



Republic v Kenya Wildlife Service & 2 others; M’Itimitu (Suing as legal representative of the Estate of Judy Gakii M’Ngai) (Exparte Applicant) (Judicial Review E008 of 2021) [2024] KEHC 7259 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
JUDICIAL REVIEW E008 OF 2021
TW CHERERE, J
JUNE 13, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

KENYA WILDLIFE SERVICE 1ST RESPONDENT

DIRECTOR GENERAL, KENYA WILDLIFE SERVICE 2ND RESPONDENT

CHIEF MAGISTRATE, MAUA LAW COURTS 3RD RESPONDENT

AND

ABRAHAM M’NGAI M’ITIMITU (SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF JUDY GAKII M’NGAI) EXPARTE APPLICANT

JUDGMENT

1. By a substantive notice of motion dated 8th November, 2021, Applicant herein moved this court seeking for the following orders; -
 - a. That a Judicial Review Order/ writ of *Mandamus* ne issued against the 1st and /or 2nd respondents compelling them, jointly and/or severally in forthwith pay the Ex-parte applicant a sum of KES. 940,000/- being the balance of the statutory provided compensation amount that is yet to be remitted/to the ex-parte applicant in his capacity as the Legal Representative of the estate of Judy Gakii M’Ngai (deceased), who was killed by an elephant on 06th October,2015 at Ndoleli area, within Meru County, in accordance with Section 25 (3) (a) of the *Wildlife Conservative and Management Act*, 2013, Laws of Kenya.
 - b. That a Judicial Review order prohibition be issued against the 3rd Respondent, prohibiting it/ them from entertaining hearing determining and /or handling any matter, application and/



or claim whatsoever relating to the ex-parte applicant's claim in respect of the killing of Judy Gakii M'Ngai (deceased) by an elephant.

- c. That the costs of this application be provided for.
2. The application is grounded upon the statutory statement of facts and the verifying affidavit thereof sworn by Abraham M'Ngai M'Itumitu and premised on the grounds that the ex-parte applicant, the father and duly appointed legal representative of the estate of Judy Gakii M'Ngai on 30th March, 2016 lodged a compensation claim form as stipulated under the *Wildlife Conservation and Management (Compensation) Regulations, 2016* for compensation of the loss of her daughter.
3. That after a period of 6 months passed without any communication from the County Wildlife Conservation and Compensation Committee, Applicant concurrently instituted a civil suit against the 1st Respondent on 28th December, 2016; being Maua CMCC 178 of 2016 for compensation for the death of Judy Gakii M'Ngai that occurred as a result of an elephant attack.
4. The applicant further averred that on or about June, 2019, a period of over three years since the negligence and tortious cause of action arose, a payment of KES. 1,500,000/- was made as opposed to the statutory mandatory compensation of KES. 5,000,000/-. That as a result of the irregular and inadequate payment, the Applicant was forced to amend his plaint in Maua CMCC 178 of 2016 to claim the balance of KES. 3,500,000// from the 1st and 2nd Respondents, which sum was awarded by the trial court.
5. 1st and 2nd Respondents appealed the decision and the lower court decision was overturned for want of jurisdiction which prompted a claim vide the application now before this court.
6. It is the Applicant's case that he has received a total of KES. 4,060,000/- and now seeks an order of *Mandamus* to compel 1st and 2nd Respondents to pay the balance of the applicant a balance of KES. 940,000/-.
7. The application was disposed off by way of written submissions which were duly filed on behalf of the Applicant and the Respondents.
8. It is the Applicant's case that internal mechanisms of the 1st Respondent should not be used as a bar for recovery of full and final settlement of compensation due. That whereas *Wildlife Conservation Management Act, 2013* (WCMA) only provide for a strict compensation sum of KES. 5,000,000/- in case of death of a victim, the award of KES. 1,500,000/- only paid to the Applicant was illegal and ultra vires. He urged the court to issue an order of *Mandamus* to compel 1st and 2nd Respondents to pay the balance of KES. 940,000/-.
9. 1st and 2nd Respondents on the other hand vide their submission dated 21st April, 2022 submitted that the Applicant herein has no basis of seeking a Judicial review writ of *Mandamus* against the 1st and 2nd Respondent herein as they have no mandate to make any compensation awards and that the mandate is the preserve of the County Wildlife Conservation and Compensation Committee.
10. 1st and 2nd Respondent further submitted that the Committee awarded the applicant KES. 1,500,000/- which amount has already been paid to the Applicant in full. That in the event that the Applicant herein was aggrieved by the award made by the Committee, he ought to have appealed the same within the statutory mechanism which is the National Environment Tribunal as the first stage of appeal and subsequently to the Environment and Land Court where one is dissatisfied with the decision of the tribunal as opposed to seeking double compensation from both the committee and the trial court.



11. 1st and 2nd Respondents additionally contend that this application is meant to deny them the avenue to seek the restitution of KES. 2,560,000/- paid to the Applicant by virtue of an irregular judgement of and therefore urge that it be dismissed.
12. Finally, 1st and 2nd Respondents argued that Applicant's remedy if, any lies with an appeal to the National Environment Tribunal as the first stage of appeal and subsequently to the Environment and Land Court if dissatisfied with the decision of the tribunal.
13. I have considered the application in the light of the submissions filed on behalf of the parties and the authorities thereto. One issue that stands out is whether this court has jurisdiction to grant the orders sought.
14. Jurisdiction is defined in *Halsbury's Laws of England (4th Ed.) Vol. 9* as "...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision."
15. *Black's Law Dictionary, 9th Edition*, defines jurisdiction as the Court's power to entertain, hear and determine a dispute before it.
16. In *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1 Nyarangi, JA, expressed himself as follows on the issue of jurisdiction: -

Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings....

17. Indeed, the issue of jurisdiction is determinative such that it can be raised at any stage of the proceedings.
18. The Court of Appeal in *Jamal Salim v Yusuf Abdulahi Abdi & another* Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows:

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in *Adero & Another v Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;

1.
 2. The jurisdiction either exists or does not ab initio ...
 3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
 4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.
19. The Supreme Court of Kenya in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & others* [2012] eKLR stated as follows: -

A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere



procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

20. Section 25 of *Wildlife Conservation and Management Act* No. 47 of 2013 provides as follows:

Compensation for personal injury or death or damage to property

- (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.



21. From the foregoing, it is clear as light of day that the Applicant's remedy for the balance of compensation lies elsewhere and not in seeking an order of judicial review.
22. In *Republic v Attorney General & another Ex parte James Alfred Koroso* [2013] eKLR, Odunga J cited *Shah v Attorney General (No. 3)* Kampala HCCM No. 31 of 1969 [1970] EA 543 with approval where Goudie, J expressed himself, inter alia, as follows:

“*Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty..... Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy.....With regard to the question whether *Mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *Mandamus* will lie on the application of a person interested to compel them to do so. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do.”
23. The duty to pay compensation Section 25 *WCMA* lies with the County Wildlife Conservation and Compensation Committee so much so that even if this court had jurisdiction to grant the orders sought, the same could not issue against the Respondents. To do so would have been an exercise in futility for the reason that the Respondents are not obligated to pay compensation under *WCMA*.
24. If there be any reason why the 3rd Respondents should not entertain any hearing to determine any matter, application and/or claim whatsoever relating to the ex-parte applicant's claim in respect of the death of Judy Gakii M'Ngai (deceased), the explanations ought to be argued by that very court if and when such matters are placed before the court.
25. This court will be acting in excess of its jurisdiction if it were to prohibit any properly constituted court from discharging its lawful mandate without any justifiable cause.
26. From the foregoing, I have come to the conclusion that the notice of motion dated 08th November, 2021 has no merit and it is dismissed with costs to the Respondents.

DELIVERED AT MERU THIS 13TH DAY OF JUNE 2024

WAMAE. T.W. CHERERE

JUDGE

Appearances

Court Assistant - Kinoti/Munene

For Applicant - Mr. Njindo for Ngunjiri Michael & Co. Advocates

For 1st & 2nd Respondents - Mr. Kariuki for Mithega & Kariuki Advocates

For 3rd Respondents - AG

