Appeal No. 271 of 2000 (UR)** :

> *The real question is what is the consequence of non-compliance therewith? No doubt that rule is an important one in the expeditious dispensation of justice. And it is made to be obeyed. However, if non-compliance with the rule were to have the effect contended for by the appellant, we think the overall result would be more injustice than justice to the parties. A lot of time and resources spent in litigation would come to naught if judgments delivered after the expiry of 42 days were to be voided or declared void ipso facto. The rule cannot and in our view could not have been intended to deprive a trial judge of his jurisdiction to write and pronounce judgment in a case he has heard. In our considered*

view, while non-compliance with the rule and particularly persistent non-compliance or inordinate delay in compliance should call for censure of the judicial officer concerned from those in-charge of judicial administration, it should not be a ground for vitiating a duly delivered judgment. Being of that persuasion we would reject ground 1 of appeal.

42. The final issue is the nature of relief the Appellant is entitled to. The Appellant prayed as follows in his Plaint;

a. *Payment of the total sum assured in the above-listed Policies Numbers 280001670, 280002406, 280002617, 280002624 and 2800037773 together with accrued bonuses and other relevant benefits payable thereto.*

43. The Company contended that the amount due was in the nature of special damages which had to be pleaded and proved as required by law. In this case though, the declaration is sufficient as the Company has special knowledge of the policies it issued and the amounts owed thereunder.

44. The appeal is therefore allowed and judgment is entered in terms of prayer (a) of the Plaint. The appellant shall have the costs of the suit and of this appeal.

DATED and **DELIVERED** at **HOMA BAY this 5th day of April 2016.**

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Okoth instructed by G. S. Okoth and Company Advocates for the respondent.