



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU
CIVIL APPEAL NO. 49 OF 2017

(Arising from the Ruling of Hon. L. Ambasi (CM) delivered
on 9th May 2017 in Meru CMCC No. 141 of 2016)

(CORAM: F. GIKONYO J.)

KENYA WILDLIFE SERVICES.....APPELLANT

-Versus-

KINYUA IKABU.....RESPONDENT

JUDGMENT

[1] This appeal emanates from the Ruling on the Preliminary Objection raised by the Appellant herein, contesting the jurisdiction of the trial Court in this matter.

[2] On 2nd June 2014 the Plaintiff was on his way home from church when at Kambakia, a baboon brutally attacked him and caused serious injuries. The plaintiff, the respondent herein subsequently filed suit claiming special damages, general damages for pain and suffering and loss of amenities. He accused the Appellant for negligence and specifically failing to watch its wildlife to prevent wildlife- human conflict, allowing its wildlife to leave its designated area to injure the plaintiff and allowing a baboon to attack and injure the plaintiff.

[3] The appellant filed its statement of defence on 6th June 2016 and denied liability, pleading the principle of contributory negligence. Before the suit was listed for hearing the appellant filed a preliminary objection dated 6th October 2016 challenging the jurisdiction of the Court to determine matters covered by the Wildlife conservation and Management Act (*herein also referred to as "the Act"*). The preliminary objection was nonetheless dismissed by the Ruling rendered by the trial Magistrate on 9th May 2017.

[4] By the aforesaid Ruling the Trial Magistrate held that by virtue of Section 6 and 18 of the Act, Kenya Wildlife Service is capable of being sued and also has a mandate to make compensation for damage caused by wildlife and whereas section 25 of the Act establishes an elaborate compensation procedure it is a matter of judicial notice that in many instances KWS has failed, refused to set up such committees aforesaid leaving plaintiffs seeking refuge in the Courts. The trial Magistrate relied on the following cited cases; **Kenya wildlife Services & Rift Valley Agricultural Contractors Ltd Civil Appeal No. 212 of 2013- Nakuru, the Joseph Boro Ngera Case and Joseph Musyoki Kalonzo vrs Kenya Wildlife Services in the High Court of Kenya at Garissa-Civil Case No. 5 of 2014.**

[5] The Appellant being aggrieved by the Ruling provoked this appeal based on five (5) grounds of appeal in his Memorandum of Appeal. The said grounds may were enumerated as hereunder;

a. The learned Magistrate erred in law and fact in failing to appreciate that the provisions of Section 25 of the Wildlife Conservation and Management Act, 2013 hence dismissing a meritorious application by the Defendant/ Appellant.

b. The learned Magistrate erred in law and in fact in that totally failing to appreciate the primary issue of the Appellants general administrative mandate primarily meant for protection, conservation and management of wildlife and to compensate the victims of human wildlife conflicts at all that was raised in the application and authorities cited in support of the same.

c. The learned Trial Magistrate erred in law and in fact in failing to consider useful authorities on principles that where the law provides for procedure to be followed, the parties are bound to follow the procedure as laid down and cannot resort to a court of law as the court would have no jurisdiction to entertain the dispute

d. That the learned Trial Magistrate erred in law and in fact in her Ruling by failing to totally address her mind as regards the gravity of the issue raised by the appellant and the submissions filed by the appellant.

e. That the decision of the learned Trial Magistrate is against settled principles of the law.

[6] Following directions by the Court on 12/6/2018 parties filed their respective submissions.

Appellant's submissions

[7] The Appellant filed its submissions on 11th July 2018 wherein it submitted that the Section 25 of the Act provided a very clear and straight forward way of compensation to the victims of Environmental Conflict. In fact this kind of Conflict falls under the realm of Environmental conflict arising out of the realm of human-wild animal's conflict. If the legislatures intention was to have the disputes to go to court, they would not have provided for the clear mechanisms of compensation which is actually very cheap compared to the litigious nature of the Court process. That section 25 provides a clear and elaborate procedure that must be followed before moving the court and that original proceedings filed in Court are fatally defective for want of jurisdiction. Some of the authorities he relied on are **Narok County Council vrs Transmara County Council & Anor Civil Appeal No. 25 of 2000, Owners of the Motor Vessel "Lillian S" vrs Caltex Oil Kenya Ltd (1989)Klr1, Samuel Kamau Macharia & Anor vrsd Kenya Commercial Bank Ltd, Re Continental Credit Finance Ltd Nairobi (Milimani) HCCC No.29 of 1986 (2003) 2 EA 399 & Nakuru Civil Appeal No. 260 of 2014 Peter Muturi Njuguna Vrs Kenya Wildlife Service.**

Respondent's submissions

[8] The Respondent filed his Submissions on 2nd August 2018 wherein he submitted that the suit does not offend the provisions of Section 25 of the Act as claimed by the Appellants. He averred that by dint of Section 6 and 18 of the Act the Appellant is capable of being sued and has mandate to compensate for damages caused by the wildlife. That section 25 is permissive and uses the word "may". The respondent or any person injured by wild animals under no compulsion to lodge his claim with the County Committee. That the claim is tortious in nature and thus involves the common law obligation under the principles of *Donghouevrs Stevenson (1932) UKHC&Rylands Vrs Fletcher (1886) LR 1 EX* on the part of the defendant to compensate the plaintiff herein for injuries and damages caused. Some of the Authorities he relied on were **Joseph Boro Njenga & Superduka Nakuru Ltd vs. Kenya Wildlife Service Civil Appeal No. 171 of 1997, Joseph Munyiki Kalonzo vs. Kenya Wildlife Service's 2015 eKlr, Peter Wesonga Laktar vs. Bomas of Kenya Ltd (2003) and Katsuri & Sons Vrs Salivates Caren Air (1964) Sc 444.**

ANALYSIS AND DETERMINATION

[9] I should determine:-

a. Whether the learned Trial court has jurisdiction to try this matter. Thereto, I shall consider matters such as; (1) interpretation of Section 25 of the Wildlife Conservation and Management Act; and (2) the Appellants' administrative duties of managing and protecting wildlife as opposed to compensation of victims; and

b. Whether the learned failed to consider the Applicable principles and authorities and the submissions filed by the Appellant.

Body corporate

[10] **Section 6 of the Act** establishes the Kenya Wildlife Service as a body Corporate capable of suing and being sued.

Committees

[11] **Section 18** establishes the County Wildlife Conservation and Compensation Committees whereas **Section 19** lists its Functions to be among others;

(h) develop and implement in collaboration with the community wildlife associations, mechanisms for mitigation of human wildlife conflict

(i) Review and recommend claims resulting from loss of damage caused by wildlife for payment of compensation

[12] **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. Section 25 provides for the procedure in Compensation for personal injury or death or damage to property the same provides;

25. Compensation for personal injury or death or damage to property

(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.

[13] From the provisions cited above, the Appellant is a body corporate with capacity of suing and being sued. Its mandate inter alia is to make compensation for damage caused by wildlife. See Section 18 and 19.

Court's jurisdiction

[14] I will begin by stating that section 25 of the Act only limits the claim 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.

[15] The plaintiff/Respondent herein was attacked by a baboon which does not fall among the categories enumerated under Section 25 as read with the 3rd Schedule.

[16] For a proper analysis and interpretation of Section 25 to ensue, established rules of Legislative interpretation as opined in the case of **Law Society of Kenya v Kenya Revenue Authority & another [2017] eKLR** is a sure guide. The Court held;

Words spoken or written are the means of communication. Where they are possible of giving one and only one meaning there is no problem. But where there is a possibility of two meanings, a problem arises and the real intention is to be sorted out. The Legislature, after enacting statutes becomes functus officio so far as those statutes are concerned. It is not their function to interpret the statutes. Thus two functions are clearly demarcated. Legislature enacts and the Judges interpret. The difficulty with Judges is that they cannot say that they do not understand a particular provision of an enactment. They have to interpret in one way or another. They cannot remand or refer back the matter to the Legislature for interpretation. That situation led to the birth of principles of interpretation to find out the real intent of the Legislature. Consequently, the Superior Courts had to give the rules of interpretation to ease ambiguities, inconsistencies, contradictions or lacunas. The rules of interpretation come into play only where clarity or precision in the provisions of the statute are found missing.

Therefore, a court must try to determine how a statute should be enforced, but I am alive to the fact that in constructing a statute, the court can make sweeping changes in the operation of the law so this judicial power should be exercised carefully. There are numerous rules of interpreting a statute, but in my view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive. Thus, when the words of a statute are unambiguous, then this first canon is also the last, judicial inquiry is complete.

See also **Joseph Njuguna Mwaura & 2 others vs. Republic (2013) eKLR**.

[17] For instance, in **Mercy Kirito Mutegi vs. Beatrice Nkatha Nyaga & 2 others** the Court agreed Section 30 of the Elections Act uses a passive word “may” and not “shall” hence the same speaks for itself that it is not a must that every candidate must have an agent in every polling station relevant to their election. Hence the failure to have an agent cannot be a ground to nullify an election.

[18] More specific interpretation hints; in **Kenya Wildlife Services vs. Joseph Musyoki Kalonzo Nairobi C.A. No.306 of 2015** the Court analysed 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 would prefer to pursue their claims. 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.

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.

[20] Courts were guided by the decision in **Kenya Wildlife Services vs. Joseph Musyoki Kalonzo (supra)**. See **Rose Ndinda vs Kenya Wildlife Services (2018) eKLR** where the court observed that;

“.....jurisdiction in civil claims is determined on the value of the claim. The Court of Appeal in the JOSEPH MUNYOKI KALONZO case was dealing with a High Court judgment where the judge had found that the court had no jurisdiction in wildlife compensation matters. However, the Court of Appeal addressed the issue of jurisdiction of courts generally. In that case, it was held that both the High Court and the magistrates courts have jurisdiction to deal with wildlife injury compensation cases. The magistrate’s court is only limited by the pecuniary jurisdiction of the particular rank of the magistrate concerned.

The relevant law confers jurisdiction of adjudicating on matters of compensation for injury by animal exclusively on the magistrates and the High Court but not under the Environment and Land Court as stated by the learned magistrate.....”

Of duties of KWS

[21] The question now before me as to whether KWS generally has administrative duties of managing and protecting wildlife and not Compensation of victims was answered by the Supreme Court in the case of **Kenya Wildlife Service vs. Rift Valley Agricultural Contractors Limited [2018] eKLR** that;

[66] A global comparison of laws and jurisprudence relating to animal and wildlife management normally provide that an entity charged with such a management task also collects the revenues generated from activities relating to the same. The rationale being that such revenue supports the costs of management and any related outcomes, including compensation for damage made by animals and wildlife. The architecture of the current law in Kenya – the Wildlife Conservation and Management Act No.47 of 2013, follows this rational principle – 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. In the case of Maasai Mara, although the management of the park lies with Kenya Wildlife Services, the recipient of revenue collection belongs to the County of Narok. The Wildlife Act gives responsibility to Kenya Wildlife Service as the Park revenue collector to compensate for damage occasioned by wild animals. Indeed, this has been the procedure in all other parks in Kenya. However, the instant case before the court is an interesting one, where Kenya Wildlife Service which does not collect revenue from the Maasai Mara but has been found liable for compensation by dint of the law. The county that receives this revenue is not liable. When therefore, the issue of compensation is raised, its application and resolution appears disjointed compared to the norm as practiced elsewhere in the country and indeed the world. We deem it fit to recommend that this is a dilemma that ought to be studied and possibly remedied by Parliament.

[67] Further we also make note that whereas compensation for damage occasioned by wildlife has been devolved to counties under section 18 of the Wildlife Conservation and Management Act: still compensation for loss to crops, livestock or other property from wildlife is subject to the rules made by the Cabinet secretary, which have not yet been enacted. Similarly, the Wildlife Conservation and Management (Compensation Scheme) Regulation 2015 which contemplate how to deal with claims for human death or injury and crop and property damage caused by wildlife, is yet to be implemented. There is therefore urgent need for parliament to pass into law the said regulations to make the compensation process provided for in the Act functional.

[22] To this day, parliament is yet to make regulations towards implementation of the Wildlife Conservation and Management (Compensation Scheme) Regulation 2015. Hence, appellants still have the mandate to award compensations to persons injured due to the human-wildlife conflict.

[23] I have cited ample judicial authorities in this appeal. Now I am properly grounded to make a conclusion. Accordingly, I therefore find that the Trial Magistrate was right in retaining jurisdiction to hear and determine the suit. This is further guided by the pleadings where the Plaintiff pleaded a tort of “negligence” which equally falls within the jurisdiction of the trial Court and by virtue of Section 6, 18 and 25 of the Act that prescribes injuries occasioning permanent disability at Kshs three million and other injuries at Kshs two million. Section 7 of the Magistrates Court Act 2015 confers the Magistrates court with jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed Kshs. Twenty Million. The third Schedule does not also grant the Committee jurisdiction to handle matters that relate to an attack by a baboon hence the same shall fall within the ambit of the Magistrates Court.

[21] The Appellant has also alleged that the Trial Magistrate did not consider its submissions in his Ruling. However in it’s Ruling the trial Court held;

“.....In their written submissions, Learned Counsel for the Defendants has dwelt at length with the provisions of Section 25 of the Wildlife Conversation and Management Act and asserted that this court is the wrong forum to adjudicate in this matter.

In my view, in the circumstances of this case, he is wrong. Firstly learned Counsel and defendant did not raise that issue in their defence or pleadings. They also did not raise it in their Statement of defence. Lastly 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] It is therefore clear that the trial Magistrate considered the submissions of the Appellant/Defendant in her Ruling.

[23] In conclusion therefore this Appeal lacks merit and to this end the same is dismissed with Costs to the Respondent

Dated, signed and delivered in open court at Meru this 24th day of January, 2019

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F. GIKONYO

JUDGE

In presence of:-

M/S Nyaga for applicant

F.K Gitonga for respondent – absent

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F. GIKONYO

JUDGE