



REPUBLIC OF KENYA



**Nzioka v Kenya Wildlife Services (Civil Appeal E030 of 2024)
[2024] KEHC 9632 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9632 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E030 OF 2024
LM NJUGUNA, J
JULY 31, 2024**

BETWEEN

NICHOLAS NDUNDA NZIOKA APPELLANT

AND

KENYA WILDLIFE SERVICES RESPONDENT

(Appeal arising from the decision of Hon. S.K. Ngii PM in the Magistrate's Court at Siakago Civil Suit No. E040 of 2022 delivered on 26th May, 2023)

JUDGMENT

1. The appellant filed a memorandum of appeal dated 15th June 2023 challenging the above cited decision of the trial court and seeking the following orders:
 - a. That the appeal be allowed with costs;
 - b. That the ruling and orders of the Principal Magistrate be set aside; and
 - c. Any other relief the court may deem fit to grant.
2. The appeal is premised on the grounds that:
 - a. The learned trial magistrate erred in law and fact in failing to consider the appellant's submissions on the issue of jurisdiction;
 - b. The learned magistrate erred in law and fact in reaching his decision that the court lacked jurisdiction to entertain the matter;
 - c. That the ruling is ambiguous as it bears two contradicting determinations, one allowing the application and the other dismissing an application unknown to the appellant;



- d. That the trial magistrate erred in law and facts by assuming facts not placed before him hence reaching an erroneous ruling; and
 - e. That the entire ruling was against *the constitution* and other relevant statutes.
3. Through a plaint dated 29th March 2022, the appellant sought for special damages of Kshs.17,020/=, general damages under the *Wildlife Conservation and Management Act* No. 47 of 2013 and costs with interest against the respondent. It was his case that he was lawfully working on his farm in Mbondoni Area when he was suddenly attacked by a hippopotamus which caused him severe injuries. He blamed the respondent for negligence and abdication of its responsibilities under the statute and common law.
 4. The respondent filed a statement of defense in which it denied the allegations made in the plaint and stated that the plaint does not disclose a cause of action. It attributed the appellant's injuries to his own negligence. The appellant filed a reply to defense wherein he reaffirmed the averments made in the plaint and urged the court to strike out the respondent's statement of defense.
 5. The respondent then filed notice of motion dated 15th August 2022 seeking for orders that the plaintiff's plaint be struck out with costs. The application was premised on grounds that the appellant has already pursued compensation for his injuries under section 25 of the *Wildlife Conservation and Management Act* and therefore the court lacked jurisdiction to entertain the claim. It was its case that the appellant's claim was already deliberated upon by the Embu County Wildlife Conservation and Compensation Committee (hereinafter referred to as the "committee") and the committee recommendations sent to the Cabinet Secretary, Ministry of Tourism and Wildlife for consideration and payment. That the appellant cannot raise his claim through the plaint based on similar facts when there is another claim pending payment.
 6. In his replying affidavit the appellant stated that the respondent did not communicate with him about his claim with the committee and how it was progressing. He stated that even though he had pursued recourse through the committee, the Act does not stop him from pursuing compensation from this court. The application was canvassed by way of written submissions wherein both parties relied on the case of Kenya Wildlife Service v. Joseph Musyoki Kalonzo (2017) eKLR where the court stated that there is nothing under section 25 of the *Wildlife Conservation and Management Act* that stops victims from claiming from the court after lodging a claim with the committee.
 7. However, the respondent submitted that the appellant should await the payment as approved by the committee before he can claim before the court. That if the award is not satisfactory to him, then he can appeal to the National Environment Tribunal. The respondent further relied on the case of Kenya Wildlife Service v. M'ngai M'itumitu (2021) eKLR where the court found itself lacking jurisdiction to determine a matter similar to the one before this court. Further reliance was placed on the case of *Nyarangi v Musyoki Mogaka & Co. Advocates (Civil Appeal 80 of 2020)* [2022] KEHC 345 (KLR). The trial magistrate stated that the court lacked the requisite jurisdiction to determine the plaint and struck out the suit.
 8. In its ruling the trial court stated that it did not have jurisdiction to determine the suit given that there is recourse provided for in statute and that the appellant was already pursuing compensation from the Embu County Wildlife Conservation and Compensation Committee. Through the ruling, the trial magistrate allowed the application dated 15th August 2022, and struck out the suit.
 9. The court directed the parties in this appeal to file their written submissions but none of the parties complied with the said directions.



10. The issue for determination is whether the trial court bore jurisdiction to determine the matter given that the appellant has already claimed compensation through the Embu County Wildlife Conservation and Compensation Committee.
11. The appellate court makes its decision purely based on the record and findings of the trial court as was held in the case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
12. This is a case where there is more than one option of recourse available to the appellant. He has already pursued compensation through the committee which approved a payment of Kshs.500,000/= as compensation for the injuries he sustained. In the pendency of this payment, the appellant sued the respondent for special and general damages under common law. As to whether the trial court lacked jurisdiction, the issue will be determined through the subsequent paragraphs which examine the applicable statute.
13. In the event of an injury or death resulting from wildlife, there is a prescribed procedure for claiming compensation. Section 25 of the *Wildlife Conservation and Management Act* provides thus, in part:
 - (1) Where any person suffers any bodily injury or is killed by any wildlife listed under the Third Schedule, the person injured, or in the case of a deceased person, the personal representative or successor or assign, may launch a claim to the County Wildlife Conservation and Compensation Committee within the jurisdiction established under this Act.
 - (2) The County Wildlife Conservation and Compensation Committee established under section 18 shall verify a claim made under subsection (1) and upon verification, submit the claim to the Cabinet Secretary together with its recommendations thereon.
 - (3) The Cabinet Secretary shall consider the recommendations made under subsection (2) and where appropriate, pay compensation to the claimant as follows —
 - (a) in the case of death, five million shillings;
 - (b) in the case of injury occasioning permanent disability, three million shillings;
 - (c) in the case of any other injury, a maximum of two million shillings, depending on the extent of injury.”
14. The procedure for compensation under this Act is provided for as stated. However, there is a loophole that could be exploited since the procedure to be followed is somewhat unclear and has been left to the discretion of the cabinet secretary. This loophole was examined by this court in the similar case of *Kenya Wildlife Services v Kioko* (Suing as the legal representatives of the estate of Brian Musyoki Mwanzia (Deceased)) (Civil Appeal E035 of 2021) [2022] KEHC 13088 (KLR) where it was held thus:

“My reading and understanding of the above sub section is that under sub section (2), the county wildlife conservation and compensation committee shall upon verification, submit the same to the cabinet secretary together with its recommendations. The cabinet secretary shall then consider the recommendations made under sub section (2) and where



appropriate, pay compensation to the claimant as provided for under sub sections 3 (a) (b) and (c) but in this case, sub section 3 (a) is what is relevant. Looking at section 25 (2) and sub section 3 (a) in regards to compensation, my considered view is that though an amount of Kshs 5 million is provided for as compensation in the case of death, there is a procedure to be followed before the cabinet secretary can pay compensation....What clearly emerges from section 25 (2) and (3) is that the compensation to the person injured or the estate of a deceased person is not automatic. The same has to be verified and the claimant shall be paid in cases which the cabinet secretary find appropriate. It is, however, not clear the considerations or the parameters the cabinet secretary uses to determine the appropriate cases where compensation should be paid as the Act is silent on the same.”

15. Given this sentiment, nothing stops the appellant from pursuing compensation through common law, hence the claim herein. This means that the trial court had jurisdiction to determine the claim before it, which was rightly lodged through a plaint. Therefore, nothing stood in the way of the court considering the claim for compensation under common law. The trial court should proceed and consider the pleadings by the parties and take evidence which will aid it in determining the claim, given that it is clothed with jurisdiction as I have stated. The Supreme Court of Nigeria in *Adetour Oladej Ltd v Nigeria Breweries Plc* 91 of 2002 stated:

“It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way, which is at variance with the averments of the pleadings goes to no issues and must be disregarded..... in fact that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

16. In the end, I find that the appeal has merit and it is hereby allowed with orders as follows:
- a. The ruling and orders of the trial court in Siakago Civil Suit No. E040 of 2022 delivered on 26th May 2023 are hereby set aside;
 - b. The lower Court matter to proceed for hearing to its logical conclusion.
 - c. Each Party to bear its own costs of the appeal.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 31ST DAY OF JULY, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant

..... for the Respondent

