



Mkilas & another (Suing as the Legal Representatives of the Estate of Ntimama Nkilasi - Deceased) v Kenya Wildlife Service (Civil Appeal E005 of 2022) [2024] KEHC 1058 (KLR) (5 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1058 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KILGORIS
CIVIL APPEAL E005 OF 2022
F GIKONYO, J
FEBRUARY 5, 2024**

BETWEEN

NOONLAMALA MKILAS 1ST APPELLANT

JAMES NKILAS 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF NTIMAMA
NKILASI - DECEASED**

AND

KENYA WILDLIFE SERVICE RESPONDENT

*(Being an appeal from the ruling of Hon. W.K. Kitur (SRM)
delivered on 08.11.2022 in Kilgoris SPMCC No. E034 of 2021)*

JUDGMENT

Impugned Ruling

1. In a ruling delivered on 08.11.2022, the trial court upheld the respondent's preliminary objection dated 16.06.2022; and in effect, dismissed the appellant's suit number Kilgoris SPMCC No. E034 of 2021. The reason for dismissal of the suit given by the trial court was that the matter was already before the committee to compensate the plaintiffs.
2. The appellant's suit in the trial court was for compensation on behalf of the estate of the deceased who died after sustaining injuries following a crocodile attack. The respondent's preliminary objection under Section 25 of the *Wildlife Conservation and Management Act*, 2013 was that the mode of seeking compensation in such claims was set out in the Act.
3. The specific terms of the respondent's notice of preliminary objection dated 16.06.2022 were set out as follows;



- i. That this honourable court lacks jurisdiction to hear and determine this suit on the grounds that the plaintiff herein lodged his claim for compensation before the county wildlife conservation and compensation committee pursuant to section 25 of the *Wildlife Conservation and Management Act* and has been awarded Kshs. 5,000,000/=
 - ii. That no appeal has been preferred by the plaintiff as prescribed in section 25(6) of the *Wildlife Conservation and Management Act*.
 - iii. That lodging the claim herein is an abuse of the court process and may result in double compensation of the plaintiff by the defendant, using public funds.
 - iv. That therefore the suit herein should be struck out with costs to the defendant.
4. The memorandum of appeal dated 22.11.2022 cited eight (8) grounds of appeal which can be condensed into two as follows;
- i. That the trial magistrate erred and misdirected himself in failing to appreciate and make a finding that he had jurisdiction to entertain the suit before him.
 - ii. That the learned magistrate erred both in law and in fact in failing to consider the appellants' submissions and authorities and upholding the preliminary objection whereas no material was placed before him to prove the same and the preliminary objection was never heard or prosecuted.
5. In the end the appellants urged this court to allow the appeal; set aside the orders issued on 11.11.2022 and reinstate the suit before the lower court for hearing before another trial magistrate, and the costs of this appeal.

Directions of the court

6. The appeal be canvassed by way of written submissions. Both parties filed their written submissions.

Appellants' Submissions

7. The Appellants submitted that section 25 of the *Wildlife Conservation and Management Act* gives discretion to the plaintiff to choose the forum for instituting his claim and they chose the forum of the court and institute their claim in tort. The appellants relied on sections 6, 7, and 25 of the *Wildlife Conservation and Management Act*, Anderson B In Blyth Vs Birmingham Water Works Co [1856] 11 Ex. 751 cited with approval in the case of Cyrus Kanyi Vs Consolata Hospital & Another Civil Suit No. 1766 of 2002, Order 2 Rule (10) (1) of The Civil Procedure Rules 2010, Adetoun Oladeji (Nig) Ltd Vs Nigeria Breweries Plc S.C. 91/2002 cited in the case of Malawi Railways Limited vs PTK Nyaulu Misc Civil Appeal No. 13 of 1992.
8. The appellant submitted that it is well settled and courts have pronounced themselves that courts have jurisdiction to handle matters related to human-wildlife conflict. Therefore, the trial magistrate was properly seized with jurisdiction to hear and determine this matter. The appellants relied on the cases of Owners Of Motor Vessel Lilian 'S' v Caltex Oil Kenya Ltd 1989 KLR 1, Samuel Kamau Macharia v Kenya Commercial Bank And Two Others, Civ. Appl. No. 2 of 2011, section 25 of the *Wildlife Conservation and Management Act*, Luke Mugania v Kenya Wildlife Service Civil Appeal No. 114 of 2017, Rose Ndinda Muluke v Kenya Wildlife Service Civil Appeal No. 73 of 2016, Peter Njuguna Muturi v Kenya Wildlife Service Civil Appeal No. 260 of 2013, Civil Appeal No. 306 of 2015 in Kenya Wildlife Service v Joseph Musyoka Kalonzo, Wardington Lyngdoh v Collector Mankyrakt AIR 1995 SC 2340, KANNEN v Land Acquisition Officer (199) 2LLT, Ajit Singh v State Of Punjab [1994]



SCCC 67, United India Insurance Company Limited v Alovi 1998 1 KLT 957, Jabalpur Bus Operators & Others v State M.P & Anor AIR 2003, Indo Scuire Time Ltd v Umrao & Others , Himalayan Tiles & Marbles (P) Limited AIR 1980 SC 118 Supreme Court Of India, Municipal Corporation Of The City Of Ahmedabad v Chandulla Shamaldas Patel, Luka Mungania Inebu v Kenya Wildlife Service Civil Appeal No. 114 of 2017, Rose Ndinda Mutuku v Kenya Wildlife Service Civil Appeal No. 73 of 2016, Kenya Wildlife Service v Kinyua Ikabu Civil Appeal No. 49 of 2017, John Kimanthi Marete v Kenya Wildlife Service Civil Appeal No. 90, Supreme Court Petition No. 11 Of 2014 Mable Muruli v Hon. Wycliffe Ambetsa Oparanya & 3 Others [2016] eKLR, And Mary Wambui Munene v Peter Gichuki And 2 Others.

9. The appellants submitted that the respondent filed the preliminary objection but failed to prosecute the same or filed submissions. The appellants filed their submissions in respect of the preliminary objection but the trial court ignored their submissions and made a ruling. The appellants argue that had the trial court had the opportunity of going through the appellants' submissions it would have arrived at a different conclusion.

The Respondent's Submissions

10. The respondent submitted that once the appellants elected to pursue compensation through the CWCC they are bound by law to follow the procedure as prescribed in section 25 of the [Wildlife Conservation and Management Act](#).
11. The respondent submitted that the suit lodged before this honourable court seek for the audience in the first instance as opposed to an appeal as prescribed under section 25(6) of the [Wildlife Conservation and Management Act](#). The proper forum for an appeal from the decision of CWCCC and MWCC would be the national environment tribunal and a further appeal or second appeal to the environment and land court. The respondent relied on the case of Meru Civil Appeal No. 48 A Of 2020 Kenya Wildlife Service v Abraham M'ngai M'itumitu [2021] eKLR, Kilungu PMCC No. 256 Of 2021 Joseph Nzuki King'oo v Kenya Wildlife Service [Unreported].
12. The respondent submitted that if parties were allowed to pursue both avenues of compensation it would set a dangerous precedent that would result in double compensation.
13. The respondent submitted that the appellants' claim is time-barred under section 4(2) of the [Limitation of Actions Act](#). The cause of action arose on 14.07.2016 when the deceased was attacked and the suit herein was filed on 30.10.2022.
14. The respondent submitted that jurisdiction is everything without which the court cannot proceed. The respondent relied on the case of Nairobi civil appeal 244 of 2010 Phoenix of E.A. Assurance Company Limited V M. Thiga T/A Newspaper Service [2019] eKLR and Nairobi High Court Civil Case 158 Of 2016 Peter Lai Muthoka V Standard Group [2017] eKLR.

Analysis And Determination

Duty of court

15. Section 78(2) provides that the appellate court shall have the same powers and shall perform nearly the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted herein.
16. The first Appellate Court should, therefore, evaluate the evidence afresh and make any of its own conclusions albeit it must bear in mind that it did not have the opportunity of seeing or hearing the witnesses firsthand. See the case of Selle & Anor v Associate Motor Boat Co. Ltd 1968 EA 123.



Issues

17. Upon consideration of the appeal, the rival submission of the parties and the law, the proper question is; ‘whether the trial court erred in finding that it had no jurisdiction’.
18. The appeal revolves around Section 25 of the *Wildlife Conservation and Management Act*, 2013 and whether it ousts the jurisdiction of the Court.
19. At the heart of this case is Section 25 of WCMA which 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 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) The Cabinet Secretary shall consider the recommendations made under subsection (2) and where appropriate, pay compensation to the claimant as follows—
 - (a) in the case of death, five million shillings;
 - (b) in the case of injury occasioning permanent disability, three million shillings;
 - (c) in the case of any other injury, a maximum of two million shillings, depending on the extent of injury.
 - (4) Any person who suffers loss or 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.
 - (5) The County Wildlife Conservation and Compensation Committee shall review the claim and award and pay a compensation valued at the ruling market rates:

Provided that no compensation shall be paid where the owner of the livestock, crops or other property failed to take reasonable measures, to protect such crops, livestock or property from damage by wildlife or his land use practices are in compatible with the ecosystem-based management plan for the area.
 - (6) A person who is dissatisfied with the award of compensation by either the County Wildlife Conservation and Compensation Committee or the Service may within thirty days after being notified of the decision and award, file an appeal to the National Environment Tribunal and on a second appeal to the Environment and Land Court.
 - (7) The Cabinet Secretary may, by notice in the Gazette, prescribe such regulations and guidelines as are necessary and appropriate to carry out the purposes of this section.’



20. This section was the subject of case of Joseph Musyoki Kilonzo v Kenya Wildlife Service [2015] eKLR and the Court of Appeal confronted with the question whether the High Court had jurisdiction to entertain similar claims arising from the Act, stated: -

“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.”

21. Almost of similar purport, section 62(1) of the Wildlife (Conservation and Management) Act (Repealed) was discussed in Peter Muturi Njuguna v Kenya Wildlife Service NKU CA Civil Appeal No. 260 of 2013 [2017] eKLR and the Court of Appeal stated 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.”

22. The case of Peter Muturi Njuguna v Kenya Wildlife Service(*ibid*) was discussed again in John Kimathi Marete v Kenya Wildlife Services [2018] eKLR where the Court of Appeal stated: -

“That case though can be distinguished from Kenya Wildlife Service v Joseph Musyoki Kilonzo (Supra) on several grounds. Although both cases dealt with provisions that are similar, 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 the principle that where the Act provides the exclusive means to agitate cases of injury by wildlife that procedure should be followed, the interpretation given by the Court of Appeal on section 25 of the WCMA is binding on this court until the Court revisits the matter.”



23. The obtaining position, therefore, is that Section 25 of the Act does not take away the jurisdiction of the court to hear and determine cases for compensation under the wildlife compensation Act.
24. Be that as it may, the decision supports the multiple-doors-of-justice approach which is the thrust of *the Constitution* and the law in enhancing access to justice to all in a manner that is proportionate, affordable and easily accessible. In addition, it is relevant in the doctrine of exhaustion of remedy jurisprudence.
25. The respondent alleged that the appellants had lodged a claim for compensation before the county wildlife conservation and compensation committee. The respondent has provided a copy of the Kenya Wildlife Occurrence Book. The respondent's witness has in his statement alleged that the appellants were issued with a compensation form for the matter to be forwarded to the county wildlife conservation and compensation committee for deliberations. The said Philemon Chebet has also alleged that the claim was approved for payment in the sum of Kshs. 5,000,000 by the CWCCC but was deferred by the ministerial wildlife conservation compensation committee for lack of a birth certificate which the family swore an affidavit to that effect.
26. The court will, however, not discuss these arguments by the respondent in light of the order and directions the court will make.
27. Similarly, the issue of whether the matter is time-barred, will also not be discussed for the same reason which will become apparent below.
28. In accordance with the decision of the Court of Appeal in Joseph Munyoki Kalonzo v Kenya Wildlife Services (Supra) the appeal is allowed and the decision by the trial court in dismissing the suit is set aside. The suit is reinstated. Conclusion and orders
29. The primary suit is remitted to the Senior Principal Magistrate court for hearing and determination by a competent magistrate other than Hon. W. K. Kitur (SRM).
30. Parties may argue before the trial court issues on the award made by the committee, limitation of actions or possibility of stay of the suit thereto.
31. In light of the circumstances of the case and the decision herein, each party will meet its own costs of this appeal
32. Orders Accordingly.

**DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH THE TEAM APPLICATION,
THIS 5TH DAY OF FEBRUARY 2024**

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Hon. F. Gikonyo M.

Judge

In the presence of:

C/A – Mr. Leken

Appellant – Mr. Amule - Present

Respondent – M/s. Feksi - Present

