



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 13 OF 2021

KANINI MUTULA & RUTH MUNYIVA KIOO (Suing on

their own behalf and as administrators of the estate of

KIOO MUTUA (DECEASED).....APPELLANTS

VERSUS

KENYA WILDIFE SERVICES.....RESPONDENTS

(Being an Appeal arising from the ruling and order issued by the Honourable Principal Magistrate W. Ngumi on 3rd March 2021)

JUDGMENT

1. The appellants, Kanini Mutula and Ruth Munyiva Kioo (suing on their own behalf and as administrators of the estate of Kioo Mutua) being dissatisfied with the ruling and Orders of the Honourable Principal Magistrate filed the appeal herein against the whole of the said ruling and orders on the following grounds:

- i. The learned trial Magistrate erred both in law and in fact in failing to consider the appellants' submissions on the issue of jurisdiction.*
- ii. The learned trial Magistrate erred in law and in fact in her interpretation of the provisions of Section 25 and 117 of the Wildlife Conservation and Management Act No. 47 of 2013*
- iii. That the learned trial Magistrate erred in law and in fact in reaching her decision that the court lacked jurisdiction to entertain the matter.*
- iv. The entire ruling was against the constitution and other relevant statutes*
- v. The Appellant sought for orders that the appeal be allowed and the ruling and decision by the trial court be set aside.*

2. It is the appellants' case that they instituted the initial suit in Siakago Law Courts and which suit sought for compensation to the estate of the deceased under the provisions of the wildlife conservation and Management Act No.47 of 2013, the Fatal Accident Act (Cap 32) and the Law Reform Act Cap 26 Laws of Kenya. That in total disregard of laws relating to compensation for injuries caused by Wild life species to human beings and further in blatant disregard of the evidence presented before the court by the plaintiffs to prove their claim, the learned magistrate prematurely dismissed the plaintiff's suit at a preliminary stage on unsubstantiated grounds that the court lacked jurisdiction to hear and determine the claim.

3. The foundation of the suit before the trial court was negligence on the part of the respondent wherein the plaintiffs pleaded that the deceased was attacked by a hippopotamus occasioning him fatal injuries which was all as a result of the negligence by the respondent herein.

4. The respondent entered appearance and filed its statement of defense and a further Notice of Preliminary Objection challenging the jurisdiction of the trial court. Basically, the Preliminary Objection was premised on the grounds that the trial court was bereft of jurisdiction and that the suit was premature and filed in total abuse of sections 18, 19, 2, 25, 26 and 117 of the Wildlife Conservation and Management Act No. 47 of 2003 and which sections provides for the procedure and remedy in cases of human- wildlife conflict.

5. The trial court proceeded to hear the preliminary objection and vide a ruling delivered on 03.03.2021, upheld the said Preliminary Objection and struck out the suit before it. It is this ruling which culminated with the instant appeal and which was commenced by way of a memorandum of appeal dated 22.03.2021.

6. The appellants faulted the trial court for holding that it was bereft of jurisdiction without considering the applicable law, judicial precedents on the issue at hand and their written submissions. Further that, the trial court failed to appreciate that the appellants' claim was based on tort of negligence and appreciate the law that striking out of a suit is a drastic remedy which ought to be exercised in very clear cases.

7. The appeal was canvassed by way of written submissions. The appellant in support of the appeal submitted that the trial court misapplied the law and relied on sections 25 and 117 of the Wildlife Management and Conservation Act in determining the issue on jurisdiction whereas the suit was premised on section 25 of the said Act and which two sections are different. It was submitted that the trial court has jurisdiction over the suit which was before it. Reliance was made on authorities including **Kenya Wildlife Services v Kurura Bulle Kussen Galgalo [2019] eKLR and Kenya Wildlife Services v Joseph Musyoki Kalonzo Nairobi C.A. No.306 of 2017**. It was further submitted that the court ought to have been guided by the decision in **Kenya Wildlife Services v Joseph Musyoki Kalonzo (supra)** and not **Civil Appeal No. 260 of 2013 Peter Njuguna Muturi v Kenya Wildlife Services** which did not limit the constitutional right of access to justice under Article 48 of the Constitution. Further that, it is a general rule of interpretation that, where a law seeks to restrict and/or take away a citizen's right, that law should be express to that effect and not by implication. The respondent on its part, never filed any submissions in this appeal.

8. I have certainly perused and understood the contents of the grounds of appeal, submissions and the decisions referred to by the appellants. It is my considered view that the main issue for determination is whether the trial court has jurisdiction to hear and determine the appellants' case.

9. It is now trite that jurisdiction is everything and a court cannot arrogate itself jurisdiction which it does not have. [See **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others** (supra)].

10. The suit, subject of this appeal, revolves around negligence leading to loss of life of the deceased herein. The respondent is blamed for being negligent in managing, and controlling wildlife leading to the attack of the deceased by a hippopotamus. The Preliminary objection was raised as to the trial court not having jurisdiction over the said dispute. The objection was premised on Sections 18, 19, 24, 25, 26 and 117 of the Wildlife Conservation and Management Act, Section 125 of the Environment Management and Co-ordination Act No. 8 of 1999 and section 13(4) and 20(2) of the Environment and Land Court Act No. 19 of 2011. The argument being that, there is a prescribed statutory procedure in cases dealing with wildlife conservation, management and protection disputes. The appellants herein in opposing the said preliminary objection relied on the cases of **Kenya Wildlife Services v Kurura Bulle Kussen Galgalo [2019] eKLR** and **Kenya Wildlife Services v Joseph Musyoki Kalonzo Nairobi C.A. No.306 of 2017**. The respondent submitted before the trial court that the court was bereft of jurisdiction to hear and determine disputes relating to management, protection and conservation of wildlife by virtue of section 117 as read together with sections 18,19, 24, 25 and 26 of the Wildlife Conservation and Management Act.

11. I will therefore proceed to determine the interpretation of Sections 25 and 117 of the Wildlife Conservation and Management Act in order to determine whether the trial court has jurisdiction to determine this matter.

12. Section 18 of the Act establishes the County Wildlife Conservation and Compensation Committees whereas Section 19 lists its functions to be among others;

develop and implement in collaboration with the community wildlife associations, mechanisms for mitigation of human wildlife conflict (h) and review and recommend claims resulting from loss of damage caused by wildlife for payment of compensation (j). Section 24 establishes the wildlife Compensation Scheme whose monies are to be used for financing compensation claims for human death or injury or crop and property damage caused by wildlife.

13. Section 25 provides for the procedure in compensation for personal injury or death or damage to property. Under section 25(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, such a person MAY launch a claim to the County Wildlife Conservation and Compensation Committee within the jurisdiction established under this Act. Under subsection 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. Section 25(6) provides that a person who is dissatisfied with the award of compensation by either the County Wildlife Conservation and Compensation Committee or the Service may within thirty days after being notified of the decision and award, file an appeal to the National Environment Tribunal and on a second appeal to the Environment and Land Court.

14. Section 25 limits the claims made to the County Wildlife Conservation & Compensation Committee to those listed under the Third Schedule. The Third Schedule provides for the following animals; Elephant, Lion, Leopard, Rhino, Hyena, Crocodile, Cheetah, Buffalo, Poisonous snakes, Hippo, Shark, Stone Fish, Whale, Sting ray, Wild dog, and Wild pig. The deceased herein was attacked by a hippopotamus which falls amongst the categories enumerated.

15. However, the dispute between the parties herein seems to stem from the use of the word "**MAY**" whether it makes it compulsory for a party to seek redress from the Committee or the Court.

16. In determining whether the trial court was bereft of the necessary jurisdiction to determine this matter, I am guided by the Court of Appeal decision in the case of **Kenya Wildlife Services v Joseph Musyoki Kalonzo Nairobi C.A. No. 306 of 2015** in which the Court analyzed Section 25 of the Act and held as follows: -

In our view, even from a literal interpretation, this provision does not oust the jurisdiction of the High Court to hear any matters raised under that Act. If the Act meant to remove those matters from the realm of the High Court or the other

courts then it would have expressly stated so. It gives an aggrieved party an option to go to the committee as first option this in our view was meant to ease, matters for the poor people whose crops and domestic animals are damaged by wild animals occasionally, and which people may be far removed from the structured judicial systems. We do note that most of the areas that are prone to wildlife-human conflict are in areas that are outside urban areas where courts are situated. The Act in our view meant to make it easier for such people to access justice that is more easily accessible in terms of not travelling long distances and also in terms of simplicity in lodging their claim. It could not have meant to shut out everybody else who could prefer to pursue their claims before the conventional courts. That would explain the use of the word MAY and the absence of any provision expressly limiting or ousting the jurisdiction of the High Court.

In other words, there is no ouster clause in the wildlife and conservation management Act, that bars a party from seeking relief outside the process provided for under the Act.... Section 25 of the Act only gives an aggrieved party an option to pursue its claim either through the process stipulated under the Act or through the court.

17. The court further held: -

The respondent could either lodge his claim through the Act, which he did but no remedy was forthcoming, or pursue the remedy under the common Law through the courts. Every person has a right to pursue a remedy under the common law for a wrong or injury suffered.

18. The appellants invited this court to adopt the Court of Appeal's decision in Kenya Wildlife Service v Joseph Musyoka Kalonzo (supra) that they relied on, and argued that it is the more convincing one as it has been followed by High Court judges in subsequent decisions and find that the trial magistrate erred in her finding that she had no jurisdiction to entertain the subject suit.

19. In the same breadth, in Rose Ndinda Mutuku v Kenya Wildlife Service (supra), the court was of the view that in reference to the Joseph Musyoka Kalonzo that:

“It was explained clearly by the Court of Appeal that the use of the word “may” in Section 25 of the Act is permissive and gives the claimant an option of filing his claim in court. This interpretation of the law is correct in my view....If the legislature intended to shut out the courts, it would have used the word “shall” to make it mandatory that all compensation claims should be filed before the County Board.”

20. Further, in Kenya Wildlife Service v Karura Bulle Kussen Galgallo, Meru HCCA No.78 of 2018 (2019) eKLR, Mabeja J. considered the conflicting positions in the two judgments and held that:

...I would prefer the interpretation given to the word ‘may’ by the Court of Appeal in the Kenya Wildlife Service v Joseph Musyoki Kalonzo (Supra) as opposed to the one in Peter Muturi Njuguna v Kenya Wildlife Service (Supra). This is because the interpretation in the Joseph Musyoki Kalonzo case does not limit the constitutional right to access to justice under Article 46 of the Constitution. Further, it is a general rule of interpretation that, where a law seeks to restrict and or take away a citizen's right, that law should be expressed so to that effect not by implication.

...It is clear from the reading of WCMA that the use of the term “may” in Section 25 is not mandatory but permissive. Further, the absence of an express ouster provision in the WCMA means that the jurisdiction of the court is not ousted. If the intention of the Legislature was to oust the jurisdiction of the courts in WCMA, nothing would have been easier than to expressly state so. What Section 25 does is to permit and not compel an injured party or one who suffered loss and damage to have the first option of approaching the County Wildlife Conservation and Compensation Committee.”

21. In Joseph Munyoki Kalonzo v Kenya Wildlife Service, Garissa HCCC No.5 of 2014 (2015) eKLR, Dulu J. held that:

“Section 25 (1) of the Act is permissive and uses the word ‘may’ and does not say specifically that the ordinary courts have no jurisdiction in such claims.”

22. The appellants further submitted that they had reported and further filed the necessary forms for compensation but nothing much has been forthcoming and upon seeing the danger of being caught by the doctrine of laches, they decided to move the court to realize the compensation in regard to the loss to the estate of the deceased herein.

23. I adopt the interpretation by the Court of Appeal in Joseph Musyoka Kalonzo case to the effect that section 25 of the WCMA does not oust the original jurisdiction of courts in matters relating to human-wildlife conflicts. It is my finding that the trial magistrate in the subject suit erred in holding that the court was bereft of jurisdiction.

24. The trial court in making its decision relied on Section 117 of the Act as read together with Section 25. The trial court proceeded to quote Section 117 (which provides that any dispute that may arise in respect of wildlife management, protection or conservation shall at the first instance be referred to the lowest possible structure under the devolved government as set out in the Devolution of Government Act.) Section 117 is very clear that it refers to disputes in respect of wildlife management, protection or conservation. However, the claim before it was not in relation to such a dispute but was based on the ordinary tort of negligence. In my considered view, the learned magistrate misdirected herself in regard to the application of the Act to the issue at hand.

25. In the given circumstances, I find and hold as follows:

(i) That the appeal is merited and the same is hereby allowed.

(ii) The ruling of the trial court is set aside.

(iii) The matter is hereby reinstated for hearing and disposal before another court other than Hon. W. Ngumi.

(iv) Each party to bear its own costs of the appeal.

26. It's so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF FEBRUARY, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent