Kenya Wildlife Services v Mukiira (Civil Appeal 146 of 2021) [2022] KEHC 3181 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEHC 3181 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL APPEAL 146 OF 2021

TW CHERERE, J

JUNE 23, 2022

BETWEEN

KENYA WILDLIFE SERVICES .... APPELLANT

AND

STEPHANO MURURU MUKIIRA .... RESPONDENT

(Being an appeal from the judgment and decree in Meru CMCC NO. 12 of 2017 by Hon. S.N.Abuya (CM) on 29th September, 2021)

JUDGMENT

1. By a plaint amended on 07.10.2020, Respondent sought damages in the sum of Kshs. 12,800,000/- being the value of his crops that were damaged by wildlife on 15.02.2014.
2. By a statement of defence dated 23.02.2017 filed on 24.02.2017, Appellant denied Respondent's claim and also pleaded that the jurisdiction to handle the claim was vested in the relevant County Wildlife Conservation and Compensation Committee.
3. The trial court heard both parties and by a judgment dated 29.09.2021 found the Respondent's claim proved and awarded damages in the sum of Kshs. 12,800,000/- plus costs and interest.

The Appeal

4. The Appellant being dissatisfied with the lower court's decision preferred this appeal mainly on the ground that the learned trial magistrate misinterpreted Section 25 (4) and (5) of the *Wildlife Conservation Act*, 2013 (WCMA)and erred in holding that Appellant had a duty to pay compensation where the Respondent had not submitted a claim to the Committee for consideration.

Submissions by the Parties

5. The appeal was canvassed by way of written submission which the parties dutifully filed.

Appellant's submissions

6. Appellant holds the view a claim for compensation such as the one by the Respondent ought to have been submitted to County Wildlife Conservation and Compensation Committee for consideration and compensation and that the Appellant has no obligation to pay compensation. Reliance was placed on *Moloyian Ole Mengati & Another v Kenya Wildlife Service* [2009] eKLR where the court held that the Committee and the Service are different entities.

7. Appellant contends that it does not own wildlife and that there is no evidence that the damage happened in an area under its jurisdiction as provided for under Section 7 (b) of WCMA. It is also the Appellant's case that Respondent neither demonstrated that the elephants strayed from lower Imenti forest nor that Appellant was negligent. Appellant submitted that the trial magistrate erred in finding that Respondent had taken steps to protect his crops whereas there was no evidence in support thereof and that liability ought to have been apportioned at 50:50%.

8. Appellant additionally submitted that Respondent's claim was based on speculation, was not specifically proved and that the person that prepared the report in support of the damage. Reliance was placed on *Stephen Odhiambo Opuodho v South Nyanza Sugar Co. Ltd* [2020] eKLR where the court in dismissing the claim stated as follows:

> Without proof of planting and taking care of at least the plant crop it becomes very hard, if not impossible, to prove liability of the part of the Respondent. In other words, the Appellant was first to discharge the evidential burden against the Respondent. Failure to do so, the Respondent did not even have to call any evidence as the case must fail. That was the case in this matter.

9. Concerning the assessment report, Appellant contends that one Joel Murage did not demonstrate that he was a retired agricultural officer and further that the report was prepared after a year from the date of the alleged damage on the basis of notes that were not availed to court. In support thereof, Appellant relied on *Patrick Wambugu Gitahi T/A Wambugu Garage v Kenya Power & Lighting Co. Ltd* [2010] eKLR where the court cited *Mutonyi vs. Republic* Cr. Appeal No.92 with approval where the Court of Appeal laid down the following guidelines on expert evidence.

> " So, an expert witness who hopes to carry weight in a court of law, must, before giving his expert opinion –
>
> 1) Establish by evidence that he is specially skilled in his science or art.
>
> 2) Instruct the court in the criteria of his science or art, so that the court may itself test the accuracy of his opinion and also form its own independent opinion by applying these criteria to the facts proved.
>
> 3) Give evidence of the facts which may be ascertained by him or facts reported to him by another witness."

Respondent's submissions

10. Respondent submitted that by dint of Section 7 of WCMA, Appellant bears responsibility for damage caused by wildlife and in support thereof relied on *Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited* [2018] eKLR where the issue of who between the Government and the Appellant was responsible for damage caused by wildlife was settled by the Supreme Court as follows:

> " [64] The appellant urges that the Government of Kenya being the owner of the wildlife would be the suitable party to bear liability for damage occasioned by wildlife, instead of KWS. The provisions of Section 3A are very clear as to who bears the obligation to protect agriculture and animal husbandry – it is KWS. The remarks of Thomas Shearman and Amasa A. Redfield, in their book, A Treatise on the Law of Negligence, (1869) Baker, Voorhis & Co. Publishers, New York, are very insightful on this. They intricately explain who the owner of an animal is in relation to the tort of negligence and observe, at page 227, that:
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> "The owner of an animal, within the meaning of the rule, is the person who has the control of it, or whose duty it is to have such control. Presumptively, of course, the lawful owner has this control, or duty of control; but if it appears that he has not in fact, he is not responsible for the animal."
>
> [65] It follows, therefore, that though the Government would ideally be expected to have control of the wildlife, factually it was KWS which had the duty of control of the wildlife by dint of Section 3A of the Wildlife Act. Consequently, the liability for the damage occasioned falls on it.

11. On whether the court has jurisdiction to hear and determine a case such as this one, Respondent submitted that Section 25(4) and (5) which uses the word Mayand does not ouster the jurisdiction of the court and in support thereof relied on *Kenya Wildlife Service v Joseph Musyoki Kalonzo* [2017] eKLR where the Court of Appeal stated as follows:

> 13. Does the High Court have jurisdiction to deal with matters arising from the *Wildlife Conservation and Management Act*" Has Section 25 of the Act ousted the jurisdiction of the Court" Section 25 provides as follows: -
>
> 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, Maylaunch a claim to the country wildlife conservation and compensation committee within the jurisdiction established under this Act."
>
> 14. 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 a first option. This in our view was meant to ease matters for the poor people whose crops and domestic animals are ravaged 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 traveling long distances and also in terms of simplicity in lodging their claims. It could not have been meant to shut out everybody else who would 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.

15. Learned counsel for the appellant sought to distinguish the authorities cited to us on the ground that they were determined under the repealed Cap 376. It is true that Section 62(1) of the Cap 376 used the word 'May' which is permissive and not mandatory. However, Section 25 of the current Act is couched in exactly the same words. This inevitably means that those decisions made before the *Wildlife and Conservation Management Act* 2013 came into force are relevant today as they were prior to 2013. Neither the repealed Act (Cap 376) nor the current Act ousts the jurisdiction of the court to hear and determine the said matter.

16. 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 that Act. An ouster, or privative clause specifically divests the court of jurisdiction to hear or entertain any matters arising from the specific statute. In this case, 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 respondent could either lodge his claim through the Act, which he did but no remedy was forthcoming, or pursue the remedy under common law through the courts. Every person has a right to pursue a remedy under common law, for a wrong or injury suffered.

Under common law, there cannot be a wrong without a remedy - or in other words,

> " Equity will not suffer a wrong to be without a remedy" (*ubi jus ibi remedium*). The respondent suffered a wrong; he went to the appellant seeking relief and was repulsed.

Was he to remain without remedy" That would be a grave injustice. Luckily for him, he went to court, he was heard and judgment given in his favour. Where else was he expected to go after being sent away by the appellant" We find that he went to the right forum in the circumstances.

12. On whether Respondent's farm was within the jurisdiction of the Appellant, Respondent submitted that the management of national parks lies with Kenya Wildlife Service which is also the revenue collector at these parks – with the exception of the Maasai Mara National Park and in support thereof relied on *Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited* (*supra*).

13. Respondent additionally urged court to find that he had demonstrated that his land was fenced and further that the agricultural officer had explained how the value of damaged crops was arrived at and also clarified that it took him long to prepare his report since he was awaiting the compensation form.

14. Concerning prove of destroyed crops, Respondent submitted that Appellant did not deny the damage in its defence and was therefore estopped from raising it at this stage. In support of this proposition Respondent relied on *Daniel Otieno Migore v South Nyanza Sugar Co. Ltd* [2018] eKLR where the court cited with approval the Supreme Court decision in the case of *Raila Amolo Odinga & Another vs. IEBC & 2 others* (2017) eKLR that: -

> "In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings……".

15. Concerning proof of Respondent's case, Respondent urge the court to find that sufficient material was tendered in support of the claim for 12,800,000/- and that the same was appropriately awarded.

16. Finally, Respondent submitted that the only issue pleaded by the Appellant was that the incident did not occur and that that being the case, Appellant cannot at this stage be allowed to delve onto issues that were not pleaded. In support of the argument that parties are bound by their pleadings, Respondent relied on *Mary A. Onyango v South Nyanza Sugar Co.Ltd* [2019] eKLR and *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (*supra*).

Analysis and Determination

17. In carrying out its mandate, the appellate court must reconsider the evidence before it, evaluate it and draw its own conclusions.

18. In *John Onyango & another vs. Samson Luwayi* [1986] eKLR the Court of Appeal expressed itself as follows: -

> "This court will not interfere with the findings of fact of the two lower courts unless it is clear that the magistrate and the judge have so misapprehended the evidence that their conclusions are based on incorrect bases: Abdul v Rubia 1917/1918 7 EALR 73."

19. I have carefully perused the record before me, and considered the grounds of appeal and submissions on behalf of both parties and I have deduced the following issues for determination.

    1. Whether the court had jurisdiction to determine Respondent's claim
    2. Whether Appellant is responsible for damages by wildlife
    3. Whether Respondent's case was proved to the required standard

1. Jurisdiction of the court

20. The Court of Appeal decision in *Kenya Wildlife Service v Joseph Musyoki Kalonzo* (*supra*) no doubt settled the issue of jurisdiction of court when it stated that Section 25 of WCMA does not oust the

jurisdiction of the High Court or the other courts to hear any matters raised under that Act and that if the Act meant to remove those matters from the realm of the Courts, then it would have expressly stated so.

21. From the foregoing, Respondent's contention that the trial court had no jurisdiction to hear this matter is without merit and must fail.

2. Whether Appellant is responsible for damages by wildlife

22. The *Wildlife Act* provides under Section 3A, stipulates that:

> " The functions of the Service shall be to—
>
> ....
>
> (c) manage National Parks and National Reserves;
>
> (l) render services to the farming and ranching communities in Kenya necessary for the protection of agriculture and animal husbandry against destruction by wildlife."

23. The Supreme Court in *Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited* (*supra*) stated that:

> 'It cannot be gainsaid that the services to be rendered by the appellant pursuant to this provision are to ensure crops cultivated, as well as animals reared on land are protected from destruction by wildlife. Any other interpretation of this provision would be grossly narrow and simplistic...................... In the present matter Section 3A without a doubt imposes a duty on the appellant to protect the crops from destruction by wildlife."

24. The foregoing demonstrates that Appellant is accountable for any damage caused by wildlife.

3. Whether Respondent's case was proved to the required standard

25. It is trite law that "whoever alleges must prove. Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya states 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

26. In this case, Respondent had the burden to not only plead that his crops had been damaged but to also specifically prove that they were valued at the sum claimed. (See *Hahn v. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716).

27. In support of its claim, Respondent stated that he had planted 4000 stems of pawpaw and 20000 stems of tomatoes but conceded that he did not have any documentary evidence in support thereof. Joseph Murage who said he was a retired agricultural officer stated that he counted each and every of the 4000 stems of pawpaw and 20000 stems of tomatoes and recorded them in notes which he did not tender before the court.

28. It is a principle of law that a party who desires the court to award special damages, must as a matter of law, strictly prove damages to the required standard. In the case before the trial court, the evidence

by the Respondent demonstrates that he is not a peasant farmer but a large scale farmer. Whereas I would not fault a peasant farmer for not keeping records of his farming activities, a large scale farmer would be expected to have at least some evidence of the inputs and outputs from his farms. That the Respondent did not have a single receipt even for purchase of seeds, pesticides and fertilizers ought to have raised a doubt in the mind of the court concerning his claim.

29. A summary of Respondent's case demonstrates that he merely pleaded special damages and left it to the trial court to award them. That is not the strict proof that is required in law.

30. Addressing the issue of special damages in *Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited* (*supra*), the Court of Appeal observed:

> "The appellant apart from listing the alleged loss and damage, it did not...lead any evidence at all in support of the alleged loss and damage. As it were, the appellant merely threw figures at the trial court without any credible evidence in support thereof and expected the court to award them. Indeed, there was not credible documentary evidence in support of the alleged special damages."

31. And in *David Bagine v Martin Bundi* (CA No. (Nbi) 283 of 1996), the Court of Appeal, referring to the judgment by Lord Goddard CJ in *Bonhan Carter v Hyde Park Hotel Limited* [1948] 64 TLR 177), once again observed that:

> "It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the particulars and, so to speak, throw them at the head of the court saying 'this is what I have lost', I ask you to give me these damages; they have to prove it."

32. Joseph Murage would have assisted the court in determining the Respondent's claim. But as an expert witness whose evidence the Respondent hoped to carry weight, he failed to demonstrate by evidence that he is specially skilled in the agricultural field. He similarly failed to demonstrate by notes, that he had specifically counted the damaged 24000 crops as he alleged. His evidence was unconvincing and ought to have been rejected.

33. Concerning whether the court should interfere with the trial court's award, I have considered the holding in the case of *Kemfro Africa Limited t/a Meru Express Services, Gathogo Kanini v A.M.M Lubia & Another* No. 2 [1987] KLR 30 where the Court of Appeal stated as follows:

> "the principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the Judge, in assessing the damages took into account an irrelevant factor, or left out of account a relevant one, or that short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."

34. From the evidence on record, I find that the Appellant failed to discharge the burden to prove that he suffered the loss of Kshs. 12,800,000/-. I therefore find that the award was against the weight of evidence and cannot be allowed to stand.

35. In the end and for the reasons given on the foregoing analysis, I have come to the conclusion that this appeal has merit and it is allowed in the following terms:

(1) The trial court's judgment dated 29.09.2021 is set aside and substituted with an order dismissing the Respondent's suit in Meru CMCC No. 12 of 2017 with costs

(2) Respondent shall bear the costs of this appeal

DATED AT MERU THIS 23RD DAY OF JUNE 2022

WAMAE. T. W. CHERERE

JUDGE

Appearances

Court Assistant - Morris Kinoti

For Appellant - Mr. Ochieng for Hamilton, Harrison & Mathews Advocates

For Respondent - Mr. Mwirigi for Mwirigi Kaburu & Co. Advocates