



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 33 OF 2017

ALEX MACHARIA.....APPELLANT

-VERSUS-

KENYA WILDLIFE SERVICE.....RESPONDENT

(Being an appeal against the ruling delivered by Honourable D.O. Mbeja Mr. (SRM) on 23rd January, 2017 in CMCC NO. 566 OF 2015)

JUDGEMENT

1. The appellant who was the plaintiff in CMCC NO. 566 OF 2015 filed a suit on 9th February, 2015 seeking for general and special damages against the respondent.
2. The appellant pleaded that sometime on or about the 20th of January, 2014, while lawfully walking along Maili Saba-Muoroto in Kayole, he was attacked by a hippopotamus and as a result he sustained bodily injuries.
3. It was further pleaded by the appellant that the injuries sustained were occasioned by the negligence/breach of statutory duty of care by the respondent.
4. Upon entering appearance and filing its statement of defence, the respondent raised a Preliminary Objection dated 17th June, 2015 in essence challenging the trial court's jurisdiction to entertain the matter and further contending that the suit is an abuse of the court process and the provisions of the Wildlife Conservation & Management Act.
5. In resistance, the appellant filed Grounds of Opposition indicating inter alia that not only does the trial court have the requisite jurisdiction over the matter, but that the Preliminary Objection in no way specifies the statutory provisions that have been violated and/or the nature of such violation.
6. The parties filed written submissions on the same and eventually, the respondent's Preliminary Objection was upheld by the trial court vide its ruling of 23rd January, 2017.
7. The aforesaid ruling is the subject of this appeal. The appellant put forward the following grounds on appeal:
 - i. THAT the learned trial magistrate erred in law by upholding the respondent's preliminary objection against the weight of evidence.***
 - ii. THAT the learned trial magistrate erred in law and in fact by failing to appreciate precedents set up by the superior court on the question of the jurisdiction of the courts under the Wildlife Conservation and Management Act No. 47 of 2013.***
 - iii. THAT the learned trial magistrate erred in law and in fact by holding that the suit was not supposed to be instituted in court.***
 - iv. THAT the learned trial magistrate erred in law and in fact by not appreciating the interpretation of superior courts on the jurisdiction of the court.***
 - v. THAT the learned trial magistrate erred in law and in fact by narrowly interpreting the statute as to lead to a mischief.***

8. The parties consented to having the appeal canvassed by way of written submissions. This court has considered the filed submissions in line with the grounds of appeal. This court has also re-evaluated the arguments presented in support and against the preliminary objection before the trial court.

9. The appellant firstly, submits that he provided evidence before the trial court by way of letters dated 23rd July, 2014 and 21st November, 2014 as proof of his attempts to lodge a claim with the County Wildlife Conservation and Compensation Committee (*the Committee*) pursuant to Section 25(1) of the Wildlife Conservation and Management Act, 2013 (*the Act*) but that the same were not considered by the trial court.

10. In response, the respondent argued that the appellant did not submit any evidence to show that he had filed a claim with the aforesaid Committee.

11. The learned trial magistrate in his ruling stated that the court's jurisdiction was being challenged in view of the fact that the Act under Section 25 provides for a system of compensation for persons injured or killed by wildlife.

12. The proceedings of the trial court show that no evidence was availed to the trial court at the preliminary stage for consideration, though the letters referred to by the appellant hereinabove constitute his filed list and bundle of documents in the main suit.

13. In view of the foregoing, I find that since the objection on the premise of jurisdiction was raised at the preliminary stage and no prior reference was made to the aforesaid letters, the learned trial magistrate was not bound to consider the letters in determining whether or not it had jurisdiction. There is also nothing to show that the parties' submissions and authorities were not considered therefore ground cannot stand.

14. On the subject of grounds (ii) and (iv), the appellant basically submit that the issue of jurisdiction in a situation such as this has already been settled by the courts, citing inter alia the case of *Joseph Munyoki Kalonzo v Kenya Wildlife Services [2015] eKLR* where the High Court held that Section 25 (1) of the Act is merely permissive and does not necessarily take away the jurisdiction of the courts to handle cases of such nature. The appellant also argued that the above reasoning was upheld on appeal and has been reinforced in subsequent decisions. In the circumstances, the appellant has urged this court to interfere with the trial court's finding and dismiss the same. The respondent did not address this court over the issue.

15. In his ruling, the learned trial magistrate indicated that he had considered the parties' submissions together with the cited authorities, and thereafter went ahead to determine that the dispute is one which ought to be heard and determined by the Committee as established under the Act.

16. Upon reviewing the parties' rival arguments, authorities and resulting ruling, I am convinced that the learned trial magistrate overlooked the analysis made in the relevant judicial precedents, including the above-cited case of *Joseph Munyoki Kalonzo v Kenya Wildlife Services [2015] eKLR*. In the aforesaid case, the issue touching on jurisdiction was exhaustively determined, had the learned trial magistrate taken time to consider the material placed before him he would have arrived at the conclusion that the provision providing for a committee to determine the issue did not oust the jurisdiction of the court.

17. In grounds (iii) and (v) of appeal the appellant contends that Section 25(1) of the Act is merely permissive and does not oust the jurisdiction of courts therefore the trial court erred in finding that it lacked jurisdiction to entertain the suit.

18. On the other hand is the respondent's contention that the learned trial magistrate correctly applied his mind to the provisions of the Act in finding that it lacks jurisdiction over the matter.

19. The respondent also argues that the wording of the Act is such that a claim can only come before the courts without going through the Committee in exceptional circumstances and that subjecting a claim to the Committee is aimed at assisting in the expeditious and affordable disposal of cases, adding that in instances where a specific procedure for redress has been established, the same should be strictly followed.

20. I have looked at the parties' submissions filed before the trial court. =The learned trial magistrate stated in his ruling that by dint of the Act, the appellant's suit ought not to have been filed in court. Section 25(1) of the Act stats:

"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 assignee, may launch a claim to the County Wildlife Conservation and Compensation Committee within the jurisdiction established under this Act."

Sub-section 3 of the said Act stipulates 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."

21. It is evident from the above that a specific procedure for seeking redress has been set out in the Act. On that basis, I concur with the respondent that where there exists a specific procedure in the law, the same ought to be strictly followed. This was the reasoning taken by the respective courts in *Peter Muturi Njuguna v Kenya Wildlife Service [2017] eKLR* and *Speaker of the National Assembly v James Njenga Karume [1992] eKLR*.

22. The appellant maintained that he had attempted to comply with the provisions of Section 25 of the Act. The record of appeal shows that the appellant had previously written to the respondent and Committee seeking compensation for the injuries sustained as a result of the hippo attack though it remains uncertain whether the same elicited a response.

23. Suffice it to say that the question remains whether the existence of a specific procedure such as the one applicable herein precludes a party from instituting a suit in court.

24. In answering this question, the Court of Appeal in *Kenya Wildlife Service v Joseph Musyoki Kalonzo [2017] eKLR*

stated 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 a first option...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.”

25. In the premises, I find that the learned trial magistrate misdirected himself in his finding on the lack of jurisdiction and subsequently, in allowing the preliminary objection.

26. In the end, this appeal is found to be meritorious. The same is allowed. Consequently, the order dismissing the appellant’s suit issued on 23.1.2017 is set aside and is substituted with an order dismissing the respondent’s preliminary objection dated 17.6.2015. The suit is reinstated to be heard and determined on its merits by another magistrate of competent jurisdiction other than Hon. D. O. Mbeja on priority basis. The appellant to have costs of the appeal.

Dated, Signed and Delivered at Nairobi this 31st day of May, 2019.

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J.K. SERGON

JUDGE

In the presence of:

.....for the Appellant

.....for the Respondent