Master MN (Minor suing through his next friend and administrator of the Estate of Ambrose Ndwiga - Deceased) Nancy Muthoni Ndwiga v Apa Life Assurance Limited (Commercial Appeal E175 of 2023) [2025] KEHC 7968 (KLR) (Commercial and Tax) (29 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7968 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

COMMERCIAL AND TAX

COMMERCIAL APPEAL E175 OF 2023

AB MWAMUYE, J

MAY 29, 2025

BETWEEN

MASTER MN (MINOR SUING THROUGH HIS NEXT FRIEND AND ADMINISTRATOR OF THE ESTATE OF AMBROSE NDWIGA - DECEASED) NANCY MUTHONI NDWIGA ..... APPELLANT

AND

APA LIFE ASSURANCE LIMITED ..... RESPONDENT

(Being an Appeal against the judgment and Decree of Hon. B.M Cheloti (P.M) in Milimani CMCC No. 2151 of 2020 delivered on 12th July, 2023)

JUDGMENT

Introduction

1. The Appellant appeals against the entire judgment and decree of Hon. B.M Cheloti (Principal Magistrate) in Milimani CMCC No.2151 of 2020 delivered on 12th July, 2023. The Appellant, being dissatisfied with the said judgment which dismissed her claim arising from an insurance contract, has preferred this appeal. The Appellant filed a Memorandum of Appeal dated 8th August, 2023.

2. The appeal is anchored on seventeen grounds, the gravamen being that the trial magistrate misapprehended the contractual terms, ignored relevant statutory provisions, and thereby wrongly held that the policy had lapsed.

3. The Appellant filed a claim in the lower court as the legal representative of the estate of her deceased husband, Ambrose Ndwiga, who had taken out an education insurance policy with the Respondent for the benefit of their minor son, Master Munene Ndwiga. The policy number was EDP/

HO/0000419/2015 with a sum assured of Kshs.2,047,978/= plus accrued bonuses. The Appellant contended that the deceased paid premiums regularly for 30 months before defaulting for nine months, and then resumed payments before his demise. Upon his death due to illness on 7th September 2018, the Respondent refused to honour the policy, claiming it had lapsed.

4. The trial court dismissed the Appellant's suit holding that they had breached the insurance contract by failing to pay premiums, which caused the policy to lapse.

5. The Appellant contends that the policy had not lapsed as claimed by the Respondent, and that the Respondent was estopped from denying liability due to its acceptance of premium payments even after the alleged lapse.

6. She further argued that the policy terms, particularly clauses 3.9.2, 5.1, and 3.13.2, provided mechanisms to preserve the policy in the event of default, including creating an Outstanding Premium Account or deducting unpaid premiums from the benefits.

7. The Respondent denied liability on the basis that the policy holder had not paid premiums for over nine months and the policy had not acquired a surrender value. It argued that the policy lapsed under clause 5.3, and any subsequent payments did not revive the lapsed contract. The Respondent averred that no reinstatement application had been made.

8. The Appeal was canvassed by way of written submissions and in compliance, both parties filed their respective submissions.

Appellant's Submissions

9. The Appellant, through her advocate filed her written submissions dated 31st May, 2024. The Appellant submitted that the trial court erred in both law and fact in dismissing the suit relating to an education policy taken out by the deceased with APA Life Assurance Limited. The deceased had procured the policy (No. EDP/110/0000419/2015) on 17th April 2015 for the benefit of his son, Master Munene Ndwiga with the assured sum of Kshs.2,047,978/= payable upon the policyholder's death. The trial court found the policy had lapsed due to non-payment of premiums and dismissed the suit.

10. However, the Appellant argues that the court failed to properly interpret and apply crucial policy clauses, particularly clause 5.1, which provides that a policy will not lapse if the net surrender value is sufficient to cover unpaid premiums. The evidence showed premiums had been paid up to 16thJanuary 2018, and although arrears existed for up to nine months, payments made in later months were not reflected in the insurer's statement.

11. The Appellant also relied on clause 3.9.2, which provides for the creation of an Outstanding Premium Account from which the owed premiums can be deducted from policy benefits. Thus, the policy remained valid, and the Respondent ought to have deducted the outstanding amount of Kshs.270,333/= and paid the balance to the beneficiary.

12. The Appellant further argued that the policy's accidental death clause (3.13.2) required full payment of the sum assured and waiver of future premiums, which the trial court failed to consider. By focusing solely on one policy clause and ignoring the others, the trial court misinterpreted the policy terms.

13. The Appellant also invoked the contra proferentem rule, asserting that any ambiguity in the policy should be construed against the insurer who drafted it. In addition, the Appellant cited Section 76(1) of the *Insurance Act*, Cap 487 which guarantees the right to receive policy benefits in Kenya despite

contrary contractual terms. The Appellant argued that court's restrictive approach to the contract was therefore in error.

14. Ultimately, the Appellant urged the appellate court to re-evaluate the evidence in line with the principles established in Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA 123, allow the appeal, set aside the lower court's judgment, grant the reliefs sought in the lower court, and award costs of the appeal.

Respondent's Submissions

15. The Respondent, through its counsel, filed its written submissions dated 29th September, 2024. The Respondent asserts that the policy lapsed in accordance with its terms due to non-payment of premiums beyond the stipulated 30-day grace period, as outlined in Clause 5.3 of the policy document. The Respondent further argued that the policy had not acquired a surrender value, having only run for 30 months instead of the required three years, and the reversionary bonuses claimed were forfeited upon lapse. The deceased's death was due to illness, not accident, disqualifying the estate from any waiver provisions under the policy.

16. The Respondent emphasized that premiums paid posthumously in September, October, and November 2018 were made without lawful authority and could not revive a lapsed policy without full reinstatement, which was never pursued.

17. The Respondent relied on Clause 5.1 to 5.5 of the policy to argue that benefits, including bonuses, were only payable under specific conditions none of which were met. Reliance was placed in Insurance Company of East Africa v Marwa Distributors Limited [2015] eKLR, which affirmed that insurance cover cannot be enforced in the absence of valid premium payment. Reliance was also placed in Virani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd and Mohansons (Kenya) Ltd v Cannon Assurance (Kenya) Ltd [2019] eKLR to emphasize the binding nature of express policy terms regarding lapse and forfeiture.

18. It was averred that the lower court correctly dismissed the Appellant's suit for lack of merit, citing clear contractual terms and failure to fulfill payment obligations. The Respondent argued that the Appellant cannot benefit from a contract they breached and prayed that the appeal be dismissed with costs pursuant to Section 27 of the *Civil Procedure Act*, urging the court not to disturb the trial court's lawful and reasonable judgment.

Analysis And Determination

19. This being a first appeal, this court has a duty as set out in section 78 of the *Civil Procedure Act* to review the evidence afresh, both on points of law and facts, reassess and reconsider it and make its own conclusion on it bearing in mind that it did not see the witnesses testify before the trial court and give allowance for this as was held in the case of Selle & Another v Associated Motor Boat Co. Ltd & Another (1968) EA 123 and reiterated by the Court of Appeal in the case of Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR.

20. Having perused the Record of Appeal, the trial file and the respective submissions of the parties, the following are pertinent issues for determination:

    i. Whether the policy had lapsed for non-payment.

    ii. If so, whether the Respondent is estopped, or the contra-proferentem rule applies to revive cover.

iii. Whether the appellant is entitled to payment of the sum assured and reversionary bonuses

Whether the policy had lapsed for non-payment

21. The Appellant asserts that the subject Education policy had not lapsed as only 9 moths of Premiums were outstanding and not 24 months as provided under clause 5.4 of the policy, which was redeemable circumstance under the terms of the policy, something which the Respondent accepted and acknowledged by accepting the premiums remitted by the policy holder vide bank standing order on 3rd September 2018, 1st October 2018 and 1st November 2018.

22. Clause 3.10 obliged the policy holder to pay every monthly premium within thirty days of the "Monthly Due Date", while clause 5.3 provided in emphatic language that "If premiums remain outstanding for a period longer than 30 days, the policy shall lapse and have no further value unless reinstated as provided under clause 5.4." That formulation leaves no room for discretion: lapse is an automatic legal consequence once the contractual grace period expires without payment.

23. It is uncontested that the last regular premium before the hiatus was credited on November 2017. No further payments were made until 3rd September 2018, a gap of nine complete months. Counting thirty days from the December due-date, the grace period expired on or about 1st February 2018, at which point the policy, by its own terms, ceased to be "in force".

24. The appellant invoked clause 5.1 on Automatic Non-Forfeiture, which authorizes the insurer to treat any available surrender value as an automatic loan to keep the policy alive. The clause, however, is expressly conditional. It applies only when "the net Surrender Value ... is sufficient to pay such premium". Clause 5.2 in turn stipulates that a surrender value arises only after the policy has been three years in force.

25. When the default occurred, the contract had been running for thirty (30) months, adding the three additional payments makes it thirty-three (33) months, a period of two years nine months, so it had not yet crossed the three-year threshold. Consequently, the policy possessed no surrender value to finance the unpaid instalments as clause 5.1 never activated, and the protection against forfeiture that the appellant seeks to rely on was unavailable.

26. The Appellant also appealed to section 90 of the *Insurance Act*, which prohibits forfeiture of "ordinary life policies" in certain cases of premium default.

27. Section 90 provides as follows:

    (1) An ordinary life policy shall not be forfeited by reason only of the non- payment of any premium (in this section referred to as "the overdue premium") if—

        (a) not less than three years' premiums have been paid in cash on the policy; and

        (b) the surrender value of the policy (calculated as at the day immediately preceding that on which the overdue premium falls due) exceeds the sum of the amount of the debts owing to the insurer under, or secured by, the policy, and the amount of the overdue premium.

    (2) The insurer may, until payment of the overdue premium, charge compound interest on it, on terms not less favourable to the policy-holder than such terms (if any) as are prescribed.

    (3) The overdue premium and any interest charged on it under this section and unpaid shall, for the purposes of this Act, be deemed to be a debt owing to the insurer under the policy.

(4) Without affecting the generality of subsection (1), an ordinary life policy on which not less than three years' premiums have been paid in cash shall not be forfeited by reason only of the non-payment of a premium unless, on or after the day on which the premium fell due, the insurer liable under the policy serves a notice on the policy-holder stating—

(a) the amount due or payable to the insurer at the date of the notice in respect of the policy; and

(b) that the policy will be forfeited at the expiration of twenty eight days after service of the notice if a sufficient sum is not paid to the insurer in the meantime.

28. That provision, however, is triggered only where the policy has already acquired a paid-up or surrender value. Because this contract had not reached that point, section 90 offers no statutory shield. Courts have repeatedly held that section 90 does not confer value where none exists since its purpose is preservative, not creative.

29. The appellant argued that only nine months' premiums were outstanding and the policy could still have been reinstated. That is true, however, reinstatement is a post-lapse remedy governed by clause 5.4.

30. Clause 5.4 states as follows:

> " A lapsed Policy may be reinstated upon payment of all the Outstanding Premiums plus interest charged or overdue premiums at a rate determined at its the company's discretion. A lapsed Policy may not be reinstated has been in lapsed state for twenty-four (24) months or more."

31. Until full arrears plus contractual interest are paid and the insurer assents, the policy remains dormant. Nothing in the record shows that the deceased or his estate ever invoked clause 5.4 or tendered the required interest.

32. The court is also urged to construe the contract benevolently because insurance is for the vulnerable. While that sentiment carries moral weight, it cannot defeat explicit words that both parties accepted at arm's length. In National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR) the court stated that:

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
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> As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):
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> "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

33. All objective indicators, the chronology of payments, the lapse clause, the absence of surrender value, and the statutory framework converge on one supposition, that the policy had lapsed. From the date of lapse forward it possessed "no further value" unless and until reinstated, which never occurred.Because lapse is automatic and self-executing, good faith or inadvertence cannot rescue the contract. As soon as the 30-day window closed, the risk reverted to the policy holder; the insurer's later bookkeeping entries or silence cannot retroactively breathe life into an expired bargain.

Whether the respondent is estopped, or contra-proferentem revives cover

34. Having found that the policy lapsed, the appellant pivots to equitable doctrines, contending that the insurer's acceptance of three late remittances on 3rd September, 3rd October and 1st November 2018 creates an estoppel or, alternatively, that any residual ambiguity must be construed contra proferentem against the insurer.

35. Promissory estoppel rests on three elements:

    (i) a clear and unequivocal representation,

    (ii) reliance by the promisee, and

    (iii) detriment flowing from that reliance. Here, the remittances were generated by a standing order that continued to operate even after the insured's demise; they were unilateral acts of the bank, not solicitations or inducements by the insurer.

36. In Insurance Company of East Africa v Marwa Distributors Limited [2015] KEHC 4512 (KLR) the Court underscored that:

> " 15. The ordinary and unvarnished meaning of the clause is that the insured must have paid the premium for the period of insurance in order to be indemnified for any loss or damage that occurs during the period of cover. In other words, the policy document issued by the insurer constitutes a contract to insure and the premium is the consideration for the promise to indemnify the insured if the event takes place.
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> 16. Since the premium was not paid, there was no obligation on ICEA to settle the claim by the company. Since the contract was not consummated by the payment of the premium, ICEA could not invoke the cancellation clause in the policy which was invalid in the first place. The trial court therefore erred as it did not direct its mind to the terms of the policy to determine whether in fact the policy was invalid for non-payment of consideration."

37. The same logic applies here since the insurer did not issue a receipt expressly reinstating cover, did not adjust the policy status to "in force", and in fact attempted to contact the policyholder to regularise the default, efforts that failed because the phone number was out of service.

38. Furthermore, two of the three payments, October and November 2018, were credited after the insured had already died. Estoppel cannot retrofit a promise to cover a loss that has already transpired as equity will not perfect a past consideration. The most it can do is oblige the insurer to return funds paid in error, a remedy the company has already offered.

39. As to contra-proferentem, modern jurisprudence regards the doctrine as a last resort, invoked only if, after applying ordinary tools of interpretation, text, context, and commercial sense, genuine ambiguity persists.

40. The interplay of clauses 5.1, 5.2, 5.3 and 5.4 leaves no ambiguity:

    (a) pay within 30 days or lapse;

    (b) if enough surrender value exists, the company may automatically loan the arrears;

    (c) else the policy lapses;

(d) the customer may thereafter re-enter by paying all arrears plus interest at the company's discretion. The provisions are sequential, self-contained and mutually consistent.

41. The appellant argues that simultaneously allowing lapse (clause 5.3) and postponing reinstatement for 24 months (clause 5.4) is mystifying. On the contrary, the 24-month ceiling merely caps the window within which the customer may seek reinstatement; it does not render the lapse clause uncertain. The policy actually favours the insured by leaving a generous two-year period for reclamation.

42. The principle of contra proferentem is therefore inapplicable because there is no residual ambiguity to resolve. The failure of the appellant's estoppel and ambiguity arguments means the lapse remains operative.The court is mindful of the imbalance of bargaining power in insurance contracts, but the legislature has intervened through the *Insurance Act* to mandate minimum standards. Where the Act is silent, courts defer to the parties' bargain, save for unconscionability which is not alleged here.

43. The equitable maxim that "equity follows the law" applies where the parties have fixed their rights in clear words and the insured has failed to perform a condition precedent, equity cannot compel performance by the insurer. Consequently, neither estoppel nor contra-proferentem can revive that policy that had lapsed.

Whether the appellant is entitled to payment of the sum assured and reversionary bonuses

44. The Appellant's final position is that, even if the contract lapsed, the insurer was obliged under clause 3.9.2 to deduct the nine months' arrears of KSh.270,333/= from the sum assured and pay the balance, together with reversionary bonuses for 2016–2018.

45. Clause 3.9.2 reads as follows:

> " If the Policy Owner does not pay premiums on or before the due date, an Outstanding Premium Account will be created under the Policy, subject to the Lapse clause, if the Policy owner dies before the-outstanding premium-account is cleared, the Outstanding Premium will be deducted from the amount of benefits payable under the Policy."

46. Clause 3.9.2 indeed authorizes the insurer, "subject to the lapse clause," to set up an Outstanding Premium Account against the death benefit. The opening words "subject to the lapse clause" are critical: they make deduction available only while the policy is still in force. Once the contract lapses, there is no longer a "benefit" against which to offset the debt.

47. Reversionary bonuses are governed by clause 5.2, which states that a bonus is credited only if the policy is in force on the anniversary date. The clause thus states:

> " The Policy will acquire a Surrender Value after it has been three years in force depending on the number of annual premiums paid and the nature of the Policy, when it can be surrendered to the Company for cash payment. Surrender Value will be calculated by the Company according to the Surrender Value Table in force that time. Application for Surrender Value must be made while the Policy is in force. The cash value of attaching bonuses, if any, at the date of surrender will be paid in addition"

48. Upon lapse the right to future bonuses is extinguished, and accrued bonuses are forfeited unless the policy is subsequently reinstated.

49. The appellant invokes section 80(1) of the *Insurance Act*, prohibiting misleading policy wording.

50. Section 80 (1) of the *Insurance Act* states that:

> "(1)A form of proposal for insurance or a policy or an endorsement or any form of written matter used by an insurer describing the terms or conditions of, or the benefits to be or likely to be derived from, a policy of insurance shall not contain anything inaccurate or incomplete or likely to mislead a proponent or policy-holder."

51. That provision aims at disclosure as it does not modify substantive rights once the parties understand what they signed. No evidence was led to show the policy wording was inaccurate or deceptive when issued in 2015.

52. Equally, section 76(1) of the *Insurance Act* merely guarantees that a Kenyan policy-holder may sue in Kenya, it has no bearing on whether the claim is meritorious.

53. The High Court in Ominde v Jubilee Insurance Company [2024] KEHC 408 (KLR) grappled with a similar plea for maturity benefits after lapse; it held that:

> "From the evidence adduced, it was clear that the appellant was in breach of the terms of the policies. He did not pay the premiums and so they lapsed and as admitted in court, he chose not to apply for the surrender value even though the evidence adduced by the respondent was that none of the policies qualified to be redeemed by their surrender value.
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> 29. It is trite law that whoever alleges must prove. Section 107 of the *Evidence Act* is clear that:
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> > "(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.
> >
> > (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."
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> 30. The appellant herein failed to prove his case against the respondent. He was bound by the terms of the policies he entered into and having failed to show that he was coerced, unduly influenced or fraudulently duped into entering into them, he cannot be heard to plead ignorance of the terms thereof."

54. From an actuarial perspective, bonuses are funded by the capital pool generated from current premiums. Permitting an insured who stopped paying for nine months to claim the same share as a fully-paying member would skew the risk pool and prejudice other policy-holders.

55. The only sums arguably due are the three late premiums, characterized as monies paid under a mistake of fact once the insurer determined that the policy had lapsed. Such a claim lies in restitution and is distinct from contract damages. The appellant never prayed for that refund in the lower court, and no cross-appeal or amendment seeks it now, but nothing prevents the estate from pursuing it in a fresh suit or by negotiation.

56. The plea for general, aggravated or exemplary damages collapses with the substantive claim. Damages for breach presuppose an enforceable contract breached by the defendant; after lapse, the insurer owed no contractual duty to pay the sum assured. Resultantly, the appellant's only potential remedy lies in restitution of the mistakenly paid September-November 2018 premiums.

57. Accordingly, I find this appeal to be devoid of any merit. It is hereby dismissed with no orders as to costs. For avoidance of doubt, the Respondent remains liable only to refund the premiums received on 3rd September 2018, 3rd October 2018 and 1st November 2018.

Orders accordingly.

DATED, SIGNED, AND DELIVERED VIRTUALLY THIS 29TH DAY OF MAY 2025.

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BAHATI MWAMUYE

JUDGE