



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL APPEAL NO. 87 OF 2017

CORAM: D.S. MAJANJA J.

BETWEEN

NAFTARI GIKUNDA M'MWARI.....APPELLANT

AND

KENYA WILDLIFE SERVICES.....RESPONDENT

(Being an appeal from the Ruling and Order of Hon.L. Ambasi, CM dated 11th September 2017 at the Chief Magistrates Court at Meru in Civil Case No. 230 of 2015)

JUDGMENT

1. The appellant claimed that on 24th February 2015, he was using a feeder road along the Meru –Nanyuki Road near Nkunga Forest when he was attacked by an elephant following which he sued the respondent for damages as a result of injuries sustained. The respondent denied the claim and after the close of pleadings, on 7th October 2016, the respondent filed a notice of preliminary objection dated 6th October 2016. The thrust of that objection was that the court did not have jurisdiction in light of section 25 of the ***Wildlife Conservation and Management Act ("WCMA")***.
2. The preliminary objection was heard by Hon. J. Karanja, PM, who by a ruling delivered by Hon. Ambasi, CM, dismissed it on 20th March 2017. Undeterred by the dismissal of the preliminary objection, the respondent lodged the Notice of Motion dated 31st May 2017 seeking to strike out the appellant's claim on the ground that the court had no jurisdiction to entertain the claim under the provisions of **section 25** of the **WCMA**. The trial magistrate considered the parties' written submissions and delivered a ruling in which she struck out the claim.
3. Although the parties did not raise the issue, a reading of the decision of the trial magistrate shows that she considered and determined the preliminary objection raised by the respondent and filed on 7th October 2016 and not the respondent's Notice of Motion dated 31st May 2017. She ruled that, *"In light of the foregoing, I hereby uphold the Preliminary Objection. Suit dismissed with costs to the Plaintiff."* As the preliminary objection had been determined by a ruling which she delivered on behalf of her colleague, it is clear that this was an error and I would allow the appeal on that basis.
4. But that does not resolve the issue as both parties urged the appeal on the basis that the trial magistrate considered the application to strike out and considered the preliminary objection. The principal objection raised by the appellant was the application was *res-judicata* as it sought to litigate the issue of jurisdiction that had been heard and determined when the preliminary objection was dismissed.
5. The respondent submitted that the doctrine of *res-judicata* could not apply because the elements of the doctrine in **section 7** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** were not established because the provision applies to suits and not applications. Further, that the application was a completely distinct process of determination and did not duplicate the preliminary objection as the latter only dealt with a pure point of law.
6. The issue whether the doctrine of *res-judicata* applies to interlocutory proceedings was settled by the Court of Appeal in ***Uhuru Highway Development Limited v Central Bank of Kenya and 2 Others [1996] eKLR*** where it held that the principle was applicable and that **section 7** of the **Civil Procedure Act** was but an aspect of the general principle. It observed that:

[T]here must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation.

7. In this case, the court had already addressed the issue of jurisdiction through the ruling dismissing the preliminary objection. The respondent did not appeal against it. It was therefore an abuse of the court process for the respondent to try and litigate the same issue under the guise of an application to strike out the claim.

8. Since the issue of jurisdiction was contentious, both parties filed submissions on whether **section 25(1)** of the **WCMA** ousts the jurisdiction of the court to hear cases arising out of injury or damage by wildlife. It provides 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 Country Wildlife Conservation and Compensation Committee within the jurisdiction established under this Act.

9. 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** where the Court of Appeal held 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 travelling 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.

10. 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.

11. To support its position, counsel for the respondent relied on **Peter Muturi Njuguna v Kenya Wildlife Service NKU CA Civil Appeal No. 260 of 2013 [2017] eKLR**. In that case the Court of Appeal determined 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....”

12. The court concluded that “*may*” in the context of the statute was mandatory and thus 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.*

13. The decision in **Peter Muturi Njuguna v Kenya Wildlife Service(Supra)** 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 that issue of access to justice which is a fundamental right protected under **Article 48** of the Constitution. Even though, 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, 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.

14. Following what I have stated, I allow the appeal and set aside the ruling and order dated 11th September 2017. I substitute the same with an order striking out the respondent’s Notice of Motion dated 31st May 2017 with costs to the appellant. For the avoidance of doubt, the matter shall now proceed for hearing before any other magistrate other than Hon. Ambasi, CM. 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 atMERU this 21st day of June 2018.

A. MABEYA

JUDGE

Mr Mwirigi instructed by Mithega & Kariuki and Company Advocates for the appellant.

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