



**Republic v Kenya Wildlife Service & 2 others; Lesimbasele & another (Exparte Applicants)
 (Suing as the Legal Representative of the Estate of Iltelesian Ortowa - Deceased) (Judicial Review
 Miscellaneous Application E002 of 2025) [2025] KEHC 4450 (KLR) (8 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 4450 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT MARSABIT
 JUDICIAL REVIEW MISCELLANEOUS APPLICATION E002 OF 2025
 FR OLEL, J
 APRIL 8, 2025
 IN THE MATTER OF AN APPLICATION FOR AN ORDER OF
 MANDAMUS
 AND
 IN THE MATTER OF THE CONSTITUTION OF KENYA
 ARTICLE 165(3)(A)
 AND
 IN THE MATTER OF THE WILDLIFE CONSERVATION AND
 MANAGEMENT ACT NO 47 OF 2013 LAWS OF KENYA
 SECTION 25(1),(2)&(3)
 AND
 IN THE MATTER OF THE WILDLIFE CONSERVATION AND
 MANAGEMENT COMPENSATION REGULATIONS, 2017
 (REGULATION (1)&(2)
 AND
 IN THE MATTER OF THE LAW REFORM ACT, CAP 26
 SECTION 8&9**

BETWEEN

REPUBLIC APPLICANT

AND

KENYA WILDLIFE SERVICE 1ST RESPONDENT



COUNTY WILDLIFE CONSERVATION & COMPENSATION COMMITTEE -
MARSABIT 2ND RESPONDENT
DIRECTOR, MINISTERIAL CONSERVATION COMPENSATION
COMMITTEE 3RD RESPONDENT

AND

KITERE LESIMBASELE EXPARTE APPLICANT
DAVID LESIMBASELE EXPARTE APPLICANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ILTELESIAN
ORTOWA - DECEASED

JUDGMENT

Introduction

1. The Judicial review-notice of motion application under consideration is the one dated 17th January 2025, filed under provisions of Order 53 Rule 3(1) of the Civil Procedure Rules, Section 8 & 9 of the Law Reform Act, Cap 26, and seeks for orders that;
 - a. That the Honourable court be pleased to grant an order of judicial Review by way of Mandamus compelling the Respondents and specifically the 1st Respondent through the 2nd Respondent (CMCC) to deliberate upon the Ex parte Applicant's claim lodged on 30th March 2023 within the next 30 days pursuant to Regulation 27(1) of the wildlife conservation and Management compensation Regulations 2017.
 - b. That the 1st Respondent do report to this Honourable court its decision and/or deliberations under prayer (1) above on or before the Expiry of 30 days from the date of issuance of this order.
 - c. An order of Mandamus be issued to compel the respondents and specifically the 1st Respondent to pay the Exparte Applicant the sum of Kshs 5,000,000/= recommended, verified by the 2nd Respondent and approved by the 3rd Respondent as compensation to the estate of the deceased in compliance with Regulation 27(1),(2) & 30(1).
 - d. That the 1st Respondent be and is hereby ordered to comply by paying the Ex parte Applicant the said approved sum within 14 days from the date of issuance of the order of Mandamus.
 - e. That costs and incidentals to the Application be provided for.
 - f. Such further and other reliefs that this Honourable court may deem just and expedient to grant.
2. This application is supported by the grounds advanced on the face of the said Application, the statutory statement, verifying and further Affidavit of the Applicant. The respondent did oppose this Application through the Replying Affidavit sworn by their legal office, Leon Kalisto.

B. Pleadings

3. The Ex parte Applicants averred that they were the legal representatives of the estate of the late Iltelesian Ortowa, who unfortunately was attacked by an Elephant on 5th March 2023, while on his way home from grazing along Ichuta road, thereby occasioning him to suffer fatal Injuries. They did report



- this incident and visited the 1st respondent's office where they filled the compensation forms and had legitimate expectation that the 2nd respondent would deliberate on their claim and award them KShs 5,000,000/= as prescribed under regulation 27(1) of the wildlife conservation and Management regulations 2017 as read with section 25(1) of the wildlife conservation and Management Act No 47 of 2013.
4. Despite constant reminders, the respondents had been reluctant and uncooperative in processing their claim, contrary to the guiding principles of a fair administrative process, and therefore had genuine apprehension that they were unlikely to receive any formal response and/or justice from the respondents unless the court intervened on their behalf.
 5. In response, the 1st respondent did aver that they were not statutorily mandated to direct CWCC on how to carry out their obligation, and was just represented in the said committee by the county warden, who was designated as the secretary to the said committee. Secondly, the responsibility to constitute the said committee fell squarely under the statutory mandate of the cabinet secretary, the Ministry of Tourism and Wildlife. To that extent, the application filed was premature as they were waiting for directives from the Minister to form the said committee, which would then sit, deliberate, and make recommendation on the Ex parte Applicant's claim lodged on 30th March 2023.
 6. It was the 1st respondent's further contention that it would be unfair to seek compensation from them, when in law that duty squarely fell on the shoulders of its parent Ministry in accordance with section 25 of the Wildlife Conservation and Management Act. From the foregoing, it was clear that the Ex parte Applicant was barking up the wrong tree and needed to have sued the Cabinet Secretary, Ministry of Tourism and Wildlife, to compel them to make payment as recommended by CMCC.
 7. Finally, the 1st respondent also averred that the Ex parte Applicants lacked locus to file this Application and urged the court to find that the said application is not merited and be pleased to dismiss the same.
 8. The Ex parte Applicants did file their further Affidavit dated 19th February 2025, and confirmed that they had indeed obtained letters of administration Ad litem for the deceased estate through Marsabit Misc Succession cause No E0010 of 2023 and therefore had the right to institute this suit.
 9. Further, they averred that under Sections 6,7,8, 9, and 16 of the Wildlife Conservation and Management Act No 47 of 2013, it was the 1st respondent who had the obligation and mandate to set up, control, and manage the affairs of the 2nd respondent and therefore was the right party to sue. It was therefore in the interest of justice to allow the orders sought

C. Submissions

i. The Ex parte Applicant's Submissions

10. The Ex parte Applicant filed submissions dated 18th February 2025 wherein they rehashed the facts pleaded and stated that under Section 7(c), and 25 of the Wildlife conservations and Management Act No 47 of 2013, the 1st respondent had the statutory obligation of setting up a county wildlife conservation committee in respect of each county and also to review and recommend compensation for person injured due to wildlife conflict under the 3rd schedule of the said Act.
11. The said provisions of the wildlife conservation and Management Act were to be read together with Regulation 27(1) and (2) of the wildlife conservation and Management (Compensation regulations) 2017, which provided that on receipt of a claim for bodily injury or death the committee (CMCC) would within 30 days of such receipt, verify the said claim and submit It to the cabinet secretary



together with their recommendations. The cabinet secretary, too, had 30 days upon receipt of CWCC recommendations to settle such a claim along the lines of the recommendations made.

12. It was their further submissions that under sections 8 and 16 of the *Wildlife Conservation and Management Act* No 47 of 2013, the 1st respondent was managed by a board of trustees who had the obligation to approve the organization's strategic plans, operational policies, capital, and recurrent expenditure. Section 16(b) & (c) of the said Act, specifically provided that the board of trustees shall make provisions of payment for all recurrent expenditure, including "other charges in respect of the county wildlife conservation and compensation committee and payment of allowances in respect of the county wildlife conservation and compensation committee.
13. For all intents and purposes, it was clear that the 2nd respondent was an agent of the 1st respondent, and they could not ignore their obligations under the law. Reliance was placed in the Republic Vrs Kenya Wildlife Service & 2 others; Muhia (Ex parte Applicant),(Judicial Review Application No E003 of 2024),(2024) KEHC 8086(KLR) to buttress this point.
14. On the issue of whether the 1st respondent was a necessary party to these proceedings, the Ex parte Applicant submitted that statutorily, it was the 1st respondent's duty to manage and conserve wildlife and that duty came with attendant responsibility to shoulder claims arising from any loss or damage caused by a breach of the aforesaid duty. Reliance was placed on Republic Vrs Kenya Wildlife Service & 2 others; M'itimitu (Suing as the legal representative of the Estate of Judy Gakii M'ngai),(Ex parte Applicant), (Judicial review E008 of 2021),(2024)KEHC 7259(KLR)& Republic Vrs Kenya wildlife service & 3 others; Musau (Interested party), (Judicial Review Misc Application No 54 of 2020), (2022)KEHC 102(KLR)
15. Finally, on whether the court could proceed to issue an order of mandamus, the Ex parte Applicant did contend that such orders were applicable, where there was a public duty imposed by law on the respondent and they had failed to perform their obligation as provided for. It was therefore appropriate to issue the said order to compel performance of statutory obligations provided for.
16. The applicant urged the court to find that they had established that the respondents had been given ample time to comply and perform their statutory duty, but had failed to do so. They therefore urged the court to grant the orders sought.

ii. The Respondents' Submissions.

17. The respondents filed their submissions dated 10th March 2025 and raised two issues. It was their contention that the 1st respondent had been wrongly sued as section 18 of the *Wildlife Conservation and Management Act*, 2013, squarely placed the obligation of constituting the CWCC on the Cabinet Secretary, Ministry of Tourism and Wildlife. Therefore, the madamus orders sought could not issue as against them to compel CWCC to sit and deliberate on the Ex parte Applicant's claim. Reliance was placed on the case of Republic Vrs Kenya Vision 2030 delivery board, & Another, Ex parte Eng Judah Abekah (2015)klr & Registrar of societies & 5 others, ex parte Kenyatta & 6 others, Nairobi HCMCA No 747 of 2006 (2008), 3KLR (EP) 521.
18. Secondly, the respondents did contend that orders of mandamus could not issue to compel the 1st respondent to pay the Ex parte Applicants Kshs 5,000,000/= as said prayer for compensation would be premature and made contrary to provisions of Section 25(2) & (3) of the *wildlife conservation and Management Act*, 2013) as read together with Part V, Rule 27(2) of wildlife conservation and Management (compensation) Regulations 2017, which had laid down the procedure for compensation and who is responsible for the same.



19. The 1st respondent also submitted that the prayer for payment of Kshs 5,000,000/= was premature as the Ex parte Applicants had not exhausted the alternative dispute resolution mechanism provided for under statute. The Marsabit CWCC had to sit to deliberate on their claim, and their recommendation be forwarded to the Cabinet Secretary for settlement. The high court could not direct the said tribunal on how to arrive at the said determination. Reliance was placed the case of Albert Chaurembo Mumba & 7 others Vrs Maurice Munyao & 148 others (2019) Eklr, NGO's Coordination Board Vrs E.G & 4 Others; Katiba Institute (Amicus Curiae), (Petition No 16 of 2019(2023)KESC & Peter Muturi Njuguna Vrs Kneya Wildlife Service (2017) Eklr, which all extensively dealt with the doctrine of exhaustion.
20. The respondent therefore urged the court to find that the application under consideration was not merited and the same be dismissed with costs.

D. Analysis & Determination

21. I have considered all the pleadings filed and respective submissions filed by both parties. The issues which arise for determination are whether the 1st respondent is wrongly sued, and secondly, if the mandamus order sought should issue and to what extent.

(i) Liability of the 1st Respondent and whether they are a Necessary party to these proceedings.

22. The 1st respondent's role and duties are well defined under Section 7(c), 7(m), 18, 19 and 25 of the [*wildlife conservation and Management Act*](#), 2013 and since the import of judicial review application is to scrutinize the decision-making process or dispute resolution process, statutorily undertaken by the 1st respondent, they then become a necessary party to these proceedings.
23. Secondly, the 1st respondent's contention that the statutory obligation to settle the Ex parte Applicant's claim lay with the Cabinet Secretary for Tourism and Wildlife also holds no water, and is an issue which has been settled by the Court of Appeal in Kenya wildlife service Vrs Joseph Musyoka Kalonzo (2017) Eklr where they held that;

“The appellant admits the duty to manage and conserve wildlife. That duty comes with the attendant responsibility to shoulder any claims of loss or damage caused by the breach of that duty. The law on this point was succinctly pronounced in Joseph Boru Ngera & Another v Kenya Wildlife Service & Rift Valley Agricultural Contractors Limited (2014)eklr amongst others, is still good law on this point. The cabinet secretary referred to in the Act pays money on behalf of the appellant. Neither the court nor the parties should concern themselves with the internal arrangement of the appellant as to whether it is the CEO of the appellant or the cabinet secretary who should disburse the money.

iii. Whether Orders of Madamus should issue as sought herein

24. In Republic vs Kenya National Examinations Council ex parte Gathenji and 9 Others, [1997] e KLR. The said Court held as follows in this regard:

“The next issue we must deal with is this: What is the scope and efficacy of an Order of Mandamus? Once again we turn to Halsbury's Law of England, 4th Edition Volume 1 at page 111 from paragraph 89. That learned treatise says:-

“The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person,



corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed....”

25. The requirements for an order of mandamus to issue were further explained by Mativo J. in *Republic vs Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & Another* [2018] eKLR as follows:

“Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for mandamus is set out in *Apotex Inc. vs. Canada (Attorney General)*, and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*. The eight factors that must be present for the writ to issue are:-

- (i) There must be a public legal duty to act;
- (ii) The duty must be owed to the Applicants;
- (iii) There must be a clear right to the performance of that duty, meaning that:
 - a. The Applicants have satisfied all conditions precedent; and
 - b. There must have been:
 - i. A prior demand for performance;
 - ii. A reasonable time to comply with the demand, unless there was outright refusal; and
 - iii. An express refusal, or an implied refusal through unreasonable delay;



- iv. No other adequate remedy is available to the Applicants;
 - v. The Order sought must be of some practical value or effect;
 - vi. There is no equitable bar to the relief sought;
 - vii. On a balance of convenience, mandamus should lie
26. The 1st and 2nd respondents have a statutory duty imposed by sections 18 and 25 of the Wildlife Conservation & Management Act, 2013, to receive, verify, and recommend appropriate payment for persons who have suffered bodily injury or are killed by wildlife. The deceased was killed by a rogue elephant on 05.03.2023, and subsequently, the Ex parte Applicants officially lodged their claim with the respondents through the Marsabit county wildlife office on 30.03.2023.
27. At the time of filing this claim, about 22 months later, the said claim had not been acted upon, yet regulation 27(1) of the Wildlife Conservation and Management Compensation Regulations 2017 provides that the same must be determined within a period of 30 days from the date the incident was reported to the respondents.
28. The Ex parte Applicants have a right under Articles 47 and 50 of the *Constitution* of Kenya to have their claim expeditiously dealt with, and also to have their dispute resolved in a fair manner. The respondents have failed to do so and further have not offered any explanation as to why there has been a delay in undertaking their statutory duty. To the extent that the Ex parte Applicants have proved that there has been a dereliction of duty on the part of the 1st and 2nd respondents and are entitled to be granted the prayers sought under prayers (1) and (2) of their application under consideration.
29. The Ex parte Applicants also sought for an order of mandamus be issue compelling the 1st respondent to pay them the sum of Kshs 5,000,000/= as verified and recommended by the 3rd respondent based on the provisions of Regulations 27(1)(2) & 30(1) of the Wildlife Conservation and Management Compensation Regulations 2017. This prayer is premature as it involves the implementation of a decision not yet arrived at, and may be subject to an Appeal by a party not satisfied with the recommendation.

F. Disposition

30. The upshot is that the notice of motion Application dated 17th January 2025 is partially successful and is allowed on the following terms.
- a. That an order of Mandamus be and is hereby issued compelling the 1st and 2nd Respondents to deliberate upon the Ex parte Applicant's claim lodged on 30th March 2023 within the next 30 days pursuant to Regulation 27(1) of the Wildlife Conservation and Management Compensation Regulations 2017.
 - b. That the 1st Respondent do report to this Honourable court its decision and/or deliberations under prayer (1) above on or before the Expiry of 45 days from the date of issuance of this order.
 - c. That the costs of this Application are assessed at Kshs 150,000/= all inclusive.
31. It is so Ordered.

READ, SIGNED, AND DELIVERED VIRTUALLY AT MARSABIT ON THIS 8TH DAY OF APRIL, 2025.



FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 8th day of APRIL 2025

In the presence of:

Mr. Amule for Ex parte Applicant

Mr. Mutai for 1st Respondent

Mr. Jarso - Court Assistant

