IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, SICHALE & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 239 OF 2007

BETWEEN

ANNE N. PARMENA (*Legal Representative of the late*

DR. WILLIAM KAAYA PARMENA (Deceased) .....APPELLANT

AND

HOUSING FINANCE COMPNANY OF KENYA LIMITED .....RESPONDENT

(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Fred Ochieng, J.) dated 5th December 2006

in

HCCC No. 294 of 2003 (O.S)

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JUDGMENT OF THE COURT

1. Two key issues arise in this appeal. First is whether a secured lending bank that has a mortgage protection policy is entitled to continue charging interest on a borrower's account when a notice of death of the borrower has been given to the bank; second, if the estate of the deceased borrower is entitled to release of security as at the date of death and whether the lending bank's rights are converted from realizing the security given to realizing the sum insured under the mortgage protection policy.

2. The appellant, ***Anne N. Parmena***, is the legal representative of the estate of ***Dr. William Kaaya Parmena*** who died on 20th April 1999.

3. Before his death, the deceased Dr. William Parmena on 24th August 1998 had borrowed the sum of Kshs.1.5 million from the respondent. The letter of Offer to Advance from the respondent ***Housing Finance Company of Kenya*** is dated 24th August 1998. In the letter, one of the special conditions is that the offer is subject to an insurance quotation from an insurer through ***M/s Kabage & Mwirigi Insurance Brokers***. The deceased borrower charged ***LR No. Nairobi/Block/32/677*** Ngumo Estate as security. Additional special conditions are contained in a memorandum dated 24th August 1998 from the respondent to the appellant indicating that the offer was subject to the following conditions:

"(a) *Equivalent of one (1) monthly repayment of Kshs. 62,302/=.*

b. *Annual Fire Insurance Premium of Kshs.7,500/=.*

c. *Annual Life Insurance Premium of Ksh. 13,104/= (emphasis ours)*

d. *Ledger Fee of Kshs.1, 800/=."*

4. By letter dated 26th September 1998, the respondent wrote to the deceased confirming that the mortgage had been completed as at 28th August 1998. In the said letter, the respondent attached its cheque for Kshs.1, 349,808/= being the loan amount offered. Unfortunately, eight (8) months later the borrower, Dr. William Kaaya Parmena, died on 20th April 1999.

5. By letter dated 30th June 1999 the appellant, as widow and legal representative of the deceased, wrote a letter to the respondent in the following terms: "I wish to report that Dr. Parmena died on 20th April 1999. Please see the attached copy of the Death Certificate. I therefore kindly request you to sort out the mortgage issue through Life Insurance."

6. Acting on the appellant's letter, the respondent wrote to the Insurance Broker Messrs Kabage & Mwirigi on 9th July 1999 stating as follows: "*We are saddened to report the death of the borrower under reference following illness. We are in touch with the family representatives who have promised to avail to us the Original Death Certificate and the Passport. In the meantime, lodge the death claim as the necessary documentation is being processed by the authorities.*" This letter was copied to the appellant. By a further letter dated 26th July 1999, the appellant forwarded to the respondent the original Death Certificate and the Tanzanian Passport of the deceased.

7. The appellant contends that everything was quiet until 24th September 1999 when she received a letter from the respondent addressed to the deceased claiming the sum of Ksh. 2,055,351.70 being the amount due and owing with interest thereon as prescribed under the charge/mortgage; the respondent continued levying interest on the outstanding mortgage account. A further surprise awaited the appellant when the respondent by letter dated 15th November 2001 wrote as follows: "*We regret to advice that the late Dr. Parmena was not covered under our Group Mortgage Protection (Life) Assurance Scheme. The insurance company could not therefore redeem the loan. The account has a balance of Ksh. 4,342,204.60 as at 30th November 2001 outstanding due this fact.*" By letter dated 14th January 2002, the respondent wrote a letter to the appellant's counsel stating that "we are conferring with the insurance on the issue of life insurance." A further letter from the respondent dated 2nd October 2002 addressed to the appellant was received stating as follows: "*Please note that our insurers agreed to settle the claim on ex-gratia basis. We have received Kshs.1, 185,159/= which has been credited to the mortgage account.*" Another letter dated 3rd October 2002 was received from the respondent addressed to the appellant stating that a balance of Ksh. 3,726,924.33 was due and owing in view of the fact that the proceeds received from the Insurance Company did not redeem the mortgage account in full.

8. Bewildered by the various letters from the respondent, the appellant filed an Originating Summons before the High Court dated 2nd May 2003 seeking the following orders:

"(a)*That a mandatory injunction order be issued requiring the defendant to surrender the title documents in regard to Nairobi/Block/32/677 House No. 37 Ngumo Estate to the applicant herein who is the administrator of the estate of Dr. William K. Parmena free from all encumbrances.*

b. *That the defendant be restrained from recovering alleged outstanding balances from the Estate of the deceased Dr. William K. Parmena and the said account be ordered as settled."*

9. The appellant's core ground in support of the Originating Summons was that upon the death of Dr. William K. Parmena, the respondent ought to have closed the mortgage account, pursued the insurance

company and released the charged property; that the respondent confirmed that the mortgaged account had been settled.

10. The respondent in opposing the Originating Summons averred that there was no life insurance policy taken out for deceased borrower and as such, the mortgage amount remained outstanding and continued to attract and accrue interest; that any monies received from the insurance company was ex gratia and did not redeem the account to permit release and discharge of the secured property.

11. Upon hearing the parties, the learned judge Ochieng, J. in a judgment delivered on 5th December 2006 held that the appellant's claim failed. The judge expressed himself as follows:

"In the net result, the claim herein fails, in so far as it sought to have the respondent compelled to discharge the security. However, the respondent is directed to re-calculate the outstanding balance from 19th November 1999. The recalculations should exclude all interest and other charges which were debited to the account from that date up to 15th November 2001."

12. On the issue whether the deceased had taken out a life policy, the learned judge expressed as follows:

"In this case, the borrower got the benefit of the loan. But he failed to present himself for a medical examination. Therefore, as he had been made well aware that the insurance company would only provide cover after he had made available the results of his medical examination, the borrower knew he was not insured. Meanwhile, the applicant has not disputed the respondent's contention that Dr. Parmena did not pay even a cent. In the circumstances, I find that there would be no justification in enabling his estate to benefit from a policy which he had failed to enable be in place."

13. Relating to the consequences of delay in notifying the appellant that there was no insurance cover for the deceased, the learned judge expressed as follows:

"In the same vein, justice demands that for the period between 19th November 1999, (when the respondent told the applicant that it was pursuing the insurance company) and 15th November 2001 (when the respondent told the applicant that Dr. Parmena was not insured) the respondent ought not to have charged interest on the balance outstanding. By waiting for almost two years before telling the applicant that her late husband was not insured, the respondent allowed the debt to grow. I see no reason why they should not have immediately notified the applicant that Dr. Parmena was not insured."

14. Aggrieved by the judgment of the High Court, the appellant has lodged this appeal urging *inter alia* the following grounds:

"(i) *That the learned judge erred in law and fact in not making a finding that the account was confirmed redeemed by the respondent and that the respondent was estopped from making contrary allegations.*

ii. *The learned judge erred in law and fact by failing to appreciate that the respondent was responsible for procuring group life cover for the mortgage as well as following up the claim thereon.*

iii. *The learned judge erred in law and fact in accepting that whatever payments made by the respondent's insurer was made ex-gratia.*

iv. *The learned judge erred in law and fact in the manner in which he apportioned the blame for delay in claim processing in the absence of any evidence of contribution against the appellant;*

v. *The learned judge erred in directing re-calculations of the amount due after making a finding of fact that the respondent was to blame for allowing the debt to grow.*

vi. *The learned judge erred in law and fact in not analysing the appellant's evidence carefully and correctly and hence arriving at the wrong conclusions as regards re-payment of the loan advanced.*

15. At the hearing of this appeal, learned counsel Mr. Joram Mwenda appeared for the appellant while the respondent was represented by learned counsel Mr. D. K. Musyoka.

16. Counsel for the appellant reiterated the grounds of appeal. It was submitted that the chronology of the facts relevant to this appeal are not disputed; that the appellant as administrator of the estate of the deceased gave notice of the deceased's death to the respondent; and that upon notification of death, there was expectation that the respondent would realize the life policy and discharge the security and that it was the duty of the respondent to obtain a mortgage protection policy on the life of the deceased.

17. The appellant emphasised that the learned judge erred in arriving at the conclusion that the deceased did not present himself for medical examination; that there was no evidence that the deceased was not medically examined; that in the Letter for Offer To Advance, it was a term that the loan disbursement was subject to a life policy being undertaken and a quotation given by Kabage & Mwirigi Insurance Brokers; that the loan disbursement could only have been made by the respondent if all conditions precedent were fulfilled; and that once disbursement was made, the appellant was entitled to presume that either the medical examination was done or that medical examination was not a condition precedent for the life policy to be in place.

18. The appellant further contends that it is erroneous for the respondent to assert that the payment of Kshs.1,185, 159/= received from the Insurance Company was ex-gratia because the letter forwarding the money to the respondent did not state that the said sum was ex-gratia.

19. As regards the amount due and owing to the respondent, counsel for the appellant submitted that no amount was due and owing for the following reasons: that a look at the respondent's bank Statements that were produced, showed that as at 30th April 1999 the outstanding mortgage balance was Kshs.1,768,189/38; that the deceased borrower died on 20th April 1999 and from this date onwards, the respondent ought to have frozen the deceased's mortgage account and stopped levying any charges and or interest thereon; that subsequent to the death of the deceased borrower, the respondent should have called upon the Insurance Company to realize the life policy and redeem the security and that the Insurance Company paid the respondent a sum of Kshs.1,185,159/= which sum should be deducted from the outstanding balance as at 30th April 1999 leaving a balance of Kshs.583,030.38. It is the appellant's contention that a balance of Kshs.583, 030/38 is the only legitimate sum due and owing; that the appellant has already paid to the respondent a total sum of Ksh. 750,000/= by letter dated 9th August 2007. It is the appellant's submission that any and all monies due and owing to the respondent have been paid in full and the mortgaged property should be discharged and released free from encumbrance to the estate of the deceased.

20. In opposing the instant appeal, the respondent urged this Court to find that there is still an outstanding amount due and owing from the estate of the deceased; and that the respondent is under no obligation to discharge and release the mortgaged property. Counsel submitted that there were two accounts that the deceased had operated with the respondent, the first related to an earlier loan taken by the deceased from the respondent prior to 1996 and it is this earlier loan account that had been redeemed in full; the second account was the mortgage account for the loan taken in 1998 which is the subject of this appeal and which mortgage account has not been redeemed or paid in full either by the deceased or the insurance company.

21. For the respondent, it was submitted that the question as to which of the two accounts of 1996 and 1998 were in dispute was not an issue before the High Court; it was submitted that the learned judge correctly held that there was no life policy taken to cover the deceased; that the judge correctly held that the deceased did not present himself for medical examination; and that the judge correctly appreciated what was necessary in this matter as recalculation of the amount due and owing by the estate of the deceased; counsel 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 the outstanding amounts.

22. We have considered the grounds of appeal, submissions by counsel and the authorities cited by the appellant. This is a first appeal and we are obliged to re-evaluate the evidence and arrive at our own conclusions. (See **Selle -vs- Associated Motor Boat Co. [1968] EA 123);** see also **(Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 E. A. C. A. 270)**. We have observed that the respondent did not lodge any cross appeal and thus no cross appeal lies on the following findings by the learned judge; that for the period between 19th November 1999 and 15th November 2001 the respondent ought not to have charged interest on the balance outstanding. We also note that the respondent's counsel conceded 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 monies.

23. There are three critical issues for our consideration in this appeal; first, was there a mortgage life protection insurance policy in force in relation to the deceased borrower; second, has the mortgage amount been paid in full hence requiring that the mortgaged property and title documents to be discharged and released to the applicant free from any and all encumbrances thereon; and third, if any interest is due to the respondent on any outstanding amounts, the same is due from which date?

24. We start our analysis by considering and determining the question if any interest is due to the respondent on any outstanding amounts, and if so the same is due from which

date? There are two dates relevant to the question under consideration. These are the date of death of the deceased (i.e. 20th April 1999) and the date on which the respondent was notified in writing that the borrower had died (i.e. 30th June 1999). In a mortgage protection life policy, the policy crystallizes on the happening of an event which is the death of the insured. In this case, the crystallization of the mortgage protection policy, if any, was 20th April 1999 when the deceased borrower died.

25. However, the respondent in this case could not start the process of realizing the mortgage protection life policy (if any existed) without notification and proof of death. The insurance money on a life policy is payable when proof of death is made. (See **London Guarantee – v- Fearnley (1880) 5 App.Cas. 911,916).** The appellant by letter dated 30th June 1999 wrote to the respondent and notified it of the death of the deceased borrower and a copy of the death certificate was attached; the respondent acted on this notification and wrote a letter dated 7th July 1999 to Messrs Kabage & Mwirigi Insurance Brokers. It is our considered opinion that from the date of death i.e. 20th April 1999 the right of the respondent to levy and charge interest on any outstanding amount came to an end; the mortgage protection policy (if any) had crystallized and the right of the respondent was converted from a right to demand and receive payment from the deceased borrower to a right to realize the proceeds of the mortgage protection policy from the Insurance Company. We are convinced that the respondent in writing the letter dated 7th July 1999 to Messrs Kabage & Mwirigi Insurance Brokers appreciated this position when it requested the Insurance Brokers to lodge the death claim.

26. The learned judge in his consideration of the issue arrived at the conclusion that interest should not be paid for the period between 19th November 1999, (when the respondent told the applicant that it was pursuing the insurance company). It is our considered view that the learned judge erred in failing to appreciate that whenever a mortgage protection life policy is in place, the policy crystallizes on the date of death and the obligation to realize the proceeds of the policy arises upon proof of death to the lender. We hold that in the instant case, interest on any outstanding sum is not due and owing to the respondent from 20th April 1999 when death occurred.

27. It is our further considered view that interest should not be levied from the date of death for the reason that when a mortgage protection policy is taken out, the death of the borrower is the event that crystallizes the policy; death of the borrower has the effect of making the sum payable under the policy to become ascertainable; it makes certainable that which was not certain; the date of death is the critical date upon which the lender must determine the amount claimable under the policy. On the part of the insurance company, the pecuniary limit of its liability under the policy remains uncertain and becomes certain and determinable upon death of the borrower. The date of notification of death is not relevant in determining the amount due under a mortgage protection policy. This is because the date of notification is uncertain

and this date is not the event that crystallizes and matures the policy. Interest on any outstanding mortgage sum can only be levied and charged up to the date of death of the borrower for this is the date that makes certain and determinable that which was not determinable. 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.

28. The next issue is whether the mortgage amount had been paid in full thus requiring that the mortgaged property and its title documents be discharged and released to the applicant free from any and all encumbrances. On 20th April 1999 the date on which the deceased borrower died, the outstanding loan amount was Kshs.1,768,189.38. This is the sum that the respondent ought to have called in and made a death claim from the Insurance Company. We reiterate that as at 20th April 1999, the right of the respondent was converted from a right to demand Ksh. 1, 768,189.38 from the deceased borrower to a right to make a death claim and realize the sum insured under mortgage protection policy (if any). The respondent is not entitled to any interest from the estate of the deceased as from the date of death.

29. 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.

30. We now turn to consider the critical question whether there was a mortgage protection insurance policy covering the life of the deceased borrower, Dr. William Kaaya Parmena.

31. It is the appellant's contention that a mortgage protection life insurance policy must have been taken out for the deceased or that in the alternative the respondent is etopped from denying that a life insurance was taken out. The appellant urged the following reasons in support of this contention: that the additional special conditions in the Offer To Advance dated 24th August 1998 expressly stipulated that an annual life insurance premium of Kshs.13,104/= was payable; that the Offer To Advance dated 24th August 1998 expressly stated that the offer was subject to an insurance quotation from an Insurer through M/s Kabage & Mwirigi Insurance Brokers; that the respondent by its letter dated 25th September 1998 addressed to the deceased borrower expressly stated that the mortgage was complete as at 28th August 1998; that the respondent proceeded to disburse the borrowed sum and the appellant was entitled to presume and believe that all condition precedent to disbursement of the borrowed sum were fulfilled; that one of the conditions precedent was that a life insurance was to be taken out in respect of the borrower; and that from these facts, the respondent is estopped from denying that a mortgage protection life insurance policy was taken out and was in existence covering the life of the deceased and securing any outstanding mortgage sum.

32. It is the appellant's further contention that even after the respondent was notified of the death of the deceased borrower, the respondent continued to make representations to the appellant and to hold out that a life insurance and mortgage protection policy was in place; that the continued representations were made vide the respondent's letters dated 7th July 1999 when the respondent wrote to the Insurance

Brokers requesting a death claim to be made and a further letter dated 14th January 2002 when the respondent wrote to the then counsel for the appellant Messrs Muriungi & Co. Advocates advising that they were conferring with the insurers on the issue of life insurance; and the letter dated 2nd October 2002 from the respondent to the appellant advising that it had received a sum of Ksh. 1,185,159/= from the insurance company on an ex-gratia basis. It is the appellant's contention that an Insurance Company cannot make an ex gratia payment to a stranger; that there must have been a relationship between the deceased borrower and the Insurance Company and this means a life insurance was taken out.

33. In contrast, the respondent contends that there was no life insurance taken out for the deceased borrower. The respondent's grounds in support of this contention are its own letters dated 15th November 2001 and 3rd October 2002 addressed to the appellant. In the letter dated 15th November 2001, the respondent regrets to inform the appellant that the deceased borrower Dr. Parmena was not covered under its Group Mortgage Protection (Life) Assurance Scheme. In the letter dated 3rd October 2002, the respondent states that the proceeds received from the insurance company did not redeem the mortgage account in full. Citing the aforementioned letters, the respondent urged this Court to find that there was no life policy in respect to the deceased borrower and thus the estate of the deceased is liable to pay any and all outstanding monies in the mortgage account.

34. The trial judge in determining whether there was a life policy taken out made the following findings of fact and expressed as follows:

"In this case, the borrower got the benefit of the loan. But he failed to present himself for a medical examination. Therefore, as he had been made well aware that the insurance company would only provide cover after he had made available the results of his medical examination, the borrower knew he was not insured."

35. We have examined the record to find out what evidence there is to support the trial judge's finding of fact stated above. We have failed to find on record evidence which on a balance of probability would prove that the deceased borrower did not present himself for medical examination; we have also not found 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 he had made available the results of his medical examination. What we have on record are the conditions in the Offer To Advance and the letter from the respondent stating that the mortgage had been completed as at 28th August 1998.

36. What inference should be drawn from these facts? We take cognizance that the borrower is deceased and the respondent is making the assertion that no life insurance policy was taken out after the death of the borrower; the dead tell no tales and the statements by the respondent could only be controverted by the deceased who can tell no tale. It was open to the respondent when the deceased borrower was alive to inform and advice him that no life insurance policy had been taken out – this, the respondent did not do; the respondent continued holding out that an insurance policy had been taken out till the letter dated 15th November 2001, when the respondent regretted to inform the appellant that the deceased borrower Dr. Parmena was not covered under its Group Mortgage Protection (Life) Assurance Scheme.

37. 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. The trial court erred and did not give any and due weight to the provisions of paragraph 7 (iii) of the charge instrument which stated that the respondent was to exclusively arrange for the insurance cover and paragraph 7 (v) which prohibited the deceased borrower from taking out any insurance policy. We agree with the learned judge when he states in the judgment that "*as the respondent had indicated that the offer was subject to an insurance*

quotation from an insurer through M/s Kabage & Mwirigi Insurance Brokers, it was only fair for the appellant to assume that when the respondent had gone ahead to disburse the loan to Dr. Parmena, there was an insurance policy." The learned judge erred when he failed to determine the legal consequences of what he established to be "*that it was fair for the appellant to assume that there was an insurance policy*"; the judge further erred in failing to make a determination as to what was the legal consequences of the letters dated 9th July 1999, 14th January 2002 and 2nd October 2002 in which the respondent made representations that an insurance policy was in place.

38. Before we pronounce ourselves further on this matter, we now cite and quote *in extenso* the case of **Mary Wambui Muturi -v- Housing Finance Company Limited Nairobi HCCC No. 346 of 2006 (2012) eKLR.** It is perplexing and dumbfounding that the facts are *in pari materia* to the facts of the instant case and the respondent is the same in both cases.

39. In extenso, the pertinent facts i***n*** **Mary Wambui Muturi -v- Housing Finance Company Limite*d* *(supra)*** are as follows***:***

"**The plaintiff is the administratrix of the estate of the late Daniel Muturi**

Muraya, (hereinafter referred to as "the deceased"). In her plaint, she avers that the deceased was her husband. According to the plaintiff the deceased mortgaged L.R. No. Dagoretti/Riruta/S. 314 which is their matrimonial home to secure the sum of Kshs. 2,160,000/-. The said sum was to be repaid for 15 years in equal monthly installments. According to the plaintiff, the deceased died before repaying the loan. It was the plaintiff's case that due to the fact that the loan was secured by a Mortgage Protection Cover, upon the death of the deceased, the estate of the deceased was legally discharged from settling the debt. The plaintiff averred that, the defendant had been negligent in handling the deceased Mortgage Protection Cover and set out the particulars of negligence as:-

a**) Failing to take out Mortgage Protection Cover inspite of the deceased having complied fully with their requirements.**

b. **Failing to inform the deceased that he was not on cover.**

c. **Misrepresenting to the deceased that he was on an Insurance Cover.**

d. **Causing the Plaintiff to suffer loss and damage.**

At the hearing of the case, the plaintiff testified that her husband secured the sum of Ksh. 2,160,000.00 from the defendant to purchase a house. The terms of the contract required the deceased to take up an insurance cover to protect the mortgage. It was the plaintiffs' testimony that the deceased filed and signed a proposal form. Further that the terms of the letter of offer required the deceased to go for medical cover and pay premium for the cover. The deceased was then insured for the sum of Kshs.3, 600,000.00. Upon the demise of her husband, the plaintiff stated that she wrote to the defendant informing them of the same, and subsequently forwarded the requisite documentation. It was the plaintiff's testimony that on furnishing the requisite documents, she got a demand letter from the defendant's advocates demanding payment of Ksh. 2,889,480.09 and later, a further demand for Kshs.3, 017,912.95. The plaintiff further stated that she received a response from the defendant claiming that her husband had not been covered under their Group Mortgage Protection Scheme. However, she informed them that her husband had fulfilled the requirements for Mortgage Protection Cover and that it was out of the defendant's negligence that no cover had been put in place. The plaintiff testified further that on 3rd October 2002, she got a demand letter from the defendant claiming Kshs.5,019.076.54 and a further letter informing her that the insurance had paid a sum of Kshs.1,183,563.00 as an *ex gratia* payment. Later on, the defendant invited the plaintiff to meet them for negotiations on mutual settlement of the debt and a proposal was made. The defendant then wrote demanding that the estate pay Kshs.555, 387.10. The Plaintiff did not accede to the offer insisting that as the cover was for Ksh. 3,600,000.00, the full loan ought to have been fully secured by the insurance cover.

For the Defendant, Mr. Migui Wangai, the defendant's Legal Manager, Litigation, testified. In his testimony, he stated that the deceased borrowed Kshs. 2,160.000.00, and executed a charge to secure the loan. The terms of the facility were that the deceased would make monthly repayments of Kshs 49,650.00 which amount included a monthly life insurance premium of Ksh. 974 and a fire premium of Ksh. 900 per month. In breach of that contractual obligation, the deceased did not make any monthly mortgage payment since draw down and until his demise 16 months later. He stated that the amount insured under the policy of Kshs.3,600,000.00 was for fire cover and that the life cover was only limited to the mortgage loan amount outstanding as at the time of death. He further testified that although the deceased fulfilled the loan conditions, the insurance cover was not effected. However, defendant managed to convince the insurance to pay an *ex-gratia* sum of Kshs.1, 183,563.00.

40. The trial judge, Mutava J. in **Mary Wambui Muturi -v- Housing Finance Company Limited *(supra)*** in answering the question whether there was a life insurance policy for the deceased and the effect of the *ex gratia* payment in his judgment stated as follows:

"It is clear from the testimony of both the plaintiff and the defendant's witnesses that mortgage protection cover was a condition that had to be fulfilled alongside registration of the mortgage. Similarly, such cover was required to be in place before the first drawdown of the loan. Evidence was led by the plaintiff demonstrating that the deceased executed all the forms that he was required to sign before the sum advanced was disbursed to him. Although the defendant retorted that failure to effect the insurance cover was due to failure by the deceased to pay premiums, I take the view that it was incumbent for the defendant as a prudent mortgagee and lender to ensure that cover was put in place in terms of the mortgage protection policy as an integral part of the security documentation held. That the defendant went on to plead with the insurance company for payment of an ex gratia sum to settle part of the debt corroborates the view that it was the defendant's obligation to ensure that cover was in place. By pursuing that payment, the defendant in effect acknowledged the negligence on its part in ensuring that cover was in place. While therefore the defendant wishes the court to believe that the estate of the deceased was not entitled to benefit at all from the proceeds of the sum that was paid by the insurance company on account of non-payment of premiums by the deceased, I am persuaded that the said payment was wholly deserved and indeed that the shortfall from the insured sum of Kshs.3,600,000/-ought to have been met by the bank to atone for its negligence in not placing a mortgage protection cover for the facility. For by allowing drawdown before fully securing its exposure, the bank assumed the risk posed by possible default or other events, including death, that were bound to impede performance of the facility but which could have been cushioned through insurance.

I have little doubt that the error referred to was the failure by the bank to effect a mortgage protection cover which was a prerequisite to the release of any funds to the debtor. Having made this unequivocal acknowledgment of the error, can the bank still sustain the claim against the Plaintiff? In my view, no, simply because had the cover been in place, the mortgage sum would have been insured to the tune of Ksh. 3,600,000/-. The amount outstanding as at the time of death was Ksh. 2,702,470.12 which sum would have been wholly paid by the insurer thereby settling the full debt in this matter. In the result, the plaintiff's suit against the defendant succeeds. While it may appear strange that in this matter the deceased obtained a loan facility, repaid nothing and now his estate is absolved of any repayment obligation in respect of the facility, this court is minded that a lender is in a position of knowledge and experience and should exercise utmost prudence and circumspection in all its lending procedures. An omission of effecting cover to a mortgage facility is not an omission a prudent banker should be seen to have overlooked as such cover provides a fairly straightforward recourse in the event of the risk insured taking place. Lenders should therefore bear the full brunt whenever omissions of the nature in this suit are committed."

41. Having extensively reproduced the facts, reasoning and decision of the judge in **Mary Wambui Muturi -v- Housing Finance Company Limited (supra),** we now revert to the instant appeal and make our final determination as hereunder.

42. We concur with and adopt the reasoning of the learned judge in **Mary Wambui Muturi -v- Housing Finance Company Limited (supra).** Having made representations and held out that a life insurance cover was in place in relation to the deceased, we hold that the respondent is estopped from alleging that there was no life insurance cover for the deceased.

The amount outstanding at the time of death on 20th April 1999 was Kshs.1,768,189/38.

This is the outstanding sum that would have been wholly paid by the insurer thereby settling the full mortgage debt. We would have been inclined to follow the final decision of the learned judge in **Mary Wambui Muturi -v- Housing Finance Company Limited (supra)** and hold that the appellant should not pay any monies to the respondent**.** The final legal issue is what amount, if any, is the respondent entitled to? As at the date of death of the borrower, a sum of Kshs.1,768,189/38 was due and outstanding. The insurance company paid a sum of Kshs.1,185,159/=. The evidence on record shows that the deceased never paid any monthly instalments to service the loan. The monthly instalment was Kshs.62,302./= with effect from 1st October, 1998. Between 1st October, 1998 and April, 1999 when he died, seven months instalments were outstanding which translate to Kshs.436,114/=. This amount is captured in the bank statement of the respondent and is included with interest and charges thereon in the outstanding balance due as at the date of death. The respondent's bank had already debited interest and charges for arrears to the outstanding sum of Kshs.1,768,189/38 that was due as at the date of death.

Taking into account that the balance due as at the date of death was Kshs.1,768,189/38 million and the insurance company paid Kshs.1,185,159/= million, it follows that there is a shortfall of Kshs.583,030/38, the appellant having admitted that sum is due to the bank. The appellant in her submissions conceded that a sum of not less than Kshs.500,000/= is due and owing to the respondent. This was explained to be the difference between Kshs.1,768,189/38 that was outstanding at the date of death and Kshs.1,185,159/= that the insurance company paid. Based on this admission and taking into account that monthly repayment instalments ought to have been paid by the deceased until the time of his death, we order and direct that the sum of Kshs.583,030/38 be deducted from Kshs.750,000/= paid to the respondent by the appellant. This sum be and is hereby declared to satisfy and settle in full the mortgage account and debt due from the deceased borrower to the respondent. Having disbursed to the deceased borrower the sum of Kshs.1,349,808/=, the respondent shall receive a total of Kshs.1,185,159/= plus Kshs.583, 030/38 in final satisfaction and settlement of the mortgage account and in discharge of the security given LR No. Nairobi/Block/32/677 Ngumo Estate House No. 37. By allowing drawdown before fully insuring and securing its exposure, the respondent assumed the risk posed by death and which risk could have been cushioned through insurance. Having failed to take out the life insurance policy and taking the risk of disbursing the drawdown, the respondent shall pay the price for its omissions and commissions. We observe in obiter that the respondent neither identified nor mentioned the insurance company that paid the ex gratia sum.

43. The final orders of this Court are that this appeal has merit. We hereby set aside in entirety the judgment and decree of the High Court dated 5th December 2006 and all consequential orders arising therefrom. We substitute in its place an order allowing the Originating Summons dated 2nd May 2003 as we hereby issue the following Orders:

(a). A mandatory order be and is hereby issued requiring the respondent to discharge and surrender the title documents in regard to Nairobi/Block/32/677 House No. 37 Ngumo Estate to the applicant herein who is the administrator of the estate of Dr. William K. Parmena free from all encumbrances.

(b). The respondent be and is hereby restrained from recovering any outstanding balances from the Estate of the deceased Dr. William K. Parmena in relation to the mortgage account no. 01/109252 and the said account be and is hereby ordered as paid and settled in full.

(c). The sum of Kshs.583,030/38 is due from the estate of the deceased and we order that this sum be deducted from Kshs.750,000/= already paid to the respondent by the appellant and the balance of Kshs.166,969/62 be refunded to the appellant. Interest on the sum of Kshs.166,969/62 shall accrue from the date of this judgment.

(d). This being a court of equity and fairness, the appeal succeeds with each party to bear its costs.

Dated and delivered at Nairobi this 31st day of July, 2015.

H.M. OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR