**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.*

**JUDGMENT**

**RINGERA AJA:** This is an appeal by Kenindia Assurance Company Limited (the appellant) against the judgment of the High Court of Kenya whereby it was ordered to pay to Margaret Nduta Kamithi and George Njenga Kamithi, suing as personal representatives of the estate of Stephen Kamithi, (the respondents) the sum of KShs 4 million (four million) together with interest thereon from the date of filing suit until payment in full. The said sum of KShs 4 million was the value of a joint life assurance policy taken by the first respondent and her deceased husband Stephen Kamithi. The brief facts of the matter as discernible from the record of appeal appear to be the following. By a proposal form for a life assurance policy dated 7 December 1998, Stephen Kamithi (the “deceased”) and Margaret Nduta Kamithi (the first respondent) jointly applied to the appellant for a policy of life assurance. It was an express term of the proposal that all statements and answers given by the deceased and the first respondent in the proposal were true, full and complete in every particular and that they had not withheld any information. The deceased and the first respondent further declared that the statements in the proposal and the declaration should be the basic of the contract of assurance between them on the one hand and the appellant on the other hand. The deceased and the first respondent agreed that if any untrue averment was contained in the proposal or declaration the contract of assurance should be null and void and all monies which should have been paid in respect of the contract should stand forfeited to the appellant. The deceased and the first respondent signed the proposal and declaration. In the proposal the deceased and the first respondent stated with regard to the deceased, *inter alia*, that: (*a*) the deceased did not have a usual medical attendant;

(*b*) no member of the family of the deceased, living or dead suffered from any hereditary disease (for

example diabetes, stroke, mental disorder, heart disease, high blood pressure);

(*c*) no illness, accident or medical condition had prevented the deceased from carrying out his work and

that the deceased had not remained absent from his work due to such condition in the last five years;

(*d*) no other life assurance was then in force over the deceased’s life.

On the basis of the information provided, the premium was fixed at KShs 37 259. The policy term was

for 12 years. After completing that proposal form, the deceased and the first respondent were on the same

day referred by the appellant to Dr JN Muiru for a medical examination. They were examined on

9 December 1998. They were also examined by a Dr Chege and X-rays were taken. The examinations

revealed that the deceased had a heart condition. As a result of that revelation the premium was increased

to KShs 44 925.

On the strength of the proposal and declaration and the subsequent medical examination, the appellant on 19 January 1999 issued a joint life insurance policy number 948694 on the lives of the deceased and the first respondent, effective from 7 December 1998 for an assured sum of KShs 4 million on the terms and conditions set out in the policy. The class of assurance was said to be a 12 year dynamic advantage plan with profits. The policy specification schedule also provided that the monthly premium would be KShs 44 925 payable by banker’s order until the stipulated date of last payment or previous death of the life assured. The stipulated date of last payment was 27 November 2010. It was an express term of the policy that the proposal from and declaration were the basis of the insurance. Clause 4 of the conditions and privileges of the policy provided, *inter alia* that in case it should thereafter appear that any untrue or incorrect statement was contained in the proposal and declaration, or in any of the statements referred to therein, or that any material information had been withheld, then and in every such case the policy shall be void, and all claims to any benefits in virtue thereof shall cease and determine, and all moneys that had been paid in consequence thereof shall belong to the company. Concerned with the increased premium, the deceased and the first respondent visited the appellant’s offices. They were advised by a Mr Njau and as a result of the advice received, they requested and were allowed to alter the plan and term of the policy form dynamic advantage, 12 years to multiple advantage, 15 years, and the monthly premium was reduced from KShs 44 925 to KShs 42 884. The dates of last payment and maturity were also changed to 7 November 2013 with effect from 7 March 1999. That endorsement to the policy was made on 10 March 1999. The deceased passed away on 11 April 1999. His death was notified to the appellant via a letter dated 1 May 1999 under the hand of the first respondent. In the letter the first respondent also put up a claim in her capacity as a beneficiary as well as an insured. A death certificate was attached. On 18 June 1999, the first respondent was interviewed by, and recorded a statement with, the appellant’s investigator. In the statement, she disclosed that the deceased had a private doctor, a Dr Gikonyo, who in 1996 had referred the deceased to South Africa for medical treatment. During the sojourn of two weeks, the deceased was given a heart by-pass-operation. She also disclosed that in 1995 he had 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 Alico whose numbers were 4146073 and 3577837 which policies had already been settled. On 9 August 1999, the appellant wrote to the first respondent to the effect that following its investigations into the genuineness of the claim, it had been found that there was gross non disclosure of material facts on the proposal from signed and dated 7 December 1998 and, in the circumstances, the claim stood repudiated. It would also appear that despite the death of the deceased, premiums continued to be paid on the policy by banker’s order until the first respondent instructed their bank to stop. On 5 November 1999, the appellant refunded to the first respondent a sum of KShs 257 442 being the amount erroneously received after the death of the assured. No refund of the premiums paid up to the time of the demise of the deceased was paid. After the appellant declined to settle the claim by the first respondent 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. After hearing the evidence adduced by the respondents (the appellant elected not to call any evidence) and the submissions made by the respective parties’ advocates, Mbaluto J, in a reserved judgment, found there was the clearest evidence of non-disclosure of material facts by the deceased in that the answers to the questions in the proposal from on whether the deceased had a usual medical attendant, whether he had other policies in force, whether he had any hereditary disease, and whether he had been prevented from carrying out his work by illness, accident or medical condition had all been untrue or incorrect. In that regard, the Learned Judge found that that the first respondent had in her evidence admitted that the deceased used to be treated by Dr Gikonyo who had been his doctor sine 1990, that he had a heart disease and was off duty for three weeks when he went to South Africa for a heart operation, and that at the time of completing the proposal form, the deceased had other life policies with Alico Kenya Limited and Mercantile Life and General Assurance Company Limited. The Learned Judge further found that by reason of non-disclosure of material facts the appellant was entitled to repudiate the policy at the time it became aware of the true position regarding the information it had received from the deceased and the first respondent. 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. As regards continued acceptance of premiums after the demise of the deceased, the Learned Judge reasoned as follows: “The deceased died on 11 April 1999 and the death was reported to the defendants on 1 May 1999. From that date up to 5 November 1999, the defendant continued to accept the monthly premium of KShs 42 884 on the joint policy without raising any query on the matter. In his submissions, Mr *Fraser* for the defendant said that the premiums were accepted because they were being paid through a banker’s order which the first plaintiff had failed to stop upon the death of the deceased. However, I am unable to see what would have obliged the first plaintiff to stop payments of the premiums prior to the receipt of communication from the defendant of its intention to repudiate the policy and particularly when the defendant was all the while, accepting the payments without complaint. In any case, the defendant having tendered no evidence whatsoever in this matter regarding that or indeed any other issue, there is nothing to support what Mr *Fraser* says*”.* As regards failure to repudiate the policy within a reasonable time after being aware of material non-disclosures, the Learned Judge reasoned as follows: “The defendant had a right to repudiate the policy upon the discovery of non disclosure of material facts by the deceased. Accordingly, although the evidence is not very clear when the defendant first became aware of the matter, at the very latest it knew by 18 June 1999 that the answer to the question regarding other life policies was untrue and that it had the right to repudiate the policy. In my opinion therefore, the defendant lost the right to avoid the policy by accepting further premiums on the policy from that moment”. In reaching those conclusions, the Learned Judge relied heavily on the following passage in the Law of Insurance by *Raoul Colinvaux* (5 ed) 1984 paragraph 5-02: “The duty to disclose it not an implied term of the contract itself. Unlike fraud or a breach of condition, non-disclosure never by itself gives to a claim for damages. Avoidance of the whole contract is the only remedy. Once the aggrieved party (i) knows all the facts, and (ii) has had a reasonable time in which to make up his mind, he must make his election once and for all. He need not exercise it, however, until he knows all the facts; being put on inquiry is not sufficient. Thus where, although the assured has suppressed or misrepresented a fact he discloses it to the insurance office before they pay a claim, they cannot after payment recover back the money. Similarly where the insurers receive notice that the risks insured against have been misrepresented, concealed or incompletely disclosed and accept further premiums on the same policy, they lose their right to avoid it”. In those premises, the Learned Judge held for the plaintiffs and awarded them the sum of KShs 4 million with interest thereon from the date of filing suit until payment in full. In the course of his judgment, the Learned Judge also dealt at length on the evidential status of two documents marked as “MFIA” and “MFIB” which had been introduced on record on the basis that they were referred to in the appellant’s notice to the respondents to admit documents but which were not formally produced by the appellant at the trial. The Judge found the said documents were not evidence in the case. As decision in this appeal does not turn on the Judge’s finding with regard to whether or not the said documents were evidence in the trial, no more will be said of them and the ground(s) of appeal pertinent thereto will not be considered. From the above judgment, the appellant has preferred this appeal on the grounds that: (i) the Judge erred in holding that the appellant was only entitled to repudiate the policy at the moment in time the appellant becomes aware of the true position; ( ii) the Judge erred in holding that the appellant did not repudiate within a reasonable time and thereby lost the right to repudiate; (iii) the Judge erred in holding that the appellant lost the right to repudiate or avoid the policy on 18 June 1999; (iv) the continuing cover under the policy came to an end on the death of the first of the deceased or the first respondent, (*sic*). Therefore no premiums were payable after the death of the deceased. In the circumstance the receipt of premiums paid by banker’s order after the death could not amount to a waiver or an estoppel on the right to repudiate; ( v) the Judge erred in holding that payments made by banker’s order in the appellant’s account could constitute a waiver or estoppel; (vi) the Judge erred in holding that there was no evidence that the premiums were paid by the first respondent by banker’s order and continued until the first respondent stopped the banker’s order; and ( vii) the Judge erred in holding that the respondents were entitled to judgment in the sum of KShs 4 000 000 with interest thereon from the date of filing suit until payment in full. For their part, the respondents availed themselves of the procedural latitude conferred by rule 91 of the Court’s Rules and filed a notice of grounds for affirming the decision of the superior court on grounds other than those relied upon by the said court. Those grounds were: (i) that the appellant having prior to the issuance of the subject policy subjected the deceased to a medical examination by its own nominated doctors and having accepted loaded premiums thereto for five months before the subjects death is therefore precluded by estoppel and/or waiver from repudiating the claim/policy; and ( ii) adverse inference ought to be drawn against the appellant for its failure to call material witnesses namely the said doctors and its underwriters to support its averments. Mr *Fraser*, who represented the appellant in this appeal, as he did in the superior court, argued that in law the appellant was not obliged to repudiate the policy upon discovering the non-disclosures or misrepresentations by the assured and, accordingly, it was under no obligation to do so within a reasonable time. The assured had a choice to make. In that regard, he referred to *Colinvaux’s Law of Insurance* (*supra*), paragraph 5-02 where it is stated: “Where the assured conceals something he knows to be material such concealment is fraud. But in any case the effect of mere non-disclosure on an insurance contract is to some extent the same as with the effect of fraud. The party aggrieved, when the matter comes to his knowledge, may choose either to carry on with the contract or not. It is voidable at the election of the aggrieved party, as opposed to that class of contract which is void by operation of law”. In further support of his submissions, counsel cited the English Court of Appeal decision in *Allen v Robles* [1969] I WLR 1193, at page 1196 letters E-H where the Court cited with approval the following passage from *Clough v London and Nothwestern Railway Company* [1871] LR 7 Exch 26 at 34: “We agree with what seems to be the opinion of all the Judges below, that if it can be shown that the (insurers) have at any time after knowledge of the fraud, either by express or by unequivocal acts, affirmed the contract, their election has been determined forever. But we differ from them in this, that we think the party defrauded may keep the question open as long as he does nothing to affirm the contract”. The English Court of Appeal then proceeded to express the view that if the insurer discovered that there was a claim and that the insured was in breach of a condition, they were in a position to elect either by refusing to indemnify; or to accept a liability or indemnity; or it was open for them to delay their decision. In the later regard, the Court stated that mere lapse of time would not lose them their right to decide to refuse to indemnify; the lapse of time would only operate against them if thereby there was prejudice to the insured or if in some way rights of third parties had intervened or if the delay in itself was of such a length as to be evidence that they had in truth decided to accept liability. Counsel also relied on *Mac Gillivray on Insurance Law* (9 ed) 1997 paragraph 17-27 where it is posited: “If the assured has failed in his duty of making full disclosure, the insurer may, on discovering the full facts, elect to avoid the contract of insurance, and he may do so either before or after the loss has occurred. The contract cannot therefore be said to be automatically avoided by non-disclosure; it remains in force until avoided by the insurer ... unless there has been wilful or fraudulent concealment on the part of the assured, the premiums paid are returnable”. As regards the effect of the retention of premiums paid before the death of Mr Kamithi and the receipt of further premiums after his death and even after discovery of the non-disclosure and misrepresentations, Mr *Fraser* argued with regard to the former that they were not refundable as the insurance was at risk on the life of Mrs Kamithi and both the proposal form and the policy itself made it clear that in the event of non-disclosure or misrepresentation of material facts the premiums paid would be forfeited to the insurer. With respect to receipt of premiums after death and discovery of non-disclosure, he argued that the evidence from Mrs Kamithi showed that payments thereof was by banker’s cheque and they continued until she stopped the payments. He contended that such payments were in any event inconsequential as the life of the policy came to an end with the death of one of the assured and, accordingly, no premiums were payable thereafter and the insurer could not be estopped from repudiating the policy on the basis that it had accepted premiums which were not payable. He argued that it was only in the case of an ongoing policy where acceptance of premiums after knowledge of facts giving rise to right to repudiate could possibly stop the insurer from repudiating. Counsel also invoked Spencer Bower and Turner’s *The Law Relating to Estoppel by Representation* (3 ed) 1977 on pertinent principles concerning estoppel and waiver. At paragraph 310, the law is stated as follows. “The doctrine of election as applicable in the law of estoppel may be summarised as follows: where A, dealing with B, is confronted with two alternative and mutually exclusive courses of action in relation to such dealings, between which he may make his election, and A so conducts himself as reasonable to induce B to believe that he is intending definitely to adopt the one course, and definitely to reject or relinquish the other, and B in such belief alters his position to his detriment, A is precluded, as against B, from afterwards resorting to the course which he has thus deliberately declared his intention of rejecting”. Mr Muturi *Kigano*, too, argued for the respondent in this Court, as he did in the superior court. His principal contention was that although the deceased might have lied in the proposal form, the appellant immediately become aware of the fact that the deceased had a heart condition and that he had a usual medical attendant in the name of Dr Gikonyo as a result of the medical examination and inquiry carried out by Dr Muiru on the instructions of the appellant and, consequently, when the appellant accepted the premiums and subsequently loaded them to KShs 44 000 and later to KShs 42 884 it waived its rights to subsequently repudiate the policy on the basis of the statements in the proposal form. In counsel’s view, a new contract of insurance constituted by the proposal as varied by the subsequent medical examination and the acceptance of premiums was created. Counsel emphasised that the appellant accepted premiums for four months before the death of Mr Kimithi and that those premiums were not returned. Counsel relied on the following passages from *Halsbury’s Laws of England* (4 ed) Volume 25: Paragraph 440 “If what is relied on as a waiver is conduct after a breach has occurred, the conduct must be such as to indicate an intention to treat the contract as still subsisting. There can be no waiver unless the insurers have full knowledge of the material circumstances”. Paragraph 422 “The dividing line between estoppel and waiver is so fine as to be in many cases almost indistinguishable. In theory a waiver of a contractual right is something contractual involving agreement express or implied, between the parties; estoppel, however, is merely a rule of evidence or law by which a party is precluded from asserting the existence of a fact, including a right. Therefore, conduct by the insurers making performance of a condition either impossible or unnecessary can be set up as a waiver if there is the requisite assent to or consideration for it. Alternatively, the same conduct can be relied on as an estoppel if it has induced the assured to believe that the condition need not be performed or that accrued rights are not going to be enforced, and to act accordingly. However, if it follows a breach of a condition, the conduct must be such as to lead the assured to the belief that the contract is being treated by the insurers as valid notwithstanding the breach, as where they accept a renewal premium or do or demand something without any justification except the policy. There must, however be a reliance on the part of the assured on the representation as to the continued validity of the policy imparted by the insurer’s conduct and a consequential alteration in his position. Unless the assured is misled, there is no estoppel”. Counsel submitted on the basis of the foregoing that in this case, the insurer was aware of all material circumstances when it issued the policy after receiving the medical report and that the insured was induced to believe the policy was in force. He invoked the passage previously cited from *Colinvaux’s Law of Insurance* (*supra*) that where the insurer receives notice that the risks insured against have been misrepresented concealed or incompletely disclosed and accept further premiums on the same policy, they lose their right to avoid it. Counsel also relied on the following passage from *Chitty on Contracts* (27 ed) Volume II at page 904: “Non-disclosure or misrepresentation makes the contract voidable, not void, so that the aggrieved party has an election whether or not to avoid the contract. Once the aggrieved party knows all the facts, he should inform the other party within a reasonable time if he elects to avoid the contract, for otherwise his subsequent conduct may be taken to be either an affirmation of the contract, or as leading the other party to suppose that the contract is being affirmed and causing him to act accordingly. Thus where the aggrieved party does some act which is inconsistent with an intention to avoid the contract, such as paying a claim, or accepting further premiums after knowledge of a non-disclosure or misrepresentation, the right to avoid the contract will be lost. However, the right will not be lost unless the aggrieved party does know all the facts; being put on inquiry is not sufficient. Once the aggrieved party has made his election, it is irrevocable”. Reference was also made to the decision of the East Africa Court of Appeal in *South British Insurance Company Ltd v Samiullah* [1967] EA 659, where it was held that when an insurer came to know that an insured had concealed a material fact when obtaining a policy, he was entitled from that moment or within a reasonable time thereafter to repudiate and should have repudiated the policy. And in *Ayrey v British Legal and United Provident Assurance Co* [1918] 1 KB 136, it was held that the acceptance of premiums by the agent of the insurer with full knowledge that there had been a non-disclosure of material facts was a waiver by the company of the breach of the clause in the proposal form entitling it to avoid the policy for such non-disclosure. In concluding his arguments, Mr *Kigano* submitted that on the facts the insurer waived its right to repudiate the policy, compensated itself for the higher risk by loading the policy, and led the assured to believe that a valid policy of insurance had been entered into. All that, in his view, lent substance to ground (1) of the notice of grounds for affirming the superior court’s decision. Counsel further submitted that even if grounds for repudiating the policy existed, it was incumbent on the appellant to prove them through its own witnesses and as it had failed to call any evidence, the Court inferred that such evidence would have been adverse to the appellant. All in all, he asked for the dismissal of the appeal with costs here and below. In a brief reply, Mr *Fraser* pointed out that according to the evidence of the first respondent, the loading of the policy was due to the discovery that the deceased had previously had a heart operation. In response to the point that the appellant knew of the non-disclosure of material facts when it accepted the premiums, counsel argued that the appellant did not know of the other lies until after the death of the deceased. Such lies included the fact that he had been hospitalised for pneumonia, that he had a usual medical attendant, and that he had other life insurances. In his view, if one was caught on one lie, it did not follow that all the other lies had been forgiven. He emphasised that the repudiation of the policy was on things other than the deceased’s medical condition relating to the heart. As regards the facts that Mr Maingi PW2, (who filled in all the answers in the proposal form) knew that the deceased had Dr Gikonyo for his regular doctor and that he had other life policies with Alico, Mr *Fraser* submitted that according to the evidence of Mr Maingi himself he was Mr Kamithi’s insurance agent and referred to Mr Kamithi as his client and, accordingly, his knowledge could not be imputed to the company and even the Learned Judge below had not made such an imputation. Having considered the grounds of appeal, the grounds for affirming the decision of the superior court, and the arguments canvassed by the advocates for the parties, the following view commends itself to me. Grounds (1), (2) and (3) of appeal raise the issue of the effect of non-disclosure or concealment of material facts on the contract of insurance and the time frame, if any, within which the insurer may exercise its right to repudiate or avoid the policy by reason of non-disclosure or misrepresentation or concealment of material facts. On the authority of the passage here before cited from *Chitty on Contracts*, *Mac Gillivray on Insurance Law* and *Colinvaux’s Law of Insurance* it is evident that the position in law is that non-disclosure or concealment or misrepresentation of material facts does not have the effect of automatically avoiding a contract of insurance. It’s effect is to make the contract voidable at the instance of the insurer. As regards when the option should be exercised, the textbooks and judicial authorities apparently express different views. In *Colinvaux* it is stated that once the insurer knows all the facts (as opposed to merely being put on inquiry) and had had a reasonable time in which to make up his mind, he must make his election once and for all. In Chitty it is said that once the insurer knows all the facts he should inform the assured within a reasonable time if he elects to avoid the contract. From those two works, the impression one gets it not that it is incumbent on the insurer who has known the full facts to elect to avoid the contract at once or within a reasonable time thereafter but that he is entitled to a reasonable time in which to make up his mind either way and he should communicate such decision to the assured. Be that as it may, in *South British Insurance Company Ltd v Samiullah* (*supra*) Law JA with whom the other member of the East African Court of Appeal concurred, took the view that from the moment the insurer became aware of the facts entitling it to repudiate within a reasonable time thereafter, it could and should have repudiated the policy. The editor of the law report in holding (ii) puts the matter somewhat differently by positing, “from that moment, or a reasonable time thereafter, the appellant should have repudiated the policy.” I think the editor’s note is a misrepresentation of the view of the Judge. In my opinion, the ratio of the case is that the insurer was entitled on discovery of non-disclosure or concealment to repudiate the contract at once or within a reasonable time thereafter. The decision does not purport to deprive the insurer of his right to elect to avoid or affirm the policy. In *Allen v Robles and another* (*supra*), the English Court of Appeal decided that an insurer who had discovered non-disclosure, or misrepresentation of material facts had three choices. It could elect either (i) to refuse to indemnify, or (ii) to accept liability to indemnify, or (iii) to elect to delay the decision. The Court said that if the option of delay was adopted, the mere lapse of time would not lose them their right to decide to indemnify; lapse of time would only operate against them if thereby there was prejudice or if in some way rights of third parties had intervened or if the delay in itself was of such a length as to be evidence that they had in truth decided to accept liability. In my judgment what the authorities established is this; if and when the insurer becomes possessed of all the facts entitling him to avoid or repudiate the policy for the reason of non disclosure, concealment or misrepresentation of material facts, he is entitled to elect to avoid or affirm the contract at once or to have a reasonable time to weigh his potions. If the opts to delay his election, the delay *per se* will not have the effect of vitiating his right to avoid or repudiate the contract. Delay would only be prejudicial to his rights if it has prejudiced the assured, or the rights of third parties 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. How do those principles apply in the circumstances of this case? In my judgment, Mbaluto J was in error to find and hold that the appellant having, at least on 18 June 1999, known that the deceased had concealed information about the existence of other life policies and that the insurer was, accordingly, entitled to repudiate the policy, it should have done so from that moment or within a reasonable time thereafter failing which he lost his right to repudiate. As seen above, the insurer was entitled to a reasonable time to weigh his options and delay in doing so did not and could not, without more, lose him his right to repudiate. And in this case, there was no more to the delay as it was not contended and it had not been shown that the insured was prejudiced thereby or that the rights of third parties had intervened, and, as will shortly be clear, the delay could not in the circumstances of this case have amounted to an affirmation of the contract. In the premises grounds (1), (2) and (3) of the appeal succeed. As regards the effect of continued receipt of premiums after 18 June 1999, I think it is best to deal with ground 6 of the appeal first. It will be recalled that the purport of that ground was that the Judge was in error in holding that there was no evidence that the premiums were paid by the first respondent and continued to be paid until the first respondent stopped them. Now from the proposal form itself and the policy both of which were exhibited, it was clear that monthly premiums were to be paid by way of banker’s order. And Mrs Kamithi*,* the first respondent, testified that such was the mode of payment and the payments continued until she put a stop to them. In those circumstances, the Judge was plainly in error in his finding that there was no evidence that the premiums were paid by banker’s order and continued until stopped by the first respondent. In that connection, it should be stated that credible and admissible evidence once adduced in a trial is not appropriated to any party and may be relied upon by any party to the proceedings. The next matter for consideration is the effect, if any, of the acceptance of those premiums from 18 June 1999 until November 1999 when a refund thereof was made to the first respondent. Mr *Fraser*’s submissions that those payments could not constitute a waiver of the insurer’s right to repudiate the policy or operate as an estoppel against the assertion of such a right are, in my view, irresistible. It is clear from the policy specification schedule that the policy in question was a joint life policy and he obligation to pay premiums ceased on maturity date or death of the assured whichever came first. Accordingly the obligation to pay premiums in the circumstances here ceased on 11 April 1999 when the deceased (one of the joint insured) died. In those circumstances the continuing cover under the policy come to an end and the premiums paid thereafter were inconsequential to the rights and obligations under the policy. Where there is no obligation to pay the premium, it can never be the case that payment thereof operates 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. Those considerations eluded the Learned Judge and they do distinguish this case from the authorities which affirm that acceptance of premium after knowledge of the material facts entitling an insurer to repudiate operate to deny him the right to subsequently repudiate the contract. In the result, I am of the opinion that grounds (4), (5) and (6) of the appeal succeed. That only leaves for consideration the respondent’s grounds for affirming the decision on grounds other than those relied upon by the Learned Judge. It bears repetition that the superior court found that the appellant was entitled to repudiate the policy on grounds of non-disclosure of material facts concerning whether the assured had a usual medical attendant, whether he had other life policies in force, whether he had been prevented from carrying out his work by illness, accident or medical condition, and whether he had any hereditary disease. There was no cross appeal from those findings. There being no such cross appeal, the respondents’ second ground of affirming the decision is a vain one as the evidence which ought to have been called could only relate to non-disclosure of material facts. That ground must therefore be peremptorily rejected. The other ground for affirming the decision was that the appellant having caused the deceased to be examined by its own doctor and having known as a result of such examination that the deceased had a heart condition, and having loaded the premium as a result of that revelation, the appellant was precluded by waiver and/or estoppel from repudiating the policy. Having weighed the rival arguments, I have taken the view that if it had been the case that the insured had attempted to repudiate the policy on the basis of information relating to the deceased’s heart condition, it would have been precluded from doing so by both waiver and estoppel: Waiver in that in the circumstances of this case, the appellant could have been said to have agreed to continue the policy notwithstanding the deceased’s non-disclosure and misrepresentation of his heart condition in consideration of payment of enhanced premiums; and estoppel in that by not repudiating the policy and by accepting premiums after knowing the truth about his heart condition, the insurer had represented to the deceased that the policy would continue to be a valid one and the deceased had altered his position to his detriment by paying the enhanced premium. However, insurer here did not seek to avoid the policy only on grounds of the deceased’s heart condition. The policy was also sought to be and was avoided on the grounds that they had not disclosed that he had a usual medical attendant, he had previously been hospitalised for pneumonia, and he had other policies of life assurance. In my view these other non-disclosures could not be said to have been waived nor could the insurer be said to be estopped from relying thereon to repudiate the policy by virtue of the fact that it had accepted an enhanced premium in consideration of the deceased’s known heart condition. As counsel for the appellant said colourfully, forgiveness of one lie did not connote forgiveness of all the other lies. In the premises, this ground of affirming the decision is also rejected. In the upshot, I would allow this appeal, set aside the judgment and decree of the superior court and substitute therefore an order dismissing the plaintiffs’ suit in the High Court with costs. I would award the costs of the appeal to the appellant.

Tunoi and Omolo JJA concurred in the judgment of Ringera AJA.

For the appellant:

*Mr AK Fraser* instructed by *Hamilton Harrison & Mathews*

For the respondents:

*Mr M*