



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VOI**

**HIGH COURT CIVIL APPEAL NO. 8 OF 2017**

**BETWEEN:**

**KENYA WILDLIFE SERVICE.....APPELLANT**

**AND**

**BERNARD KATAMBO MAJHOSA**

**(Suing as the Guardian ad Litem of and for the**

**ESTATE OF JACKSON MWACHAZI MAJHOSA.....1st RESPONDENT**

***Being an appeal from the decisions of Hon Elena Nderitu SPM in Civil***

***Case No 54 of 2013 delivered in the SPM's Court in Voi on 27 March 2017***

**JUDGMENT**

1. The Appeal herein was commenced by the filing of a Memorandum of Appeal filed on 26th April 2017. The Appeal was brought in relation the whole of the Ruling and Order of Hon Elena Nderitu SPM as she then was, delivered on 25th March 2017 in Voi PMCC No 54 of 2017. The Appeal was brought on the following grounds:

*"1. THAT the Learned Trial Magistrate erred in law and in fact in arbitrarily ordering that the decision in Voi PMCC No 59 of 2015 with regard to jurisdiction would apply in this case when the parties, and circumstances were/are not the same as in Vboi PMCC 59 of 2015.*

*2. THAT the Learned Trial Magistrate erred in law and in fact in ordering that Submissions in respect of the Preliminary Objection challenging the Court's jurisdiction to deal with this case be filed, and when Submissions were filed, failing to read, consider, and write a reasoned ruling thereof, but instead ordering that the decision in Voi PMCC No 59 of 2015 on the issue of jurisdiction to apply without the consent of the Appellant.*

*3. THAT the Learned Trial Magistrate erred in law and in fact by holding impliedly that she had jurisdiction to determine the issues arising in Voi PMCC No 54 of 2013 touching on compensation for personal injuries allegedly inflicted by a wild animal when such jurisdiction by dint of Section 25 of the Wildlife conservation & Management Act 2013 vested in the County Wildlife Conservation & Compensation Committee and the Cabinet Secretary responsible for matters relating to wildlife.*

*4. THAT the Learned Trial Magistrate erred in law and in fact in failing to be bound by decisions of Superior Courts cited to her in the Appellant's Submissions dated 25/3/2017 ie*

*(a) The Speaker of the National Assembly -vs- the Hon. James Njenga Karume Civil Application No. Nai 92 of 1992.*

*(b) Wakenya Pamoja Sacco Society Ltd -vs- Stephen Ogamba Kisii HCCC No. 8 of 2008*

*(c) In the matter of the principle of Gender Representation in the National Assembly and the Senate (2012) hence arriving at a wholly erroneous decision.*

**5. THAT the Learned Trial Magistrate erred in flouting the tenents of natural justice requiring a party to be heard before being condemned by failing to hear the Appellants through their Submissions filed in Court upon payment of Court filing fees."**

2. The Memorandum of Appeal sought the following Orders:

(a) *THAT this appeal be allowed;*

(b) *THAT the Order of the Subordinate Court made on 27/3/2017 be set aside, and this Appellate Court be pleased to substitute its decision in place of the said ruling.*

(c) *Any other relief that this Honourable Court deems fit to grant*

(d) *THAT the Respondent be ordered to pay the costs of this Appeal.*

3. The Records show that the Lower Court proceedings were received by the High Court on 30th June 2017 (three months later). On 18th September 2017 the Appeal was listed for directions before Hon Lady Justice Kamau in the High Court on various dates. The Appellant (First Defendant) was not present nor represented. The Respondent was. The record seems to suggest that on each occasion it was the Respondent pushing for dates and seeking to progress the matter. It was not until 20th September 2018 that the High Court, as currently constituted, was informed that the Appellant had withdrawn its Appeal. The Respondent through Mr Kariuki asserted that he was neither informed of the withdrawal nor served with the Notice to Withdraw. That Notice does not appear on the Court File. The Court had given directions for the filing of Written Submissions. To their credit, the legal representatives of the Appellant, did file those submissions notwithstanding their withdrawal. The Court appreciates that conduct. Armed with the knowledge that the Appellant did not want to proceed, the Respondent was pushing for a decision. The Court gave directions on the Preliminary Issue of whether there was an Appeal properly before the Court as set out on page 4 of the Appellant's Written Submissions.

4. Those Submissions are best understood if they are repeated verbatim. The Appellant says;

*"We hasten from the onset to state that no Record of Appeal was filed because directions were given for parties to file submissions without the benefit of directions under Order 42 rule 13 having been undertaken. We also hasten to call that on 4/10/2017 the Appellant file a Notice of Withdrawal of Appeal as per copies of Notice attached as well as the court receipt No 8507893 herewith attached. Vide letter dated 19/4/2018 (copies attached) the Appellant once again reminded the Court about the Notice of Withdrawal of the Appeal but this too appears to have been acted upon hence the current status of the Appeal."*

It is clear from that extract that the Appellant did not wish to proceed with the Appeal. The Respondent nonetheless has repeatedly taken dates for directions and/or hearing and/or highlighting.

5. In the circumstances, the Court has to decide whether or not its jurisdiction is engaged and there are any issues and/or matters that it must adjudicate upon? Clearly, the Appellant has disengaged. Clearly, the Respondent wants an answer to the very same issues raised by the Appellant. **Article 159(2)(d)** requires that justice be administered without undue regard to procedural technicalities. The Defendant's have repeatedly asked the Court to rule on the issue. This Court therefore finds that: Notwithstanding that the Appellant has withdrawn, the Respondent has, in fact, by word and deed, put before the Court a cross-appeal requiring the Court to Rule upon the issues raised in the Memorandum of Appeal. Therefore on the Preliminary Issue this Court rules that its jurisdiction is properly engaged by the Defendant seeking an answer. Although that might appear surprising at first. It could be explained by the process that once the appeal is withdrawn, there must be some activity directing the progress of the underlying suit.

6. Having found that it is required to rule on the Appeal, this Court has also resolved that it is in the interests of timely delivery of justice for that decision to also be contained in this Judgment.

7. The main thrust of the Appeal is a challenge to the decision of the SPM that the Magistrate's Court has jurisdiction to hear questions of compensation under the Wildlife Conservation and Management Act 2013. The first ground of appeal is that the Learned Trial Magistrate did not address her mind to the issue and simply followed and/or copied her own decision in **PMCC 59 of 2017**. The Learned Trial Magistrate therefore misdirected herself - and denied KWS access to justice.

8. This Court has called for a copy of the Judgment in **PMCC 59 of 2017** and a copy is on the Court file. It is very clear that the two judgments contain surprising, if not alarming, similarities. It is clear that the decision in **PMCC 54 of 2017** is copied directly from the decision in **PMCC 59**. That suggests no thought has been given to any recent decisions made in a developing area of law and jurisprudence. To that regard the Learned Trial Magistrate did misdirect herself. This Court rules as such. That Ground of Appeal succeeds.

9. The Court must then address the question whether that has any substantive implications. This Court finds that it does. The Learned Trial Magistrate acquires her jurisdiction from the case of **Joseph Musyoka Kalonza vs KWS** where the High Court held that the High Court had jurisdiction to hear claims relating to deaths caused by wild animals. That decision was upheld by the Court of Appeal sitting in Nairobi in **Civil Appeal No 306 of 2015**. There also exists a conflicting decision of the Court of Appeal sitting in Nakuru in **Civil Appeal No. 260 of 2013**. I will come to that later.

10. In this case the Learned Trial Magistrate was sitting as a magistrates' court. The Court takes judicial notice of the fact that due to the shortage of space the magistrates in Voi choose to sit in the Court designated as the High Court. That physical re-location of itself, does not confer jurisdiction. The Magistrates' Court is a creature of statute. Its jurisdiction must be conferred by an Act of Parliament. It does not have the inherent jurisdiction conferred on the High Court by the Constitution of Kenya 2010.

11. It is undeniable that the Magistrates' Courts have jurisdiction to hear claims of personal injury arising out of tortious actions. However, the issues arising from **Section 18** and following of the **Wildlife Act** are not torts and do not fall to be treated as torts. Therefore the Learned Trial Magistrate was under a duty to appraise herself of whether or not that Act confers jurisdiction upon her. She did not, she simply presumed that she was remedying an imagined lacuna in the law. In fact the Act does not confer jurisdiction. In that respect she misdirected

herself. From her Ruling it is very clear that she did not consider any part of the Act beyond **Section 23(1)**. For interpretation of any Act, consideration of its statutory framework is essential. That is particularly so in relation to Acts of Parliament passed after the promulgation of the **2010 Constitution**.

12. In addition, it is clear on the face of the Ruling that the Learned Trial Magistrate conflated and mixed up the issues of jurisdiction, the merits of the case and the appropriate parties. For example the phrase that the Plaintiff needs a remedy presupposes that the Plaintiff was a victim rather than perpetrator without hearing the facts. If the claim is founded in tort then the plaintiff's own conduct is called into question. Again, that required consideration of the facts.

13. The Wildlife Act recognises that both the citizenry and the wildlife are valued resources for our society. The points at which the two meet, creates a flashpoint for conflict. The **Act** provides for situations where man is the perceived aggressor eg encroachment and poaching. Equally the **Act** provides for situations where the wild animals are the perceived aggressor. In addition the **Act** provides for the management of the areas of confluence. It does that by the establishment of a Service to be known as the Kenya Wildlife Service (KWS) in **Section 6**. That Service, being a creature of statute also must have its powers and duties conferred upon it by the Act. It is a body corporate capable of suing and being sued. Having that capacity does not mean it must be sued. **Section 7** sets out its functions. These include to: (a) *conserve and manage national parks, wildlife conservation areas and sanctuaries under its jurisdiction*". Of the 18 functions that are listed, there is not one that provides for the management and/or physical control of or over wild animals. The closest the **Act** comes to that is the function to "(g) *advise the Cabinet Department on matters pertaining to wildlife policy, strategy and legislation*".

14. The Act then does away with the need for tortious claims against wild animals and their perceived "owner" in the form of KWS. Instead, **Section 18** provides for a no fault scheme for compensation. Victims are not required to go through the rigours of adversarial litigation in order to obtain damages that could vary and which may or may not cover the costs of the litigation. The Act provides for a body, the County Wildlife Conservation and Compensation Committee. The functions of that body include to: "(a) .....

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

*(i) review and recommend claims resulting from loss or damage caused by wildlife for payment of compensation";*

**Part V** of the **Act** then explains where the funds for the compensation scheme will emanate. **Section 24** provides that "*The Government shall establish a Wildlife Compensation Scheme that shall consist of .... (2) The Wildlife Compensation Scheme shall be used for financing compensation claims for human death or injury or crop and property damage caused by wildlife*". **Section 25** then sets out the process of claiming that compensation.

15. The Learned Trial Magistrate hearing submissions from the Plaintiff which interpret the phrase that "(1) *Where any person who suffers any bodily injury or is killed by any wildlife listed under the Third Schedule .... may launch a claim to the County Wildlife Conservation...*" to mean that a person aggrieved may launch a claim to the Compensation Committee or any other person in any forum of their choosing. That forum then becomes seized of jurisdiction. That cannot be the correct interpretation. As stated above, the Act provides a scheme. The step of launching a claim is followed by assessment of that claim. The process is a no fault compensation scheme. It is not adversarial. The correct interpretation is that a person aggrieved may bring a claim but is not obliged to do so. If such person does bring such a claim it will be dealt with by assessment.

16. It should be recorded that the Plaintiff/Respondent repeats those submissions now based on **Section 62(1) of Cap 376** which is repealed. That does not further the discourse one iota. The Respondent urges the Court to ignore the Judgment of the Court of Appeal in **Civil Appeal No 260 of 2013** because it was delivered "*long before*" **Civil Appeal No 306 of 2015**. In fact, the date of the Judgment is **Civil Appeal 306 of 2015** is 19th October 2017 and **Civil Appeal No 260 of 2013** is dated 22nd November 2017. That Judgment states:

*"18. From the foregoing, it is abundantly clear to us that where there is a specific procedure as to the redress of grievances, the same ought to be strictly followed. ... we are satisfied that the learned Judge of the High Court did not err by upholding the lower court's finding. Section 62(1) of the Act..." That decision was made under the previous Act. However, there too the Learned Appeal Judges found that bringing a suit as well as a claim was an abuse of court process and the suit stands to be dismissed - and was dismissed".*

17. In the circumstances, the Learned Trial Magistrate's views that the fact that the Compensation Committee has not been set up by the appropriate Cabinet Secretary does not entitle the magistrate's court to provide a completely different regime of adversarial litigation as an alternative. The Plaintiff's remedy lies in judicial review and not statutory amendment by a court that does not have the jurisdiction to change the law. This is in marked contrast to the High Court which has inherent jurisdiction which can be applied to provide solutions or fill lacunae in the appropriate situations. That is not a question before this Court.

18. For the reasons set out above, the Appeal is allowed. The decision of the lower court that it has jurisdiction is set aside. Following, the Court of Appeal decision in **Civil Appeal 206 of 2016** it would follow that the appropriate order would be to dismiss the suit for being an abuse of the process. However, this Court has not heard submissions on that issue therefore it is ordered and directed that the file be returned to the lower court to consider whether the suit should stand dismissed for being an abuse of the process of the Court.

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**Signed and Dated and Delivered at the High Court in Voi this the 23rd day of May 2019**

**In the Presence of:**

Court Assistant: Simon Tshelo

The Applicant: Clerk Shem Mutinda

The Respondent: No Appearance