



CIVIL

- Does provision for compensation under statute bar a party from claiming under common law?
- What is the limitation period in the case of tort against the government?
- Is a plaint for which fee is not paid for validly on record.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL CASE NO. 113 OF 2008

PETER MUGAMBI APPELLANT

VERSUS

**DISTRICT COMMISSIONER MERU
NORTH DISTRICT**

.....1ST RESPONDENT

KENYA WILDLIFE SERVICE

2ND RESPONDENT

THE HON. THE ATTORNEY GENERAL

3RD RESPONDENT

(An appeal from the judgment of Hon. Mr. W. Korir Principal Magistrate in Meru CMCC Case No. 496

of 2003 dated 11th November 2008)

JUDGMENT

The appellant filed a case in Meru Chief Magistrate Court against all the respondents in Civil Case No. 496 of 2003. In that case, the appellant's claim was that on 18th May 2002 he was attacked while at Nchiru Village by a wild elephant which was under the care of the respondents. It was pleaded in that claim that the 2nd respondent breached its statutory duty of managing wild animals. The appellant set out in his plaint the injuries that he suffered which were:-

- *Fracture base of the scalp*
- *Injury to the parietal region of the head.*

- Impaired hearing.
- Injury to the hip.

In his claim, the appellant prayed for special damages of Kshs. 3,960/= and general damages against all the respondents jointly and severally. The appellant by an application dated 24th April 2008 sought leave of the lower court to amend his plaint. That leave was granted on 19th August 2008. On my perusal of the lower court file, I was unable to find evidence of the appellant's payment of the fee on that amended plaint. It is for that reason that I find that the amended plaint was not available to the lower court to consider as it delivered its judgment. That is the position of sections 71 of the Interpretation and General Provisions Act Cap 2. That section provides as follows:-

“71. (1) Where a person, public officer or local authority is required to do anything for which a fee is to be paid or a charge made under a written law, that person, public officer or local authority may decline to do that thing until the fee is paid or until payment of the charge is made, or, where the precise amount of the payment to be made cannot be ascertained until the thing has been done, until there is paid such an amount as may be estimated to be the correct amount by the person or public officer, or the responsible officer of the local authority, required to do the thing.”

As it can be seen from that section, a public officer or local authority has no obligation to act on a document which a fee ought to be paid for but is not paid. The Court of Appeal in the case **South Nyanza Sugar Company Limited Vs. Samwel Osewe Ochillo P/A Ochillo & Co. Advocates** Civil Appeal No. 127 of 2003 held that a plaint is invalid if fees were not paid for it. The court stated as follows:-

“The Deputy Registrar, however, had no power to exempt the respondent from paying the requisite fee with the result that the plaint was not properly filed and that being so, there was no valid plaint upon which the learned Judge of the superior court could proceed to deliver his judgment. The judgment was based on no valid plaint.

Dealing with a similar situation in the Ugandan case of Unta Exports Ltd Vs Customs [1971] EA 648, Goudie, J. stated as follows at page 649 letters E to F:-

I have no doubt whatsoever that both as a matter of practice and also as a matter of law documents cannot validly be filed in the civil registry until fees have either been paid or provided for by a general deposit from the filing advocate form which authority has been given to deduct court fees.....”

With respect, we agree and would adopt that principle as being aptly applicable to the issue we are dealing with.”

The amendments introduced by the plaintiff in the proposed amended plaint will therefore not be considered in this judgment in view of the above irregularity. The subordinate court after receiving evidence delivered its judgment on 11th November 2008. That judgment aggrieved the appellant who filed this appeal. The appellant has presented the following grounds for consideration in this appeal.

- 1. The learned principal magistrate erred in law in dismissing the plaintiff's claim against the 2nd respondent on the ground that the claim against the 2nd respondent was filed out of time when indeed the same was filed within time.***
- 2. The learned principal magistrate erred in law in dismissing the plaintiff's claim against the 1st and 3rd respondent basing the dismissal on the ground that the leave obtained against the 1st and 3rd respondent was illegally obtained while indeed the appellant had met the conditions of obtaining leave.***
- 3. The learned principal magistrate erred in law and fact in dismissing the appellant's claim against the 2nd respondent on the ground that there was no proper leave obtained against it without taking into account that no leave was necessary and indeed the 2nd respondent being aware of that fact never***

challenged the leave obtained in court and produced as evidence.

4. The learned principal magistrate erred in law in stating that had he entered judgment for the appellant he would have awarded him a mere sum of Kshs. 600,000/= without considering the grievous injuries the appellant sustained.

This is the first appellant court. As such, I am required to reconsider the evidence adduced before the trial court afresh, analyze it, evaluate it and come to my own independent decision but taking into consideration that the trial court had the advantage of seeing the witnesses and hearing them. See the case **Selle And Another Vs. Associated Motor Boat Company Ltd & Others** [1968] EA 123. At the trial, PW1 was Doctor Macharia. He stated that he examined the appellant on 23rd July 2003. He found the appellant was 16 years old. He found that he sustained injuries after being attacked by an elephant. The injuries that he found were as follows:-

- ***He was seen with a head injury (fracture of base of the skull with bleeding from the left ear). The left side of his head was swollen and tender.***

- ***Tender and swollen left hip.***

The doctor in his further evidence stated that the appellant received the following treatment:-

- ***He was given steroids, antibiotic and analgesic. He was then put under head injury observation with nursing. He progressively did well till he was discharged on 23rd May 2002 in a stable state. He has been on follow up as an outpatient.***

The appellant reported to the doctor that he was having episodes of fits. The doctor's opinion having examined the appellant was as follows:-

“As a result of the trauma Peter Mugambi sustained a head injury with fracture base of the skull and otorhoea. Management was done and currently he has developed convulsions as reported. These can be attributed to the head injury and will require follow up with medication. The poor hearing is also due to the injury and requires further analysis (as is conductive deafness) and management.

The appellant in evidence stated that he was at about 8am on 18th May 2002 at home at Nchiru. Near his home, there is a forest called Imenti forest. That forest is about 5kms away from this home. He said that the elephant which attacked him came from that forest. Although he tried to run away from the elephant, the elephant caught up with him and attacked him. He became unconscious. He was admitted in hospital for five days. He was injured at the back of his head which injury caused the bleeding of his ear. As a result of that injury he said he became deaf on one ear. He was also injured on his hip and as a result he now limps. He also said that he experiences pain in his leg when he walks for a distance. As a result of head injury he had developed epilepsy. He said that he had continued to attend hospital where he gets drugs prescribed to him to prevent epilepsy attacks. When he was admitted in hospital following the attack, officers of the 2nd respondent, Kenya Wildlife Services (KWS) visited him and requested him to see them on his discharge. He saw them on his discharge and filled forms for compensation but he never received any compensation. He stated that he had obtained an order from PM Misc. Civil Application No. 134 of 2003 giving him leave to file this action out of time against the government. The action was filed beyond the one year provided under the Public Authorities Limitation Act Cap 39. That Limitation is provided under section 3. That section provides as follows:-

“No proceedings founded in tort shall be brought against the government or a local authority after the end of 12 months from the date on which the cause of action accrued.”

The appellant gave the reason for his failure to file the suit within a year as failure by his then advocate Kirima to file the case. Also in cross examination by the state, he stated that he had been ill which prevented him from filing the case. The 2nd respondent called Mary Wanjiru Mungai a KWS Ranger to give evidence. This witness stated that when the incident subject of this case occurred she was stationed at Meru. The injury of the appellant was reported to KWS by the assistant chief. The personnel of KWS attended appellant's home and confirmed that an elephant had been there. They also confirmed that the appellant had sustained head injuries. She stated that although the appellant was advised to fill forms in his claim for compensation by KWS, he had failed to do so. This witness said that the maximum compensation the appellant could have obtained was Kshs. 20,000/=. The trial magistrate after receiving that evidence dismissed the appellant's suit. The learned trial magistrate in his considered judgment stated thus:-

“The plaintiff filed this suit one year after he was injured. He produced an order dated 26/6/2003 giving him leave to file this suit out of time, It is now established law that a defendant has a right to query whether the granting of leave to a plaintiff to file a suit out of time was done in accordance with the law. This is because such an order is an ex parte order. The defendants put questions to the plaintiff in this respect. The plaintiff told the court that he did not file this suit within time because his first counsel had delayed in filing the same. He also told the court he had been sick. He did not elaborate on the nature of his sickness and neither did he produce medical documents. The limitation of Actions Act clearly outlines the circumstances under which the court can grant a plaintiff leave to file a suit out of time. The reasons given by the plaintiff for filing this suit out of time did not meet the conditions set by the Act. With due respect to the magistrate who gave leave to the plaintiff on 26/6/2003 to bring this suit out of time, I find that the said leave was not proper. The defendants have therefore succeeded in proving that the plaintiff did not have leave to file this suit out of time. That being so, the plaintiff's claim against all the defendants fails. His suit is therefore dismissed with costs to the defendant.”

From the quoted part of that judgment, it is clear that the trial magistrate regarded KWS as the Government. That however was in error. KWS is a body corporate which by virtue of section 3 (1) of the Wildlife (conservation and Management) Act Cap 376 has the power to sue and to be sued. It therefore follows that the limitation of filing action against the government as provided in section 3 (1) of Cap 39 does not apply to KWS. The action therefore against KWS was only limited by the Limitation of Actions Act Cap 22 section 4 (2) which gives a period in case of tort of three years from the date when the accident occurred. Bearing in mind the provisions of Cap 22 the appellant's action against KWS was filed within time. The appellant was injured on 18th May 2002. He filed his claim in the lower court on 3rd July 2003. That was just over one year. The appellant had obtained an *ex parte* order of the court giving him leave to file a suit out of time. As can be seen from the quoted judgment of the trial magistrate, the trial court faulted that leave because as the learned magistrate stated, “*the said leave was not proper.*” As far as the leave refers to the 1st and 3rd respondent, that is, the government, section 5 of Cap 39 provides that the limitation period of one year which is in section 3 (1) of that Act, can be extended in the case where a person is under disability. Section 5 provides as follows:-

“Notwithstanding the provisions of section 4, if, on the date when a right of action accrues for which a period of limitation is prescribed by this act, the person to whom it accrues is under a disability, the action may be brought at any time before the end of twelve months from the date when that person ceases to be under disability.”

With the provisions of that section in mind, it will be recalled that the appellant stated that one of the reasons which prevented him from filing this suit in time was because he was sick. That means that he was under a disability as envisaged under section 5 quoted above. The trial court in my view was wrong to have held that the leave issued to the appellant was not proper when considering that disability. The trial court erred to have dismissed the suit in respect of 1st and 3rd respondents on the basis that he leave

granted was not “proper”. Having considered the above issue of whether the suit was filed out of time I have dealt with grounds number 1 to 3 of the memorandum of appeal. Before considering ground 4 I wish to consider whether or not the appellant’s claim against the respondent will succeed. The appellant in his original plaint filed on 3rd July 2003 (since the proposed amended plaint was not paid for) the appellant pleaded that it was the Government of Kenya which kept wild animals in gazetted parks. Having pleaded so, the appellant then pleaded that it was KWS which breached its statutory duty to keep wild animals in national parks. Looking at the original plaint, there is no cause of action against the 1st and 3rd respondent. The appellant did not show the obligation 1st and 3rd respondents owed him. He indeed did not show the wrong that they did. It is on that basis that the appellant’s claim as against those respondents fails. It also ought to be noted that the preamble of Cap 376 provides that it is KWS that is mandated to ensure protection, conservation and management of wildlife in Kenya. That responsibility is not on the government but on KWS. Again, considering the original plaint, which is being considered in this judgment, the appellant sued “*The Director Kenya Wildlife Services.*” Section 3C of Cap 376 provides as follows:-

“3C (1) There shall be a director of the service who shall be a member of the Board of Trustees, the chief executive and head of the Service.

(2) The Director shall be appointed by the President.

(3) The Director or his nominee shall be the secretary to the Board of Trustees.

(4) The director shall, on behalf of the Board of Trustees and subject to this Act, have the general superintendence of all matters within the scope of this Act.”

The director as can be seen from the above section has no capacity to sue or be sued on behalf of KWS. It is for that reason that the appellant’s claim against the director of Kenya Wildlife Services fails. The respondent in submitting in opposition to this appeal stated that the appellant’s claim lay in the provisions of section 62 of Cap 376. This is the section that provides that KWS would compensate for personal injury or death caused by wild animals. The respondent’s argument in this regard was wrong as was clearly stated in the case **Kenya Wildlife Services Vs. Ismael Adan** HCCA No. 40 of 2003. This case was decided by Justice Lenaola which is persuasive to me. The portion which I will quote below is very relevant to this matter.

“I am aware of the ruling of Rimita J in Joseph Boro Ngera Vs. Kenya Wildlife Service Ltd HCCC No. 268 of 1992 (NKU). That jurisdiction to hear claims for compensation for personal injury, death or loss of property “was not vested in the courts of law” and that “it was vested in the District Committees established under S. 62 (2) of the Act.” I am also aware that in the appeal against that ruling, the Court of Appeal in Ngera & Another Vs. Kenya Wildlife Service KLR (E&L) 314, held that whether or not the Act “imposes a remedy for breach of statutory obligations, such a provision does not bar a right of action against the respondent (Kenya Wildlife Service).” The court said so having taking he view (per Pall J.A.) that the law on the subject was as stated in a passage from Odgers on Construction of Deeds and Statutes 5th Edition at page 398 which was as follows:-

“The first question is whether a remedy given by statute ousts the remedy at common law. The matter was summarized in the following way by Willi J. in Wolverhampton New Waterworks vs. Howkesford:-

There are three classes of cases in which liability may be established founded upon a statute. One is, where there is a liability existing at common law and that liability is affirmed by statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class is where the statute gives the right to sue merely, but provides no form of remedy; there the party can only proceed by action at common law. But there is a third class viz where a liability not existing at common law is created by a statute..... The remedy provided by the statute must be follows.....”

In the case **Ngera & Another Vs. Kenya Wildlife Service KLR (E & L) 314** the Court of Appeal dealt with the argument that a person injured by a wild animal could only claim compensation under Cap 376 section 62 and could not claim under the common law. From the judgment of Gicheru J.A. (as he then was) it is clear that that argument is not correct. I will quote from that judgment as follows:-

“The respondent (KWS) is a body corporate with power to sue and be sued. In the instant appeal, the appellants were persons in the farming communities in Kenya to whom under section 3A (1) of Act No. 16 of 1989 the respondent was to render services necessary for the protection of agriculture against destruction by wildlife. Whether or not the provisions of this section imposes no remedy for their breach by the respondent is no bar for a right of action in the circumstances such as obtains in the present appeal against the respondent otherwise such provisions should never have found any space in the statute book. The learned superior court judge may not therefore have been right in upholding the respondent’s preliminary point of law that no action can be sustained in respect of losses resulting from damage to property occasioned by wild animals or birds. In the result, I would allow this appeal, set aside the order of the superior court dismissing the appellant’s suit in that court with costs to the respondent and order that the appellant’s Civil Suit No. 268 of 1992 be restrained and proceed to hearing before a judge of the superior court other than Rimita J. The appellants shall have the costs of this appeal. As Tunoi and Pall JJA agree, it is so ordered.”

The one issue remaining to consider is whether I would disturb the proposed award of the trial court of Kshs. 600,000/=. The appellant was detained in hospital for five days. He did not undergo any surgery after his attack. Amongst the documents submitted in evidence by the appellant was a document entitled, *“History and physical examination.”* On 10th September 2003, it is noted in that document, *“No fits.”* I could not indeed find any record in the hospitalization documents showing that the appellant had suffered injury to his hip or that he was suffering epilepsy. There is a document that was submitted in photocopy form which shows the word *“epilepsy”* and is dated 4th May 2003. That document does not however bare the name of the appellant. Further, PW1 Doctor Macharia saw and examined the appellant in July 2003 which was one year after the injury occurred. His report which is reproduced in this judgment contained information received from the appellant. The doctor did not say that he verified for himself what the appellant said to him. It is for that reason that I find that there is no basis for interfering with the learned trial magistrate’s proposed award. In the end, for the reasons given above, the appellant’s appeal fails and is dismissed with costs being award to the 2nd respondent.

Dated, signed and delivered at Meru this 17th day of March 2011.

MARY KASANGO

JUDGE