



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 78 OF 2018

KENYA WILDLIFE SERVICES.....APPELLANT

-VS-

KURURA BULLE KUSSEN GALGALO.....RESPONDENT

(Being appeals from the Ruling and Order of Hon. Samwel Mungai (CM) delivered on 3rd July, 2018 in Isiolo Civil Suit No. 16 of 2017)

J U D G M E N T

1. This is an appeal from the ruling on the Notice of Motion dated 7th November 2017 by the appellant. In the motion, the appellant contested the jurisdiction of the trial court to hear and determine the claim lodged by the respondent who was the Plaintiff before the trial Court.
2. The respondent is a farmer in Burat Area in Isiolo County who cultivate a variety of crops that include maize, beans, sweet potatoes, tomatoes and onions. He filed a suit before the trial court alleging that on 22nd November, 2014, a herd of elephants strayed from the nearby Samburu National Park, invaded his farm thereby trampling and destroying his crops.
3. He claimed special damages as compensation for the aforesaid damages to his crops. He accused the appellant for negligence and for, *inter alia*, failing to watch its wildlife to prevent wildlife-human conflict, allowing its wildlife to leave its designated area to injure him.
4. The appellant filed its statements of defence on 4th August 2017 and denied liability and pleaded contributory negligence. It also denied the jurisdiction of the court claiming that the respondent's claim was to be handled by the County Wildlife Committee and if such claim remains unresolved, in the National Environment Tribunal.
5. Pursuant thereto, the appellant took out a Motion on Notice dated 7th November, 2017 challenging the jurisdiction of the trial court to hear and determine matters covered by the **Wildlife Conservation and Management Act, 2013** (*hereinafter* "WCMA"). By a ruling dated 3rd July, 2018, the trial court dismissed the said Motion and held that it had jurisdiction to entertain the suit.
6. Being aggrieved by that decision, the appellant this appeal and Civil Appeal Nos. 79,80 and 81 of 2018. The outcome of this appeal will apply to those appeals. The appellant set out four grounds of appeal as follows:-
 - a) ***the Learned Magistrate erred in law in dismissing the appellant's application dated 7th November, 2017 which sought to strike out the suit;***
 - b) ***the learned magistrate erred in law in relying on the cases of Rift Valley Agricultural Contractors Petition No. 11 of 2015 and Joseph Boru Ngera and another v Kenya Wildlife Service Civil Appeal No. 171 of 1997 which were decided on the basis of Section 3A of the repealed Wildlife Conservation and Management Act Cap 376;***
 - c) ***the learned magistrate erred in holding that the appellant was obligated to support farmers and ranching communities to protect their crops and livestock from loss occasioned by wildlife when in fact there is no such obligation under the Wildlife Management and Conservation Act, 2013; and***
 - d) ***the learned magistrate erred in law by failing to consider the Court of Appeal decisions particularly in the case of Peter Muturi Njuguna v Kenya Wildlife Service Civil Appeal No. 260 of 2013 and Speaker of the National Assembly v Karume 1KLR EP for the proposition that a party ought to first exhaust statutory dispute resolution mechanisms before making a claim to court.***

7. The appeal was canvassed by way of written submissions which I have carefully considered. This being a first appeal, the court is enjoined to re-evaluate the evidence on record and draw its own independent conclusions and findings. See **Selle v Associated Motor Boat Company**

8. From the grounds of appeal and the submissions of learned counsel, the issues for determination are; ***whether the trial court has jurisdiction to determine matters covered under the WCMA.***
9. The appellant's contention was that the trial court lacked jurisdiction in light of the fact that WCMA had a detailed dispute mechanism system which should have first been resorted to. The decision in the **Speaker of the National Assembly v. Karume [2008] (supra)** was relied on for that submission. It was the appellant's contention that ***sections 25 and 62 of WCMA*** precluded the trial court from assuming jurisdiction in this matter. The respondent was of a different view.
10. There was no dispute that ***section 25 of WCMA*** sets out a dispute resolution mechanism. Under that section, any person who suffers bodily injury or loss and damage to his crops is to lodge his claim with the County Wildlife Conservation and Compensation Committee whose decision is appealable to the National Environment Tribunal and thereafter to the Environment and Land Court.
11. I am in agreement with the appellant that where the Constitution or an act of Parliament prescribes a procedure for the redress of any particular grievance, that procedure should strictly be followed. **See the Speaker of the National Assembly v. Karume (supra) and Diana Kethi Kilonzo v IEBC & 2 others [2013] eKLR.**
12. However, I should point out here that, the provisions of the Constitution and the statute that were under consideration in the above decisions were mandatory in terms. There was use of the term "shall" as opposed to the use of the permissive term "may".
13. I am aware that the Court of Appeal did in **Peter Muturi Njuguna v. Kenya Wildlife Service [2017] eKLR** hold that the term "may" in ***section 25 of WCMA*** compels an aggrieved party to first exhaust the dispute resolution procedure therein before coming to court.
14. However, the same court had in **Kenya Wildlife Service v. Joseph Musyoki Kalonzo [2017] eKLR** held:-

"Has Section 25 of the Act ousted the jurisdiction of the Court? ...

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 the first option. .. It could not have 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.

...

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.

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...

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.

15. 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 of 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 express as to that effect not by implication.
16. 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 has suffered loss and damage to have the first option of approaching the County Wildlife Conservation and Compensation Committee.
17. It should be noted that the Plaintiff first approached the appellant by filling the necessary forms. But there was no response from them. The respondent was not directed where to take his claim. If he waited further, he would have been confronted with the danger of limitation. He took the right decision.
18. Although the trial court wrongly relied on the decisions of the Court of Appeal and the Supreme Court in **Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited [2018] eKLR**, which were dealing with ***section 3 of the repealed Act***, for the foregoing reasons, the trial court nevertheless arrived at the right decision.

19. In the circumstances, I find the appeal to be without merit and dismiss the same with costs.

20. This judgment will apply to **CA Nos. 79, 80 and 81 of 2018**, respectively.

It is so decreed.

DATED and DELIVERED at Meru this 30th day of May, 2019.

A. MABEYA

JUDGE