REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL APPEAL NO. 114 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

LUKE MUNGANIA INEBU.....APPELLANT

AND

KENYA WILDLIFE SERVICES.....RESPONDENT

(Being an appeal from the Judgment and Decree of Hon.L. Ambasi,

CM dated 6th December 2017 at the Chief Magistrates Court

at Meru in Civil Case No. 359of 2015)

JUDGMENT

1. The appellant's case before the trial court was that on 18th June 2014, 3 leopards from the nearby Meru National Park attacked and killed his seven heads of cattle on his farm situated in Muthara Location, Tigania within Meru County. After a full hearing, the trial magistrate dismissed the case on the ground that the court did not have jurisdiction to entertain the matter under the provisions of **section 25** of the ***Wildlife Conservation and Management Act ("WCMA")***. It is this finding that has precipitated this appeal.

2. In his memorandum of appeal dated 20th December 2017, the appellant complained that the trial magistrate misinterpreted the provisions of section 25 of the WCMA and consequently came to the wrong conclusion that the court lacked jurisdiction. He complained that the trial magistrate erred in law and fact in dealing with the issue of jurisdiction that was never raised by the parties. He also complained that the judgment was against the weight of the law and precedent presented before the trial court. He consequently prayed that the appeal be allowed and the trial court's judgment be set aside and judgment be entered for the appellant for general damages for pain and suffering, special damages of Kshs. 600,000/- for 1 bull bovine and Kshs. 3,000,000/- for 6 cow bovines.

3. Both parties filed written submissions on whether the trial court had jurisdiction. Before considering the matter, I will set out the contentious provision which states as follows

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) Any person who suffers loss and 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.*

4. The trial magistrate held that **section 25** of the ***WCMA*** gives an option to the victim to opt whether or not to pursue a claim and is not related to resorting to the court process to pursue the claim against the respondent. The trial court held that, "*The legislative procedure set*

out in the aforesaid Act ousts the jurisdiction of the Court to deal with suits arising under the Act." Since the court found that the respondent had admitted jurisdiction, the court noted that, *"Consequently, the admission of jurisdiction of this court by the Defendant cannot in any way confer jurisdiction where none exists, nor can it override legislative provisions set out in law."*

5. To support the position that the trial court had jurisdiction to entertain the suit, counsel for the appellant cited the case of ***Kenya Wildlife Service v Joseph Musyoki Kilonzo*** **NRB CA Civil Appeal No.306 of 2015[2017]eKLR** in which the Court of Appeal (Visram, Karanja and Koome JJA) took the position that *"may"* in **section 25(1)** aforesaid was permissive. The Court observed that:

> *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.*

6. The Court then concluded that the ***WCMA*** did not bar anyone from seeking relief from the courts by stating that;

> *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.*

7. Thus the court rejected the principle of alternative procedures and remedies and held that the language of the statute and the needs of access to justice supported the concurrent jurisdiction for matters coming under the purview of the ***WMCA***.

8. On the respondent's part, its counsel cited the case of ***Peter Muturi Njuguna v Kenya Wildlife Service*** **NKU CA Civil Appeal No. 260 of 2013 [2017] eKLR**. The case was decided about a month later, on 22nd November 2017, after the decision in ***Kenya Wildlife Service v Joseph Musyoki Kilonzo*** **(Supra).** A differently constituted bench of the Court of Appeal (Waki, Nambuye and Kiage JJA) considered the import of **section 62(1)** of the repealed ***Wildlife (Conservation and Management) Act (Chapter 376 of the Laws of Kenya)*** which provided as follows;

> *62(1) Where any person suffers any bodily injury from or is killed by any animal, the person injured or in the case of a deceased person, any other person who was dependant upon him at the date of his death may make application to a district committee established by this section, for the award of compensation for the injury or death...."*

9. The court concluded that *"may"* in the context of the statute was mandatory and thus it held that;

> *[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. Having arrived at that conclusion, 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 is explicit on the procedure to be followed by any person who suffers bodily injury from or is killed by any animal. Such person, is required to make an application to the District Committee. It is good practice intended to foster public confidence and trust to let each organ perform its mandate. The appellant ought to have approached the District Committee first and followed the appellate system designed under the Act.*

10. The decision in ***Peter Muturi Njuguna v Kenya Wildlife Service*** **(Supra)** supports the position taken by the respondent that where the legislature provides a specific procedure then that procedure must be exhausted before recourse to the courts. That case though can be distinguished from ***Kenya Wildlife Service v Joseph Musyoki Kilonzo*** **(Supra)**. Although both cases dealt with similar provisions, the former case was in respect of the repealed ***Wildlife (Conservation and Management) Act*** while the latter case dealt directly with **section 25** of the ***WCMA***. In the latter case the Court considered the issue of access to justice which is a fundamental right protected under **Article 48** of the Constitution. Even though, I would venture to say that the words of the statute may, in the context of the ***WCMA***, support the application of principle that the Act provides the exclusive means to agitate cases of injury by wildlife then that procedure must be followed, the interpretation given by the Court of Appeal on **section 25** of the ***WCMA*** is authoritative and binding on this court until the Court revisits the matter.

11. One of the concerns raised by the appellant is the manner in which the objection on jurisdiction was raised and then considered by the trial magistrate. Although the issue of jurisdiction can be raised at any time, it is proper practice to plead or raise it at the earliest opportunity. The respondent, in its amended defence was very vague about the issue of jurisdiction and only stated that, *"Jurisdiction of this Honourable court to dismiss this suit with costs and interest is admitted."* This manner of pleading is to be deprecated as it is evasive and does not give notice to the other side what the objection is about. The trial magistrate though accepted that the jurisdiction of the court had been admitted.

12. On the basis of ***Kenya Wildlife Service v Joseph Musyoki Kilonzo*** **(Supra)**, I find and hold that the trial court had jurisdiction to entertain the matter. I would therefore allow the appeal and set aside the judgment. This decision is not the end of the matter, as the trial court heard the appellant's case. The court did not consider the evidence or make any finding on it having taken the view that it had no jurisdiction. This court has power to consider the evidence on record and come to its own conclusion. However, since the court did not have the benefit of the observations of the first trial court, I decline to take that course. Instead, I refer the matter back to the trial court to consider the evidence and submissions and write the judgment.

13. I therefore allow the appeal and set aside the judgment of the trial court. I direct the trial magistrate (Hon. L. Ambasi, CM) to consider the evidence on record and submissions and write the judgment on the issues raised by the parties.

14. The appellant shall have the costs of this appeal assessed at Kshs. 40,000/- only.

SIGNED AT KISII

D. S. MAJANJA

JUDGE

DATED and **DELIVERED** at **MERU** this **21st day of June 2018.**

A. MABEYA

JUDGE

Mr Nyakwara instructed by Igweta Murithi and Company Advocates for the appellant.

Mr Kariuki instructed by Mithega, Kariuki Advocates for the respondent.