



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 48A OF 2020

KENYA WILDLIFE SERVICE.....APPELLANT

VERSUS

ABRAHAM M'NGAI M'ITUMITU (SUING AS THE LEGAL REPRESENTATIVE OF THE

ESTATE JUDY GAKII M'NGAI.....RESPONDENT

JUDGMENT

Introduction

[1] This is an appeal from the decision of the Maua Chief Magistrate's Court in Civil Suit No. 178 of 2018 awarding the respondent in compensation for injury by wildlife resulting in the death of the a child *"(a) General damages of Ksh.3, 500, 000/- being the balance as provided under section 25(3) of the Wildlife Conservation and Management Act 2013 (b) special damages of Ksh.120,000/- and (c) costs of the suit and interest from the date of judgment."*

Issue for determination

[2] The Issue before the court is whether the court had jurisdiction to award the respondent damages assessed under the Wildlife Conservation and Management Act. The respondent had after filing the suit for compensation for personal injury sought and obtained payment of compensation from the appellant under section 25 of the Wildlife Conservation and Management Act in the sum of Ksh.1,500,000/-. Subsequently, the respondent Plaintiff amended the Plaintiff in the trial court to introduce 11 thereof pleading as follows:

"11. i. In or about the month of May 2016 the plaintiff filed the defendant's Compensation Claim Form in respect of the deceased's said attack but the defendant failed, refused and or neglected to compensate the plaintiff even after being issued with the demand notice as pleaded in paragraph 12 herein below thereby causing the plaintiff to file this sut.

ii. In or about June 2019, during the pendency of this suit, the Defendant herein paid to the Plaintiff a sum of One Million and Five Hundred Thousand Kenya Shillings (Kshs.1,500,000/-) but the defendant remains with an outstanding balance of Ksh.3,500,000/- since the Wildlife Management and Conservation Act 2013 provides Five Million Kenya Shillings (Kshs.5,000,000/-) as compensation for death of a person which amount the plaintiff is claiming from the defendant." (sic)

Based on the amendment, the respondent Plaintiff prayed for "General damages as provided for under section 25 of the Wildlife Management and Conservation Act 2013 less the amount that was paid to the plaintiff in or about June 2019 as pleaded under paragraph 11 herein above."

[3] After full trial of the matter, the trial court ruled on the claim as follows:

"The defendant ... submitted that this court is not the proper forum to determine this matter and is an abuse of the court process. It is true that section 25 of the Wildlife Conservation and Management Act 2013 provides that a party may come to court or file a complaint before County Wildlife Conservation Committee. In the instant case of the plaintiff filed the said complaint and was received by the defendant on the 9th march 2016 while this suit was filed in December 2016. The Committee did not communicate to the plaintiff until June 2019 when they paid him ksh.1,500,000/-. This lead to the amendment of the Plaintiff.

Section 25(3) of the said Act provides for compensation to be awarded in case of fatal injury to be Ksh.5,000,000/-. The Act does not indicate whether the said amount is maximum that can be awarded or minimum. In my understanding and taking the literal

meaning of the said provisions, the amount to be awarded in case of death is Ksh.5,000,000/- not a penny more or less. I will therefore proceed to award the plaintiff Ksh.3,500,000/- being the balance of the general damages.”

The Appeal

[4] The Memorandum of Appeal dated 29th June 2020 challenged the trial court’s decision on several grounds as follows:

- “1. The learned Resident Magistrate erred in law and fact in proceeding to adjudicate upon a matter in which the said court lacked the requisite Jurisdiction to hear and determine.
2. The learned Resident Magistrate erred in law and fact in failing to find that by going to the said court with his suit, the Respondent had violated the law as laid down under the express provisions of section 25 of the Wildlife Conservation and Management Act, 2013 as read together with section 117 of the Act.
3. The learned Resident Magistrate misapplied and/or misapprehended the law in proceeding to make an award of general damages to the Respondent under statute while the Respondent’s claim as presented before court was purely a common law claim.
4. The learned Resident Magistrate misdirected herself into usurping the powers of the Cabinet Secretary in Charge of environment in basing her award on the provisions of section 25 (3) of the Wildlife Conservation and Management Act, 2013, yet the Respondent’s claim had not been presented in the manner prescribed under section 25 (1) of the said Act.
5. The learned Resident Magistrate erred in Law and fact in making an award of general damages in the sum of Kshs.5,000,000/- (Five Million) in favour of the Respondent, whereas the Respondent had already been fully compensated by the County Wildlife Conservation Committee in June 2019 at the tune of Kshs.1,500,000/- and the Respondent never appealed against the said award.
6. The learned Resident Magistrate misdirected herself into arriving at a decision and Judgment that was obviously wrong and against the law, and also against the weight of evidence offered at the hearing.
7. The learned Resident Magistrate erred in law and fact in failing to consider the written submissions, tendered by the Appellant’s counsel and in failing to consider the legal Authorities tendered therewith.”

[5] Counsel for the parties filed written submissions on their respective contentions on the dispute before the court, citing case-law and statutory authorities.

Determination

[6] The question determined in the decision of the Court of Appeal relied on by both sides, **Kenya Wildlife Service v Joseph Musyoki Kalonzo** [2017] eKLR, is primarily whether section 25 ousts jurisdiction of the court. In that decision the Court of Appeal (Visram, Karanja & Koome, JJA), the issue of the ouster of jurisdiction of the courts and the liability of the appellant in negligence for injury to persons or destruction of property by wild animals under its charge was dealt with conclusively and remarkably 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, MAY launch 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.

18. On the consent order on liability, we need to clarify that parties cannot confer jurisdiction on the court where there is none or can have none, even if it is by consent.

See this Court’s decision on **Mercy Kirito Mutegi vs Beatrice Nkatha Nyaga & 2 Others (2013) eKLR**. Jurisdiction is conferred either by the constitution or by statute and cannot be conferred by the parties where no such jurisdiction exists. It is pertinent to note however that it was not on the basis of the consent order that the court assumed jurisdiction to hear the matter herein. The court had jurisdiction to entertain the matter regardless of the consent on liability.

19. Before we conclude, we would like to observe that the appellant has dwelt at length in its submission on an issue that was not raised before the High Court at all. This is the question as to whether it has the duty to pay compensation or not. We must admit we found this submission self-defeating.

The appellant admits the duty to manage and conserve wildlife. That duty comes with the attendant responsibility to shoulder any claims of loss or damage caused by the breach of that duty. The law on this point as succinctly pronounced in **Joseph Boru Ngera & Another vs Kenya Wildlife Service vs Rift Valley Agricultural Contractors Limited [2014] eKLR** among others is still good law on this point.”

[7] The Question for the court in this appeal, however, is whether the court had jurisdiction under section 25 to make the award it made, not whether in addition to the mechanism under the Act, the civil court has jurisdiction in common law to make compensation. The question whether the appellant had a duty to pay compensation which is positively determined by the Court of Appeal in **Kalonzo**, supra, arises only after the jurisdiction of the court to make the award is settled.

[8] Had the court on the usual principles of the law of negligence of breach of duty of care occasioning the plaintiff injury determined that damages in the sum awarded was payable by the appellant defendant upon assessment on the common law principles governing award of damages in fatal accidents, and there would have been, in my respectful view, no cause for complain if the plaintiff did not thereby achieve a double compensation for the same injury.

[9] However, the court in this case purported to assess and award damages in accordance with section 25, and the issue then arose whether the court could validly do that under the provision.

[10] Section 25 of the Wildlife Conservation and Management Act 2013 is in the following terms:

“Compensation

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, 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.

(4) Any person who suffers loss or damage to crops, livestock or other property from wildlife specified in the Seventh Schedule hereof and subject to the rules made by the Cabinet Secretary, may submit a claim to the County Wildlife Conservation and

Compensation Committee who shall verify the claim and make recommendations as appropriate and submit it to the Service for due consideration.

(5) The County Wildlife Conservation and Compensation Committee shall review the claim and award and pay a compensation valued at the ruling market rates:

Provided that no compensation shall be paid where the owner of the livestock, crops or other property failed to take reasonable measures, to protect such crops, livestock or property from damage by wildlife or his land use practices are in compatible with the ecosystem-based management plan for the area.

(6) 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.

(7) The Cabinet Secretary may, by notice in the Gazette, prescribe such regulations and guidelines as are necessary and appropriate to carry out the purposes of this section.”

Conclusion

[11] Clearly, the appellant having awarded an amount under the Act, further intervention in court could only have been by the appeal process following upon the provision of the section, that is to say through the mechanism of a first appeal to the tribunal and thereafter a second appeal to the Environment and Land Court. The respondent may have opted to pursue its claim for compensation in negligence for damages for personal injury in the civil court as an alternative to the statutory compensation mechanism. Without deciding, I would consider that the respondent may also have pursued judicial review remedy in the High Court, if so advised by his advocates, for the award of the full award of compensation prescribed under the Act. The respondent may also, as he may be advised by his legal advisors, file an application for extension of time to pursue the appeal process set out in section 25 (6) of the Act. The court is not without sympathy for the family of the deceased but it considers that the procedure for the pursuit of compensation therefor was wrong, and the court acted without jurisdiction.

[12] Having opted to pursue and accepted compensation under the Statute, the respondent plaintiff disentitled herself of the claim in negligence in the civil court. As held in *KWS v. Kalonzo*, supra, the mechanism for compensation under section 25 of the Act and the forum of the court are options that a claimant may choose to employ in the pursuit of compensation for injury or damage by wildlife. In awarding damages for personal injury in the civil suit for the amounts set out under the mechanism of the statute, the Wildlife Conservation and Management Act, the trial court, with respect, fell into error.

[13] Consequently, this court must return a verdict of want of jurisdiction of the Magistrate’s Court to award compensation under section 25 of the Wildlife Conservation and Management Act 2013, and therefore allow the appeal as prayed by the appellant.

[14] In view of the finding of want of jurisdiction on the part of the trial court to award under section 25 of the Act, it is not necessary to determine whether the judgment of the trial court was formally valid in terms of its contents as required by Order 21 Rule 4 of the Civil Procedure Rules.

Orders

[15] Accordingly, for the reasons set out above, the court allows this appeal as prayed. The judgment in the suit before the trial court in Maua Chief Magistrate’s Court Civil Case No. 178 of 2016 is set aside. The respondent’s said suit against the appellant is dismissed. However, as the respondent plaintiff was innocent of the trial court’s error of law in assuming jurisdiction in the matter to award compensation under the Wildlife Conservation and Management Act, there shall be no order as to costs before the trial court and in this court on appeal.
Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF JANUARY 2021.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Mithega & Kariuki Advocates for the Appellant

M/S Ngunjiri Michael & Co Advocates for the Respondents.