



**Ominde v Jubilee Insurance Company (Civil Appeal E024 of 2023)
[2024] KEHC 408 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 408 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E024 OF 2023
RE ABURILI, J
JANUARY 25, 2024**

BETWEEN

SAMUEL ONYANGO OMINDE APPELLANT

AND

JUBILEE INSURANCE COMPANY RESPONDENT

(An appeal arising out of the Judgement of the Honourable G.C. Serem in the Kisumu Small Claims Court delivered on the 9th January 2023 in Kisumu SCC No. E164 of 2022)

JUDGMENT

Introduction

1. The appellant instituted before the Small Claims Court a claim vide a statement of claim dated 14th October 2020 against the respondent for refund of premiums amounting to Kshs. 302,320 paid for an educational plan for his three children, which premiums had been payable on a monthly basis and which he paid until the year 2016 when he lost his employment and he could no longer afford to make the monthly remittances.
2. In his testimony before the trial court, the appellant reiterated the claims in his statement of claim and further stated that he could not understand how his savings were lost and further that the clause that provided for lapsing was meant to defraud. He testified that in an inactive account, money was not lost and that he was entitled to his money.
3. In cross-examination, the appellant stated that all the policies he entered into were written life policies, that payment of premiums were his obligations and that he was to pay 96 premiums but only paid 2. He admitted that Clause 2 on page 12 provided for revival on discontinued or lapse of policy and that the policy would lapse if one did not pay premiums. The appellant further admitted that the policies lapsed as per the description of lapse therein.



4. The appellant further stated that he was to apply for the surrender value while the policies were in force but chose not to do it.
5. The respondent filed a response dated 8th November 2022 in which it admitted that indeed, vide an acceptance letter dated 27th February 2012, it accepted the appellant's offers culminating in life insurance policy Nos. IL201xxxxxxxx, 2012xxxxxxxx and 2012xxxxxxxx which subsequently lapsed on the 13th June 2012 due to the appellant's failure to pay premiums.
6. It was the respondent's contention that on or around 8th February 2013, the appellant made offers to the respondent for three life insurance policies which culminated in acceptance by the respondent and subsequent issuance of policies nos. IL2013001xxxxx for 6 years, IL2013xxxxxxxx for eight years and IL2013xxxxxxxx for eight years which lapsed on 14th June 2013 and 14th July 2015 after which they were redated when the appellant paid the outstanding premiums and interest thereon.
7. The respondent averred that the 2013 policies lapsed for the final time on 14th June 2016 due to the appellant's failure to pay premiums and were not redated. It was their case that the total amount of premiums paid by the appellant was Kshs. 302,488.
8. In support of its case, the respondent called one witness, Ronald Ochoge who adopted his witness statement dated 22.11.2022 and reiterated the averments in their response.
9. In cross-examination, RW1 confirmed the amount paid on all 6 policies was a total of Kshs. 302,408. He denied that the appellant had paid premiums for 3 years.
10. In re-examination, RW1 testified that the appellant never contested the terms until it lapsed and that he had not paid for the period he was required for a surrender value, which is a period of 36 months.
11. In her judgement, the adjudicator found that the court had no power to vary a contract entered into by willing parties such as the appellant and respondent more so as the appellant had the opportunity to read the contracts that he freely entered into and was aware of the consequences of default and further as he had an opportunity to revive the contracts and equally apply for the surrender value but failed to do so.
12. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 5th May 2020 raising the following grounds of appeal:
 1. The learned magistrate completely misunderstood the evidence before her, wrongly analysed the evidence and therefore came to wrong conclusions of fact and law.
 2. The learned magistrate erred in law and in fact by failing to take in to consideration that despite the appellant's policy having lapsed they had already gained the surrender value according to the policy document that was issued by the respondent and for that reason the appellant was entitled to refund of his premium.
 3. The learned magistrate erred in fact and law by holding that the before the appellant entered in to the contract herein he read through the contract and was aware of the consequences of default which he signed without taking into consideration that the said documents were in the policy document which was not even signed by the appellant herein.



4. That the learned magistrate erred in law and in fact by holding that the appellant had an opportunity to revive the contract and equally apply for surrender value which he did not do without taking into consideration that the appellant in deed applied for the same and he was given refund forms which he filled and returned only to be declined by the respondent herein.
 5. Th learned judge totally misunderstood and wrongly evaluated the evidence before hr and therefore arrived at a wrong conclusion.
13. The parties canvassed the appeal by way of written submissions.

The Appellant's Submissions

14. The appellant submitted that according to the policy document at clause 6, it is clear that the premiums gain surrender value after being in force for 3 years and that as he had been making payments after they were renewed since February 2013 to July 2016, he was entitled to refund of the same.
15. The appellant submitted that he applied for the refunds of his premiums vide a letter dated 30th September 2022 but the respondent failed to respond to the said letter.

The Respondent's Submissions

16. It was submitted that the appellant was not entitled to any benefits under the policies as they lapsed with no cash value as per the terms of the said policies and thus the appellant could also not claim under surrender value which claim must be made during the life of the policy.
17. The respondent further submitted that none of the policies were in force for a continuous period of 3 years in terms of premium payments so as to qualify for surrender value since in the 2012 policies, the appellant only made payments for 2 premiums before the policies lapsed on 14th July 2012 whereas for the 2013 policies, the appellant made a payment of 25 premiums for each of the 3 policies before lapse on 14th July 2015 after which they were redated to 14th March 2014 but still lapsed on the 14th June 2016 and 15th July 2016 and thus the said policies were not in force for a continuous period of 3 years.
18. The respondent submitted that the court ought to hold the parties to the terms of the policies in their entirety as was held in the case of *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd & Another* [2001] eKLR.
19. It was submitted that the learned adjudicator was right in dismissing the appellant's claim as it was unproven and this court should do the same with costs to the respondent.

Analysis and Determination

20. 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.
21. The facts and evidence adduced before the trial court have been set out herein above. I have considered the pleadings before the trial court, the evidence adduced by both parties to the suit, the judgment of the trial court, grounds of appeal and the submissions by both parties' counsel to this appeal. The main



issue for determination is whether the appellant proved his case against the respondent on a balance of probabilities.

22. Firstly, the position in law with regard to the binding nature of a contract executed willingly by the parties is now well settled. In *National Bank of Kenya Ltd* supra the Court of Appeal stated that:

“It was clear beyond para adventure 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.”

23. The Court of Appeal in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR, after reviewing case law on the subject reiterated they that it was “alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties as the said parties were bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.”

24. In the instant case, it is not contested that the appellant and respondent entered into contract vide life insurance policy Nos. IL2012xxxxxxxx, 2012xxxxxxxx and 2012xxxxxxxx which subsequently lapsed on the 13th June 2012 due to the appellant’s failure to pay premiums., that subsequently upon acceptance of an offer from the appellant by the respondent, the respondent issued subsequent policy Nos. IL201xxxxxxxx for 6 years, IL2013xxxxxxxxfor eight years and IL201xxxxxxxx for eight years which lapsed on 14th June 2013 and 14th July 2015 after which they were redated when the appellant paid the outstanding premiums and interest thereon but that the latter policies of a2013lso lapsed for the final time on 14th June 2016.

25. From the evidence adduced before the trial court, the appellant’s claim seems to be that he could not understand how his savings were lost and further that the clause that provided for lapsing was meant to defraud. He however admitted in cross-examination that the policies lapsed as per the description of lapse in the policy document and that he was to apply for the surrender value while the policies were in force but chose not to do it.

26. I have examined the aforementioned policies and I note that in all of them, the 2012 and 2013 ones, a lapse is defined as the termination of a policy with no cash value due to non-payment of premiums.

27. The said policies also provide for surrender value as the sum of money which can be realized in the event the policy is voluntarily terminated before its maturity date...a policy will acquire a surrender value after it has been in force for three years.

28. 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.

29. It is trite law that whoever alleges must prove. Section 107 of the *Evidence Act* is clear that:

“(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.”

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.

31. I therefore find and hold that the appellant did not prove his case against the respondent on a balance of probabilities and that the adjudicator did not err in dismissing his case as there was legal basis for such dismissal.
32. Accordingly, I find this appeal to be devoid of any merit. It is hereby dismissed. I uphold the judgment of the adjudicator.
33. The respondent shall have costs of this appeal assessed at Kshs 20,000 to be paid by the appellant within thirty days of today and in default, the respondent shall be at liberty to execute for recovery.
34. This file is closed.
35. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY, 2024

R.E. ABURILI

JUDGE

