REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. E185 OF 2025

GEORGE OCHIENG OGENDO …..……..... APPELLANT

- VERSUS -

MADISON LIFE ASSURANCE KENYA LIMITED …... 1ST RESPONDENT

PATRICK OKECH OWUOR …..……..…….. 2ND RESPONDENT

(Being an appeal from the judgment and decree of **Hon. V. Adhiambo RM** delivered on the 1/8/2025 in the **Kisumu CMCC No. E242 of 2024, George Ochieng Ogendo v Madison Life Assurance Kenya Limited & Another)**

J U D G M E N T

1. The appellant filed suit against the respondents vide a plaint dated **16/7/2024** seeking judgment against the respondents jointly for: -

    a) ***A declaration that the acts and omissions of the defendants constitute a breach of the policy of insurance between the Plaintiff and the 1st defendant.***

    b) ***General Damages for breach of the policy of insurance.***

    c) ***Kshs. 4,408,062/- being the pay-out calculated as of 12th June 2024.***

    d) ***Interest on (b) at court rates from the date of judgement till payment in full.***

e) ***Interest on (c) at court rates from 12th June 2024 till payment in full.***

f) ***Costs of the suit and interest from the date of judgement till payment in full.***

2. The 1st respondent entered appearance and filed a defence dated **13/8/2024** denying the claim in toto and put the appellant to strict proof of the same. There was no appearance or defence filed on behalf of the 2nd respondent.

3. In its judgment, the trial court found in favour of the appellant and decreed as follows: -

a) ***A declaration that the acts and omission of the defendant constitutes a breach of the policy of insurance between the Plaintiff and 1st defendant.***

b) ***Judgment in the sum of Kshs. 1,252,598.41 and interests at court rates from the date of this judgment until payment in full.***

c) ***The plaintiff will have costs of the suit.***

4. Being dissatisfied with the said Judgment/decree, the appellant lodged this appeal vide the Memorandum of Appeal dated **22/8/2025** raising five (5) grounds of appeal as follows: -

a) ***The learned trial magistrate erred in fact and in law by relying on the Madison Insurance Personal Pension Plan issued by the respondents which allegedly stipulated that the premium payable was Kshs. 30,000/- per year to give a total payout of Kshs. 1,252,598.41/- and yet the very documents produced by the 1st respondent showed that in 2013, 2012, 2011 and 2008 the appellant paid a total of Kshs. 43,195/-, 38,443/-, Kshs. 38,502 and Kshs. 30,102/-, respectively which amounts were accepted by the respondents, an indication that the agreement between parties had been varied.***

b) ***The learned trial magistrate having made the correct finding that the 1st respondent was bound by the acts of the 2nd respondent, erred by subsequently failing to find that even though the contract between the parties stipulated that the annual payments would be Kshs. 30,000/-, the fact that the 2nd respondent accepted higher annual payments than the contract stipulated amount implied that the contract had been varied.***

c) ***The learned trial magistrate erred in law and in fact by failing to find that the contract between the parties having been varied, meant***

that the total contribution made by the appellant would amount to a payout of Kshs. 4,408,062/- as of 12/6/2024 in accordance with the statements issued to the appellant by the 2nd respondent.

d) The learned trial magistrate erred in fact and in law by placing on the appellant's shoulder a heavier burden of proving his case compared to the required standard of a balance of probabilities.

e) The learned trial magistrate erred in law and in fact by failing to accord the requisite consideration to the appellant's evidence and submissions filed on record.

5. The appeal was disposed off by way of submissions. I have duly considered the submissions on record.

6. This being a first appeal, the Court is duty bound to evaluate the evidence before the trial court afresh and come to its own independent findings and conclusions but having in mind that it did not have the advantage of seeing the witnesses testify. See **Selles & Anor vs. Associated Motor Boat Co Ltd & Others [1968] EA 123.**

7. The appellant's case before the trial court was vide a plaint dated **16/7/2024** in which he sought the orders outlined hereinabove. His contention was that on the **1/4/2008**, the 2nd respondent, acting as an agent of the 1st respondent,

approached him to take out a life insurance policy for a term of 15 years. That he subsequently made all payments in cash to the 2nd respondent and was always issued with receipts as evidence of the same.

8. That on the **12/6/2024,** he received a call from the 1st respondent to the effect that his policy was on the verge of being cancelled on the basis that he had not been paying premiums and was taken aback as he had been consistently paying the premiums to the 2nd respondent who would issue annual statements with the last being issued on the **20/1/2024** stating that he had a total balance of **Kshs. 4,073,154.85** in the fund.

9. That upon presentation of the receipts that he had been issued by the 2nd respondent to the 1st respondent, he was informed that the same were forgeries. It was his case that the 1st respondent was thus liable for the actions of the 2nd respondent and ought to have paid out the sum of **Kshs. 4,073,154.85**, the total funds that he had paid in premiums to the 2nd respondent.

10. The appellant testified as **Pw1.** He adopted his witness statement as his evidence in chief and produced his list of documents as **PExh1 – 10**. In addition, he testified that the policy was to mature in the year 2025 when he

turned 55 years old and that he was to pay all the premiums in cash and not through cheques.

11. In cross-examination, he stated that it was the 2nd respondent who approached and sold him the policy. That he made additional payments to the initial agreed payment of **Kshs. 30,000/-.** That he made the payments in cash to the 2nd respondent who would pick the money from his office and later bring the receipt.

12. On its part, the 1st respondent called one **David Mboya Olande**, their regional manager Western to testify as **Dw1**. He adopted his witness statement as his evidence in chief and produced its list of documents as his exhibits. Further, it was his testimony that their records showed that the 1st respondent had received **Kshs. 559,285.47** only from the appellant and that the appellant was in default. That the contract was clear on the amount to be paid in premiums. That they had not been able to contact or trace the 2nd respondent.

13. In cross-examination, he told the court that the premiums were to be paid monthly, that the pension plan had a mode of payment on a yearly basis as captured. That according to their last statement, the last payment made by

the appellant was in **2013.** He reiterated that they were still looking for the 2nd respondent so that he could explain the allegations made by the appellant.

14. It is on the above evidence that the trial court rendered its decision. It is not disputed that the 2nd respondent was acting as an agent of the 1st respondent. The trial court found as such and proceeded to hold the 1st respondent liable for his actions. The issue for determination is whether the trial court was right in its decision, as if so, whether the amount payable to the appellant should have been **Kshs.4,408,062/-** instead of **Kshs.1,252,998/41** awarded.

15. The first ground of appeal was that the trial court erred in relying on the Madison Insurance Personal Pension Plan in awarding the appellant the sum of **Kshs.1,252,598/41** as the total payout on an annual premium of **Kshs.30,000/-** yet the documents produced showed the premiums paid to be in excess of the said **Kshs.30,000/-.**

16. It was contended by the appellant that the documents produced by the 1st respondent showed that the appellant had paid **Kshs.43,195/-, Kshs.38,443/-, Kshs.38,502/-, Kshs.30,102/-** in the years **2013, 2012, 2011** and **2008** respectively. That since the 1st respondent had accepted the said amounts, the agreement between the parties had been varied and the amount

payable should have been **Kshs.4,408,062/-** as the amount of the funds as evidenced by the statement by the 2nd respondent.

17. The applicable law as to the burden of proof is set out under ***Sections 107, 108 and 109 of the Evidence Act***. In **Mumbi M'Nabea v David M. Wachira [2016] eKLR,** the Court of Appeal stated: -

> ***"In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not. Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya provides as follows:***
>
> ***"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." The above provision provides for the legal burden of proof.***
>
> ***However, Section 109 of the same Act provides for the evidentiary burden of proof and states as follows:***

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

The position was re-affirmed by the Court of Appeal in Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that:

"Whereas under section 107 of the Evidence Act, (which deals with the legal evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence."

18. In **Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR,** it was held that: -

"Denning J, in Miller –vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;- "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a

tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties…are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained."

19. From the foregoing, it is clear that the duty of proving the averments contained in the plaint lay with the appellant. The appellant testified in support of his case that though the contract between him and the 1st respondent stipulated that the premium payable was **Kshs. 30,000/-** per year for a total payout of **Kshs. 1,252,598/41**, he made payments over and above that amount. Specifically, that, in **2013**, **2012, 2011** and **2008** he paid a total of **Kshs. 43,195/-, 38,443/-, Kshs. 38,502/-** and **Kshs. 30,102/-**, respectively. He contended that if the said sums were tallied up, the total payout would be **Kshs. 4,408,062/-** as evidenced by the receipts that he produced and by the statement issued to him by the 2nd respondent.

20. In its judgment, the trial court dismissed this aspect of the appellant's claim on account that the contract between the appellant and 1st respondent strictly provided for premium payment of **Kshs. 30,000/-** and as such, it could not interfere with the provisions in the said contract.

21. Indeed, it is trite that a court of law cannot rewrite a contract between parties and that parties are bound by their contract unless coercion, fraud, or undue influence is proved. See the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2002] 2 EA 503.**

22. The critical terms and conditions of the contract between the parties as can be discerned from the Policy document appearing at pages **17 to 23** of the record of appeal are as follows: -

a) This was a Pension Plan for **15years.**

b) The annual premiums agreed upon were **Kshs.30,000/-.**

c) There was to be a presumed annual interest of **12%.**

d) The estimated maturity value was agreed at **Kshs. 1,252,998/41.**

23. The contract between the parties was in writing. **Condition No. 1** in the **Third Schedule** to the contract provided that: -

"ALTERATION TO PLAN

No alteration to the plan will operate to alter the terms of this policy unless and until the Insurance Company shall have agreed in writing to such alteration."

Can the receipts issued by the 1st respondent or on its behalf be deemed to have been the acceptance of the variation in writing? I do not think so. This is because, it was not clear whether the so called increased payments were to likewise attract the assumed **12%** annual interest or not.

24. In any event, nowhere in his pleadings or evidence did the appellant tabulate the exact total amount he had paid to warrant the increased total payout sum from the agreed **Kshs.1,252,998/41** to the alleged **Kshs.4,408,062/-**. I say so because, for the 15 years Plan at an annual premium of **Kshs.30,000/-,** the appellant would have paid a total sum of Kshs.450,000/- to entitle him to a total payout of **Kshs.1,252,998/41**. It is not clear what total amount of premiums had been paid to warrant a total payout of **Kshs.4.408,062/-.** The statement by the 2nd respondent in my view could not have been the basis of the claim. It was for the appellant to show the total premiums paid and how the same would have entitled him to a total payout of **Kshs.4,408,062/-** claimed.

25. This Court is alive to the concept of implied contracts. An implied contract is distinguished from an express contract by its formation, which is through the behavior and interactions of the involved parties rather than explicit written agreements. An implied-in-fact contract is inferred from the situation, conduct, activities, or established relationship between the parties, demonstrating a collective intent to form a contract.

26. In the case of **Steadman v Steadman, (1976) AC 536, 540** cited with approval by the Court of Appeal in **Ali Abdi Mohamed v Kenya Shell & Company Ltd, (2017) eKLR**, it was stated that: -

> ***"If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid, he will not then be allowed to turn around and assert that the agreement is unenforceable."***

27. The foregoing notwithstanding, in the present case, although the 2nd appellant acting as an agent of the 1st respondent is said to have received annual premiums in excess of what was set out in the Policy contract from the appellant thereby making the appellant have a legitimate expectation that he would receive payments commensurate to the premiums paid out, there was no evidence on what sums were targeted as the total payout amount.

Customarily, Pension Plans would ordinarily have the expected payout amount agreed beforehand. That is not the case here. Accordingly, that ground fails.

28. The second and third grounds were to the effect that the trial court erred by not finding that the contract between the parties had been varied by the payment of higher premiums and by not finding that the appellant was entitled to a total payout of **Kshs.4,408,062/-** by **12/6/2024**.

29. I have already referred to what the contract between the parties provided in respect of alterations to the Plan. There was no evidence to show that the 1st respondent had agreed to the alteration. Even if there was such alteration, there was no proof that the sum of **Kshs.4,408,062/-** was the amount agreed to be the total payout amount. The question that arises is, the parties having agreed on a specific annual premium for an expected specific sum, how and why would the appellant change the same where he would make multiple premiums during one given year? The appellant seems to have turned the Plan to a savings account or investment plan which was not in the contemplation of the parties. Accordingly, I find that the trial court did not subject the appellant to any higher burden of proof than as expected in civil cases.

30. In any event, the appellant should have claimed the agreed total payout amount and separately claim the excess premiums paid as money had and received but not as claimed in the Plaint. Those grounds also fail.

31. The last ground was that the trial court did not consider the evidence and submissions of the appellant. That it treated them superficially. From the foregoing, it is clear that the trial court properly directed itself to the law and evidence placed before it. It cannot therefore be faulted. That ground also fails.

32. Accordingly, this Court finds the appeal to be without merit and dismisses the same. As the respondents did not file any submissions, I will make no orders as to costs.

It is so decreed.

DATED and **DELIVERED** at Kisumu this **6th** day of **May**, **2026**.

A. MABEYA, FCI Arb

JUDGE