



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 60 of 2004

MOLOYIAN OLE MENGATI 1ST PLAINTIFF

KAMAKEI OLE MENGATI..... 2ND PLAINTIFF

VERSUS

THE KENYA WILDLIFE SERVICE..... DEFENDANT

JUDGMENT

On 27/1/04 Mologyian Ole Mengati and Kamakei Ole Mengati filed this suit against the Kenya Wildlife Services, hereinafter referred to as K.W.S. seeking the following orders;

- (a) *Special damages for the sum of Kshs.216,000.00*
- (b) *General damages.*
- (b) *Declaration that the said Act is discriminative and violates the Constitutional guarantees afforded to the Plaintiffs.*
- (d) *declaration that S 62 of the Wildlife (Conservation and Amendment) Act is unconstitutional to the extent that makes no provision for compensation for damages to or loss of crops or property.*
- (e) *An order to quash, invalidate and/06 nullify section 11 of Act No.18 of 1989 for being in contravention of section 60, 75 and 80 of the Constitution.*
- (f) *Costs of this suit.*
- (g) *Interest at court rates on special damages and costs.*

Later on 27/10/04 the Plaintiffs filed the Notice of Motion dated 21/1/04 seeking the following orders:-

- 2) That the Wildlife (Conservation and Management) Act Cap. 376 Laws of Kenya is discriminative and violates the Constitutional rights guarantees afforded to the applicants.
- 3) A declaration that S 62 of the Wildlife (Conservation and Management) Act is unconstitutional to the extent that it makes no provision for compensation for damages to or loss of crops or property.

4) That an order do issue to quash, invalidate and/or nullify section 11 of Act No.18 of 1989 for being in contravention of section 60, 75 and 80 of the Constitution.

5) Costs of the application be provided for.

The Notice of Motion is expressed to be brought under S 60, 75 and 84 of the Constitution. The application is premised on grounds found on the face of the application and the joint affidavit of the Plaintiffs, arguments filed in court on 3/7/07 and supplementary submissions filed in court on 10/7/09. The Defendant filed grounds of opposition dated 28/1/05, a defence dated 23/3/04, skeleton arguments filed in court on 23/4/05 and further submissions and list of authorities filed in court on 15/6/09. On 27/1/04, the Plaintiffs filed this suit against the Defendant seeking damages for injuries sustained by them as a result of an attack on the Plaintiffs and their cattle by a lion, as a result of which they were injured. In the plaint, the Plaintiffs contend that the Defendant was negligent. The Defendant filed the defence dated 23/3/2004 denying the said allegations. Later that year is when the Plaintiffs filed this Constitutional application within the said suit alleging contravention of the fundamental rights. The Constitutional application of what is before this court for determination. It is the Plaintiff's case that on 11/3/03, they were both grazing their cattle in Oldonyo Orashe in Narok District when they were attacked by a stray lion as a result of which they received serious injuries. They were seen by a Doctor as per medical reports MK 2 'A' and 'B' They have also been informed by their advocate that the maximum compensation payable for personal injury or death is Kshs.30,000/=, which is inadequate and that Act 16 of 1989, the Wildlife (Conservation and Management) Act Cap 376 Laws of Kenya was amended to remove the provision for compensation for damage or loss of property and that vide the amendment to S 62, th

e Defendant now enjoys statutory immunity for damage or loss caused by its negligent Acts, actions or omissions and that the section violates S 75 of the Constitution. That the Applicants have a right to access this court under S 60 and 84 of the Constitution to address any grievance.

Mr. Mwangi, counsel for the Applicants argued that they are challenging the amendments to S 62 of the Wildlife Conservation Act which are unconstitutional for the reason that they limit the access of the plaintiffs or any body else, to this court, if he finds himself in conflict with the wildlife. That the amendment also deprives the Plaintiffs and any other would be aggrieved party to their property under S 75 of the Constitution. That under the Act the court's jurisdiction is omitted. Counsel relied on the case of *JOSEPH BORO v KWS CA 71/1997* where Gicheru J held that the court has a duty to protect one's property. Reliance was also made on *AUSTIN SALMON KITOLOLO V KRA HC 1969/1996* where the court held that where a statute ousts the jurisdiction of the High Court, it is inconsistent with S 60 of the Constitution and by virtue of S 3 of the Constitution, it is void to the extent of its inconsistency. Reliance was also made on the case of *SHAH V AG* which interpreted property under S 75 of the Constitution to include contracts and that at page 101 of the "Nationalisation of Private Property and Constitutional Clauses," property is given a liberal interpretation to include what can be acquired and disposed of. Counsel urged the court to adopt a liberal interpretation to interpret the Applicants rights.

Mr. Fraser, counsel for the Defendant submitted that S 62 set up a statutory scheme for no fault compensation for personal injuries by Wildlife. That the scheme was created and funded by Parliament, managed by the District Committee but the K.W.S (Respondent) has no responsibility for the scheme. That since parliament created it, it had the power to amend its scope. That amendments were made in 1989 and the incident complained of herein arose on 11/3/03, 14 years later.

That the Defendant has never denied the jurisdiction of this court to decide whether the Defendant had a duty of care in respect of the Applicant and admits the court's jurisdiction at para. 21 of the plaint. That the Notice of Motion does not raise any constitutional issues but only raises issues of whether or not there is any duty of care owed under the Act. He urged this court to direct that the Plaintiffs proceeds with their civil case on merit.

After hearing both parties on the Constitutional Application I think the issues for determination are as follows;

- (1) Whether the application is competent
- (2) whether the Respondent is the owner of the Wildlife, that caused the damage/loss
- (3) whether the Respondent is liable for the damage/loss caused by Wildlife
- (4) whether the Plaintiffs have proved damage loss/injury to themselves
- (5) what is the effect of the amendment to S 62 of the Wildlife conservation Act
- (6) whether the amendment is unconstitutional?

Even before I delve into the merits of this motion I wish to point out that it is trite law that it is the Government that guarantees fundamental rights and freedoms of the individual but not an individual or legal person/ entity. The courts have stated over and over again that in such an application under the constitutional provisions under Chapter V, the Bill of Rights, it is the Attorney General who is the legal adviser of Government who has to be sued. In the instant case, KWS is a statutory body set up under S 3 of the Act. It is a body corporate with perpetual succession with a common seal with power to sue or be sued. The Defendant can not therefore guarantee the rights of individuals save the state. The KIRIBATI decision in *TEITIWNANG V ARIONG V REP (1987) LRC CONST 517* was adopted as good law and applied it in the case of

1. *KBS V REP HC MISC APP. 413/05*
2. *RICHARD NDUATI KARIUKI V HON. LEONARD MR NDUATI KARIUKI HMIS 7/06*
3. *HON. MARTHA KARUA V RADIO AFRICA LTD t/a KISS F.M.*

In the above cases the courts held that it is the state that guarantees the fundamental rights of individuals and the Attorney General has to be sued as the representative of the state.

In the above quoted case, Maxwell CJ had this to say about fundamental rights;

“ Dealing now with the question can a private individual maintain an action for declaration against another private individual or individuals for breach of fundamental rights provisions of the Constitution.

The rights and duties of individuals are regulated by private law. The Constitution on the other hand is an instrument of Government. It contains rules about the Government of its country. It follows therefore that the duties imposed by the Constitution under the fundamental rights provisions are owed by the Government of the day to the Governed. I am of the opinion that an individual or a group of individuals as in this case cannot owe a duty under the fundamental rights provisions to another individual so as to give rise to an action against the individual or a group of individuals since no duty can be owed by an individual or group of individuals to another individual under the fundamental rights provisions of the Constitution.”

To the extend that the Attorney General is not named as the Respondent, this application is incompetent.

To appreciate the Plaintiff’s case, I must set out the provisions of S 62 of the Wildlife Act before the amendment and after the amendment. It reads;

“S 62 (1) where after the appointed day any person suffers any bodily injury from or is killed by, any animal or suffers any damage to or loss of crops or property or, in the case of a deceased person any other person who was dependent 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 such injury or death or damage or loss:

Provided that no compensation shall be desirable where the injury or death or damage or loss occurred

(a) In the cause of any conduct on the part of the person concerned which would constitute an offence under this Act; or

(b) In the course of normal wildlife utilizations activities.

(2) For the purpose of receiving and considering applications under subsection (1), and of awarding compensation thereunder, there is hereby established in each district a committee which shall consist of

(a) the District Commissioner, who shall be the chairman of the committee;

(b) the Divisional Officer of the service;

(c) the officer in charge of the Police Division;

(d) the District medical Officer;

(e) One Elected member of the National Assembly representing a constituency in the district, who shall be appointed by the minister;

(f) The chairman of county council in the district; and

(g) Three other members appointed by the minister to represent the general public of the district.

(3) A District Committee may co-opt any person whom it considers may assist it either generally or for the consideration of any particular case.

(4) Compensation awarded under this section shall be payable out of moneys provided by parliament for that purpose.”

Act 16 of 1989 amended section 62 (1) by removing the words “ or suffers any damage to or loss of crops or property or...”

The amended S 62 (1) reads as follows;

“11 Section 62 of the repeal Act is amended by repealing subsection (1) and inserting the following new subsection

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 dependent 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:

Provided that no compensation shall be claimable where the injury or death occurred –

(a) in the course of any conduct on the part of the person concerned which would constitute an offence under the Act; or

(b) in the course of normal Wildlife utilization activities”

The Wildlife Conservation and Management Act Cap 376 (the Act) was first amended in 1976 when it established the Wildlife and Conservation Service and the Wildlife Fund Trustees. The KWS was established under S 3 of the Act and the Board of Trustees was set up under S 3 B of the Act, to be

responsible for the management of the Service. In the preamble of the Act, one of the objects of the Service is stated as follows;

“The prime objective of the service should be to ensure that Wildlife is managed and conserved so as to yield to the nation in general and to individual areas in particular, optimum returns in terms of cultural, aesthetic and scientific gains as well as such economic gains as are incidental to proper Wildlife Management and Conservation and which may be secured without prejudice to such proper Management and Conservation.”

By virtue of Act 16 of 1986, S 3 of the Act was amended and S 3 (4) of the Act provides that the KWS is the successor to the Trustees and the functions are set out in S 3A of the Act. The amendment removed a scheme that provided for compensation without one necessarily proving liability (no-fault) but with the amendment of 1989, the award of damages was restricted to death and personal injury whereas damages for loss of crops and property was removed from the Act. That is what has prompted this complaint by the Applicants. I also agree with the Defendants submission’s that S 62 (2) of the Wildlife Conservation Act was not amended and that section imposes the obligation to make payments on the District committee which is set up under the said section 62 (2). S 62 (4) clearly provides that the compensation is payable out of the money provided by parliament for that purpose. In the committee that deliberates on the issue of compensation, the Service is only represented by the Divisional Officer of the Service. The other members of the committee are officer in charge of police Division, District Medical/officer, an M/P appointed by the minister of Wildlife, chairman of county council of the District, Three other members appointed by the minister to represent the public and lastly, it is chaired by the District Commissioner. This Committee does not emanate from the Service and the service has no control over it and I would agree with the Defendants that it is Parliament that funds the scheme and it seems, it is parliament which is in charge of the said scheme and should have been the body to be sued. I would agree with my brother Lenaola J. in his decision in *LEONARD GERALDO WASIKE V KWS AND OTHERS MISC APP. 1044/03* where the KWS had been sued along with others for compensation for injuries sustained following an attack by a stray leopard, the court held that the KWS has got no clear role in the chain of events save that its Divisional Officer sits in the Committee and the court found KWS to have been improperly enjoined to the application and struck out the KWS from the application. I do likewise hold that S 62 (4) of the Act does not impose any duty on the service to pay any compensation but that duty lies upon Parliament. Parliament is not before this court. KWS is wrongfully sued in the first place.

For any liability to attach, it would have been necessary for the Plaintiffs to establish who owns the Wildlife. Is it Kenya Wildlife Service? Nowhere in the Act is it indicated that KWS owns the Wildlife. The functions of Kenya Wildlife Society as set out under S 3A of the Act includes formulation of policy regarding conservation, advise Government on establishment of National Parks, manage national parks, provide Wildlife Conservation education, render services to the farmers and ranching communities in Kenya for protection of agriculture etc. There is no evidence that the Wildlife is the property of the Kenya Wildlife Service. Since Parliament funds the compensation scheme the wildlife must belong to the Government of Kenya.

So have the applicants’ right to property under S 75 of the Constitution been contravened? The answer would be no. S 75 of the Constitution offers protection against compulsory acquisition of property. S 75 of the Constitution reads as follows;

“75 (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired., except where the following conditions are satisfied.

(a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order or the development or utilization of property so as to promote the public benefit and

(b) ...

(c) ...

(2) ... (7) “

S 75 (6) provides for limitations to the above right. I do agree with the Plaintiffs submissions and the decision in *SHAH'S* case (supra) that property includes contract. In this case if the Plaintiffs were to prove that they are entitled to compensation for injury, then that would amount to be vested right or interest in the award which would require protection by the law. However, I have earlier found that the Plaintiffs have not yet demonstrated that they are entitled to compensation from the Defendant under S 62 of the Wildlife Conservation Act. In the case *JOSEPH BORO NGERA*, J. Gicheru acknowledged that the amendment to the Act removed compensation for/to damage crops or property by animals but that the amendment provided that the Kenya Wildlife Service do provide services to the farming and ranching communities in Kenya for the protection of agriculture against destruction by Wildlife. That the Respondent having been charged with that responsibility, if it failed in the discharge thereof, it was in breach of a statutory duty. That court did not hold that failure by the Respondent in its duty amounted to a Constitutional breach but that it was a mere breach of a statutory duty to give advise to farmers. Even if there was any breach by the Defendant it would only be a breach of statutory duty i.e. a duty of care but not contravention of a Constitutional right.

Apart from the above observation, I think that what the court said was that where a statute creates a duty but imposes no remedy, there will be a presumption that a person injured thereby will have a cause of action. So that in this case, despite the fact that the amendment removed compensation for crops and animals from the Act, if there was proof that such loss or damage to crops or property has occurred, the body charged with the duty could still be liable to compensate the aggrieved party by way of damages. That proof can only be done upon the hearing and determination of the civil suit in which the reference arises. In my view this reference is premature.

In any event breach of duty or negligence has to be established before this court can be called upon to declare any rights. This court has been called upon to make findings on points of law raised by the Plaintiffs in this matter before any findings of fact have been made on whether or not there was an attack on the Plaintiffs crops or property, and whether the Defendant was negligent. In its defence in the civil suit, the Defendant denied the allegations of negligence leveled against it and it is upto the Plaintiff to prove them. The Court of Appeal, in *RASHID ODHIAMBO OLOGGOH & 245 OTHERS V HACO INDUSTRIES CA 110/05*, observed that in an application under S 84 of the Constitution for likely, or alleged breach of rights, the court should first consider whether or not the allegations made by the Plaintiffs are true and the burden is on the Plaintiffs to demonstrate to the court that the facts on which they base their claim are true. If the facts are found to be true, then the Plaintiffs would move further to prove whether the facts amount to a violation or a contravention of the Constitutional provisions. In their plaint, the Plaintiffs merely alleged that the Defendant was negligent and a defence was filed denying those allegations of negligence. There is need to prove the said allegations. I doubt that such proof would have been ably done in a Constitutional application that is based on affidavit evidence like the present one. In my view, such proof would only have been possible in the civil matter that is still pending determination by the civil court. After proof of negligence thereof, the Plaintiffs would be required to demonstrate that the facts amount to a Constitutional Violation. The conclusion I come to is that the Plaintiffs have not proved that the Defendant has breached S 75 in relation to them and that claim can not succeed.

Has the application been denied access to the court? The Plaintiffs alleges that they have been denied access to the High Court by virtue of amendment of S 62 (1) of the Wildlife Conservation Act removing compensation for crops and animals. Section 60(1) which creates the High Court provides as follows:-

“There shall be a High Court, which shall be a Superior Court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred by this Constitution or any other law.”

The civil and Criminal jurisdiction of the High Court is unlimited. I do not agree with the Plaintiff's Contention that they have been denied access to the High Court. The Plaintiffs filed a civil suit against the Respondent claiming damages for negligence and breach of duty (see para 17 of the plaint). The High

Court has not denied that it has jurisdiction to entertain that matter nor has the Defendant denied such jurisdiction. Infact at para 14 of the plaint, the Plaintiffs admit the jurisdiction of the High court. What was created under S 62(1) is a non-fault Compensation Scheme which is funded by Parliament and applications by aggrieved parties there lie to a tribunal set up under that Act. But that section does not preclude one enforcing their rights under the Common Law. I find that no breach of S 60 of Constitution has been disclosed.

The Plaintiffs also allege breach of S 80 of the Constitution which offers protection of freedom of assembly and association. The Plaintiffs did not plead specifically in respect of that section. There is no cause of action disclosed. It is not enough to cite a section of the Bill of Rights.

For all the reasons given in this judgment, I find that this motion is incompetent and unmeritious for non-joinder of the Attorney General and the fact that the Plaintiffs have not attempted to prove any breach of their Constitutional rights as alleged. The Plaintiffs have filed a civil claim based on negligence and they should go ahead to prosecute that claim but not try to use shortcuts. I therefore dismiss this Constitutional Reference, by way of notice of motion dated 21/10/04. I think it proper that the Plaintiffs pay the costs of this application. I direct that this matter be sent back to the Civil Division where it had been filed for hearing and determination.

It is so ordered.

Dated and delivered at Nairobi this 16th day of October 2009.

R.P.V. WENDOHO

JUDGE

Delivered in the presence of:-

..... **For the Plaintiffs/Applicants**

.....**for the Defendant/Respondents**

court clerk