**Kenindia Assurance Company Ltd v Kamithi and another**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of Judgment:** 28 May 2004

**Case Number:** 94/04

**Before:** Omolo, Tunoi JJA and Ringera AJA

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Insurance law – Material facts – Non-disclosure, concealment or misrepresentation thereof –*

*Whether contract of insurance automatically avoided or voidable – Delay in repudiating – Whether*

*insurer’s right to avoid or repudiate vitiated.*

*[2] Insurance – Premiums – Life policy – Obligation to pay premiums – Waiver and estoppel – Whether*

*payment of premiums on a life policy after death of insured could operate as a waiver and estoppel on*

*the insurer.*

**Editor’s Summary**

The first respondent and her husband, Stephen Kamithi, took out a joint life assurance policy with appellant (Kenindia). In the proposal form, the first respondent and her husband stated that the husband did not have a usual medical attendant; that no illness, accident or medical condition had prevented the husband from carrying out his work due to such condition in the last five years and that no other life assurance was then in force over the deceased’s life. The husband and wife were referred to two doctors by the appellant who, on examination, revealed that the husband had a heart condition. As a result of this relation, premiums payable were increased. The appellant issued a joint life policy on the strength of the proposal form and declaration signed by the husband and wife for an assured sum of KShs 4 million. It was a term of the contract of insurance that if any untrue averment was contained in the proposal or declaration, the contract of insurance would be null and void and all monies which should have been paid in respect of the contract would stand forfeited to the appellant. The husband passed away five months after entry into force of the contract of assurance and the wife notified the appellant. She also made a claim in her capacity as a beneficiary as well as an insured. The wife was interviewed and recorded a statement with the appellant’s investigator. In the statement she disclosed that the deceased had a private doctor, who had referred the deceased to South Africa for medical treatment. She also disclosed that the deceased had previously been admitted to Nairobi Hospital with pneumonia for which he was treated and discharged. She further disclosed that the deceased had two other life policies with different insurers. The appellant wrote to the first respondent that it had discovered gross non-disclosure of material facts on the proposal form and the claim therefore stood repudiated. The first respondent had continued to pay premiums after the deceased’s death which amount was refunded by the appellant. No refund of the premiums paid up to the time of the demise of the deceased were paid. After the appellant declined to settle the claim, the first respondent and her son, the second respondent who had jointly obtained a grant of letters of administration to the estate of the deceased, filed a suit in the High Court for recovery of the sum assured. The High Court found that there was the clearest evidence of non-disclosure of material facts by the deceased and that the appellant was entitled to repudiate the policy at the time it became aware of the true position regarding the information received from the deceased. The Judge further found that in the circumstances of this case, the appellant had, however, lost its right to repudiate the policy as it did not do so within a reasonable time of becoming aware of the non-disclosures and untruths but on the contrary continued to accept premiums from the first respondent. The Judge held for the plaintiffs and awarded them the sum of KShs 4 million. The appellant Appealed to the Court of Appeal.

**Held** – Non-disclosure or concealment or misrepresentation of material facts did not have the effect of automatically voiding a contract of insurance, but its effect was to make the contract voidable at the instance of the insurer. If and when an insurer became possessed of all the facts entitling him to avoid or repudiate the policy for reason of non-disclosure, concealment or misrepresentation of material facts, he would be entitled to elect to avoid or affirm the contract at once, or to have a reasonable time to weigh his options. If he opted to delay his election, the delay *per se* would not have the effect of vitiating his right to avoid or repudiate the contract. The delay would only be prejudicial to his rights if it had prejudiced the assured or the rights of third parties who had intervened as a result thereof, or it was of such a length as to be evidence that the insurer had in truth decided to accept liability. *Allen v Robles* [1969] 1 WLR 1193; *South British Insurance Company Ltd v Samiullah* [1967] EA 659 considered. The High Court had erred in finding that the appellant had lost its right to repudiate the policy when after learning of the concealed information it had failed to repudiate immediately. The appellant was entitled to a reasonable time to weigh his options and delay in doing so did not and could not lose him his right to repudiate. Since the policy in question was a joint life policy, the obligation to pay premiums ceased on date of maturity or the death of the assured whichever came first. The obligation to pay premiums in the circumstances of this case ceased on 11 April 1999 when the deceased (one of the joint lives insured) died. In those circumstances the continuing cover under the policy came to an end and the premiums paid thereafter were inconsequential to the rights and obligations under the policy. Where there was no obligation to pay premiums, it can never be the case that payment thereof could operate as a waiver or an estoppel on the right to repudiate a policy obtained through non-disclosure, concealment or misrepresentation of material facts. A waiver and estoppel could only operate on a continuing policy. Appeal allowed.

**Editor’s Note**

This case has overturned the decision in *Kamithi v Kenindia Assurance Co* [2001] 2 EA 394.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*South British Insurance Company Ltd v Samiullah* [1967] EA 659 – **C**

***United Kingdom***

*Allen v Robles* [1969] 1 WLR 1193 – **C**

*Ayrey v British Legal and United Provident Assurance Co* [1918] 1 KB 136 – **C**

*Clough v London and North Western Railway Co* [1871] LR 7 – **C**