Kenya Wildlife Service v Muchoki & 3 others (Civil Appeal 23 of 2018) [2023] KEHC 19044 (KLR) (14 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19044 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 23 OF 2018

FR OLEL, J

JUNE 14, 2023

BETWEEN

KENYA WILDLIFE SERVICE .... APPELLANT

AND

NANCY WANJA MUCHOKI .... 1ST RESPONDENT

BONIFACE NJIRU KIVOKO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PAUL MUGENDI MAINA – DECEASED) .. 2ND RESPONDENT

AND REGIONAL AUTHORITITES .... 3RD RESPONDENT

THE HON ATTORNEY GENERAL .... 4TH RESPONDENT

(Being an appeal from the Ruling and/or of Hon. Daffline Nyamboke Sure- Resident Magistrate delivered on 5th March 2018 in Wang'uru PMCC No. 140 of 2016)

JUDGMENT

1. This appeal arises from the Ruling of the Honourable Daffline Nyaboke Sure Resident Magistrate delivered on March 5, 2018 in Wang'uru PMCC no 140 of 2016 where she dismissed the appellants notice of motion dated January 19, 2018, which application had sought that the primary suit as against Kenya Wildlife Service be struck out of being an abuse of the court process.

Background Facts

2. By a plaint filed in court on October 13, 2016, the 1st and 2nd Respondent's herein had sued the appellant seeking damages under *law reform Act* and under *Fatal Accidents Act* for fatal injuries sustained by one (Paul Mugendi Maina – deceased) who was attacked by a hippopotamus on October 21, 2013 while fishing along the shores of Masinga dam. The 1st and 2nd Respondents averred that the

deceased was a licenced fisherman and due to his death, the family and his beneficiaries had suffered damages and therefore sort compensations under the law of tort.

3. The appellants filed their statement of defence dated October 19, 2017 and denied any negligence alleged on their part. They stated that if the deceased died as a direct result an attack by a hippopotamus as alleged, then the attack was as a direct consequence of the deceased negligence. The 3rd and 4th Respondents were enjoined in this suit as third parties and they too filed their statement of defence dated December 15, 2017 denying all the allegations made in the plaint and they too attributed the incident to the negligence of the deceased.

4. In the statement of defence filed, the appellants stated that the suit filed did not disclose any cause of action against the defendant in light of clear provisions of Section 25 of the *Wildlife Conservation and Management Act* 2013, which clearly spelt out who was entitled to claim compensation, where an incident arose with respect to victims of wildlife/human conflict. The said section provided for claims to be lodged with respect to personal injury claim or damage to property at the county wildlife conservation and compensation committee within the jurisdiction established by the Act.

5. On April 12, 2017 the appellant did file a notice of preliminary objection on the basis that in light of provisions of Section 25 as read together with the third schedule of the *Wildlife Conservation and Management Act*, 2013 the court did not have jurisdiction to determine the suit filed. The trial court considered this preliminary objection and vide its ruling dated July 7, 2017 held that the same did not have merit and dismissed it with cost to the plaintiffs (1st and 2nd Respondent herein).

6. The appellant subsequently, filed a notice of motion application dated January 19, 2018 seeking that the suit as against the appellant be struck out for being an abuse of the process of court. On the grounds in support of the said application and the supporting affidavit the appellants averred that the 1st and 2nd Respondent's opted to lodge their claim under Section 25 of the *Wildlife Conservation and Management Act* 2013, with their local county wildlife conservation and compensation committee and were paid Ksh 200,000/=. They therefore could not keep the process alive i.e under the statute as provided for and by filing the claim under common law in court. The claim filed in court was thus an abuse of the process of court and ought to be struck out.

7. The both parties filed submissions with respect to the said application dated January 19, 2018. The trial magistrate vide the Ruling dated March 5, 2018 did find the issues raised in the notice of motion dated January 19, 2018 were similar to the issues she had dealt with when the trial court made a determination on the preliminary objection earlier raised. The central issue of determination was on jurisdiction of the court vis-à-vis the compensation procedure under section 25 of the the *Wildlife Conservation and Management Act* 2013 and that the appellant was re-opening the issue again. The issues raised were res judicata and proceeded to dismiss the motion with costs to the 1st and 2nd Respondent.

8. Being aggrieved by this Ruling, the appellant did file their Memorandum of Appeal on March 24, 2018 and raised the following grounds of appeal;

    a. That the Honourable trial magistrate erred in law and in fact in holding that the application was Res judicata when the issue before court was whether or not the suit was an abuse of the process of court and NOT whether or not the court had jurisdiction to determine Wang'uru CMCC No 140 of 2016.

    b. That the learned trial magistrate erred in law and in fact in holding that "the mechanism under the 2013 Act is not mandatory but optional seeming to suggest that the 1st and 2nd Respondent had the option of wither proceeding under the Act and/or filing a civil suit which interpretation was erroneous.

c. The learned trial magistrate erred in law and in fact in relying on the case of GWB vrs Principle Magistrate Bungoma and 3 others (2014)eKLR where it was held that 'the existence of an alternative remedy is not by itself a ground for refusing relief' thereto erroneously confirming that the striking out of suit.

d. That the learned trial magistrate erred in law and fact in failing to make a finding that the payment of Ksh 200,000/- which the 1st and 2nd Respondent admitted receiving pursuant to filing a claim under statement Act whether repeated or current constituted a claim pursuant under the statute hence fling of a suit in a court of law was and abuse of the court process.

e. That the learned trial magistrate erred in law and in fact in going into extraneous issues that were not addressed in the subject application when writing the said Ruling 1st and 2nd Respondent had 2 options to pursue in terms of relief but failing to make a finding that the pursuit of both reliefs was an abuse of the court process.

f. That the learned trial magistrate erred in law and in fact in failing and/or refusing to apply the doctrine of stare decisi in refusing to be bound by the decision of the court of Appeal in Nakuru Civil Appeal no 260 of 2013 which held into alia 'filing the claim before the district committee as the appellant appears to negligence based on the same facts is an abuse of court process' and proceeded to substitute an order of dismissal of the suit with an order striking out the suit.

9. The appellant prayed that this appeal be allowed and the ruling/order of the trial magistrate delivered on March 5, 2018 be set aside and an order do issue striking out the suit Wang'uru CMCC no 140 of 2016 for being an abuse of the court process.

Appellant submissions

10. The appellant did set out the pleadings as filed and submitted that in their statement of defence filed, they had pleaded that the Respondent's claim did not disclose any cause of action against the appellant in light of clear provision of Section 25 of the *wildlife Conservation and Management Act* 2013. For personal injuries, under Section 25(3) of the said Act, it is the Cabinet Secretary in charge of Tourism and Wildlife, who had the mandated to compensate those who suffer personal injury, while with respect to damage property the same would be paid by the relevant county wildlife conservation and compensation committee.

11. The appellant reiterated that there was a distinction between the notice of motion filed and dated January 19, 2018 and the earlier filed and disposed of, Preliminary Objection dated March 14, 2017. The motion did not challenge the issue of jurisdiction but the fact that the Respondent had elected to lodge their claim under statute and even received monetary compensation under the said Act, while at the same time they were insisting on pursuing a remedy in the court. That duopoly constituted an abuse of the process of court. The Respondents were paid a sum of Ksh 200,00/= and if aggrieved with the sum they received as compensation, they had a legal recourse of appealing against the said award to the National Environment tribunal and a second appeal to the Environment and land court.

12. The appellant further submitted that by receiving compensation under the act, it amounted to them electing to remain under provisions of statute and therefore could not maintain court proceedings. The court proceedings were thus an abuse of the process of court and that was an error as the trial magistrate did not address this issue in her considered ruling.

13. On ground 2 of the appeal, the appellant had submitted that the trial magistrate erred in law and in fact in holding that 'the mechanism under the 2013 Act is not mandatory but optional seeming to suggest

that the 1st and 2nd Respondents had the option of either proceeding under the Act and/or filing a Civil suit which interpretation was erroneous. The appellant abandoned this ground of appeal, but still faulted the trial magistrate for relying on *GWB versus Principal Magistrate Bungoma and 3 others [2014] eKLR* where it was held that the existence of an alternative remedy is by itself not a ground for refusing a relief.'

14. The appellant while referring to the above cited authority submitted that the finding in the above citation was certainly true but it did not state/find that the party can pursue both remedies simultaneously and thus a misdirection by the trial magistrate.

15. The appellant also faulted the court for failing to apply the doctrine of stare decisis and failing to consider the decision of the court of appeal in Nakuru Appeal No 260 of 2013 Peter Muturi Njuguna v Kenya Wildlife Service and apply it mutatis mutandis. The appellant also faulted the trial magistrate for considering extraneous issues that were not subject of the application at hand. The upshot of their submission was that they urged this court to allow this appeal and strike out the suit filed being Wang'uru CMCC no 140 of 2016 on the basis that it was an abuse of the court process.

1st and 2nd Respondents submissions

16. The 1st and 2nd Respondents submitted that the Hippo attack occurred on October 21, 2013. The statutory claim forms were supplied to the 1st and 2nd Respondent and they completed the same and submitted it to the appellants on October 31, 2013. After waiting for three years without any success they opted to file the suit on October 13, 2016. The 1st and 2nd respondent's also observed that, the previous wildlife (conservation and management) Act, Cap 376 under which they had made their claim was repealed and a new *Wildlife Conservation and Management Act* 2013 came into force on January 10, 2014.

17. The 1st and 2nd Respondent submitted that the Ruling dated July 7, 2017 dealt with the issue of whether the Respondent were at liberty to elect whether to pursue the claim under statute or common law. The claim had been made under a statute which was repealed and did not have a saving provision of how to deal with pending claims. The 1st and 2nd Respondents opted to lodge their claim in court and did not lodge a new claim under the amended Act. All these issues were conclusively determined in the Ruling dated July 7, 2017 and raising them again under the camouflage that they were seeking to strike out the suit did not change the fact the issues had already been dealt with and were thus res judicata.

18. There was no new legal issue raised in the notice of motion which was not addressed in the earlier ruling, where a proper finding was made that the statutory claim under the repealed Act was abandoned and the 1st and 2nd Respondent's opted to pursue their claim under common law. Further the 1st and 2nd respondents did submit that amended act did not operate retrospectively and any payment made was not made pursuant to any claim lodged under the amended Act.

19. Further the 1st and 2nd Respondent did submit that the 2nd ground of appeal was abandoned and it was a clear manifestation that the trial magistrate was right in holding that they had a right to choose and/or elect an option of how to pursue their claim. The 1st and 2nd respondent's had abandoned the claim lodged and clearly indicated as much in their witnesses' statement that they took this action after waiting for close to 3 years without progress. The appellant upon being served entered appearance and filed its defence without raising the issue of a parallel claim being filed. It was therefore not an issue for determination before the trial Magistrate.

20. It was therefore mischievous for the appellant to sneak behind counsels back and pay the 1st and 2nd Respondent a paltry ksh 200,000/- then move to court to strike out the suit. Further there was no law

prohibiting partial settlement of a matter in court and no consent was signed that with payment of ksh 200,000/=, the suit filed was fully settled. The suit was thus not compromised and at best the said award of ksh 200,000/- could be credited to the appellant while making the final award.

21. With regard to the comments made by the trial magistrate in her ruling, which the appellant deemed as 'extraneous' the 1st and 2nd Respondent's submitted that the appellant advocate was not keen to proceed with this matter and ensured hearing never took off by taking out 3rd party proceedings against a 'committee' created under the appellant own Act (Section 7 thereof), failing to appeal against the ruling dated July 7, 2018, which ruling dismissing the preliminary objection and seeking a second bite of the cherry by filing the notice of motion application dated January 19, 2018. Further the appellant was purporting to hold brief for the 3rd party who had not complained or desired to have this suit dismissed.

22. In conclusion the 1st and 2nd Respondent's prayed that this appeal be dismissed with costs.

The 3rd and 4th Respondent submissions.

23. The 3rd and 4th Respondent supported this appeal and gave a length background of the pleaded facts and proceedings so far held. They equally abandoned ground 2 of the appeal. With respect to ground 1 of the appeal, the 3rd and 4th Respondent's submitted that it was uncouth and conduct unbecoming of the 1st and 2nd Respondent's to receive Ksh 200,000/= under the Act and still pursue their claim under common law. If they were dissatisfied with the sums received, they should have opted to appeal under the mechanism/procedure placed under the Act.

24. By making an application to the county wildlife compensation committee and accepting the compensation payment, the 1st and 2nd Respondent bound themselves to the jurisdiction of the Act and cannot therefore seek compensation for the same issue in the court as it would amount to res judicata. The trial magistrate was also wrong in failing to follow the doctrine of stare decisis, in that she did not apply the decision of the court of Appeal in Nakuru Civil Appeal No 260 of 2013.

25. The final issue raised by the 3rd and 4th respondent's was that, the Act provided for a very clear mechanism and procedure of seeking redress and it was for good order that the said provisions be followed. The 3rd and 4th respondent relied on the citation of The speaker of the National Assembly Vs Hon James Njenga Karume, where it was held that prescribed by the *constitution* or an act of parliament that procedure should be strictly followed.'

26. The 3rd and 4th Respondent prayed that this appeal ought to be allowed and the Ruling dated March 5, 2018 be set aside and the suit Wang'uru CMCC no 140 of 2016 be struck out.

Analysis and Determination

27. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.

28. As held in *Selle & Another v Associated Motor Boat Co ltd & others [1968] EA 123* where it was stated that;

> ' I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it

itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. Abduk Hammed saif v Ali Mohammed Sholan[1955], 22 EACA 270.

29. In *Coghlan v Cumberland [1898] 1 Ch, 704* , the court of appeal of England stated as follows;

> ' Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... when the question arises, which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen.'

30. Also it has been held by the court of appeal in *Ephantus Mwangi and Another v Duncan Mwangi Civil Appeal No 77 of 1982{ 1982 -1988}1KAR 278* that;

> ' A member of an appellate court is not bound to accept the learned judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstance's or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.'

31. Therefore, this court has a solemn duty to delve at some length into factual details and revisit the evidence as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusion, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.

32. The appellant raised six grounds of appeal, which could be condensed and determined as follows;

    a) Did the trial magistrate err in holding that the application dated January 19, 2015, was Res judicata, when the issue before court was whether or not the suit was an abuse of the process of court and NOT whether or not the court had jurisdiction to determine Wang'uru Cmcc No 140 of 2016. {Ground 1 of the Appeal}

    b) Did the trial Magistrate err in law in holding that the compensation Mechanism provided for under 'The *wildlife conservation and Management Act*, 2013 Act 2013', was not mandatory but optional. {Ground 2, 3 and 4 of the Grounds of Appeal}.

    c) By receiving compensation of Ksh 200,000/= whether under the repealed *wildlife conservation and Management Act*, Cap 376 or current *wildlife conservation and Management Act*, 2013, did the said act of the 1st and 2nd respondent's amount to have pursued a claim under the statute

hence the filing of the suit in a court of law amounted to an abuse of the process of court. {Ground 5 of the Grounds of Appeal}.

d) Did the trial Magistrate err in law in making a determination on extraneous issues that were not addressed in the subject application when writing her ruling.

Ground 1 of the Grounds of Appeal

33. The appellant had filed a preliminary objection dated March 14, 2017 in the primary suit. The said objection was premised on provisions of Section 25 of the *wildlife conservation and Management Act*, 2013 as read together with the Third schedule of the said Act. The said preliminary objection was canvassed by way of written submissions and by a ruling dated July 7, 2017, the trial magistrate did find that the provisions of Section 25(1) of the said act was permissive. The court did find that the said section used the word, 'May' which was permissive and not mandatory and relied on the citation of *Joseph Munyoki Kalonzo v Kenya wildlife services {2015} eKLR* , which also supported the finding. The preliminary objection was disallowed.

34. The appellant subsequently filed a notice of motion dated January 19, 2018, where they sought to have the suit filed as against them to be stuck out. On the grounds on the face of the application, the appellant stated that under provisions of section 25 of the said Act, the 1st and 2nd respondent's had to elect to either lodge a claim under common law, or lodge a claim under the statute, with the wildlife conservation and compensation committee as provided for under the Act. Having received Ksh 200,000/= from the committee, it was not open to the 1st and 2nd respondents to pursue the filed suit and hence it was an abuse of the process of court.

35. At paragraph 12 of the supporting affidavit to the said application, the appellants did aver that they had not admitted in their pleadings to have paid the 1st and 2nd respondent's, but did expressly plead provisions of the said Act under which compensation ought to be pursued by affected persons and they did in fact raise a preliminary objection based on the said section of the Act and a ruling delivered. The appellants further averred that if the 1st and 2nd respondents were aggrieved by the compensation, they ought to have appealed under the mechanism provided for under the Act, by filing an appeal to the National Environment Tribunal and/or second appeal to the Environment and Land court.

36. The 1st and 2nd respondents in response to this ground of appeal, stated that they were at liberty to choose which forum to pursue their claim under the statue or common law and that the trial court had agreed with them on this issue under the ruling dated July 7, 2017. That the statutory claim filed under the initial Act, abated as the repealed *Wildlife Conservation and management Act* 2013 , did not have a saving provision on how pending claims were to be dealt with .Further the 1st and 2nd respondent did not file and/or lodge any new claim under the repealed *wildlife conservation and management Act* 2013 which came into force on January 10, 2014.

37. Further it was the 1st and 2nd respondent's contention that the issues raised in the notice of motion dated January 19, 2018 are similar to the issues raised in the determined preliminary objection and as the trial court correctly observed, the issues raised in the said application were res judicata.

38. The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

> ' No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court

competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'

39. The Black's law Dictionary 10th Edition defines 'res judicata' as

> ' An issue that has been definitely settled by judicial decision…the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties…'

40. In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the instant Application to ascertain;

    i. what issues were really determined in the previous Application;

    ii. whether they are the same in the subsequent Application and were covered by the Decision.

    iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

41. There is no running away from the fact that the preliminary objection was premised on section 25 of the *wildlife conservation and management Act* 2013, while the notice of motion application too was based on the same grounds. In fact, the ground on the face of said application dated January 19, 2018, clearly showed that the appellant was seeking to have the suit struck out on the basis of section 25 of the wildlife conservation & management Act 2013. A determination having been earlier made in the said suit, expressly over the same issue this court finds that the application dated January 19, 2018 was without doubt Res judicata.

42. It matters not that in the preliminary objection, section 25 of the *wildlife conservation and management Act* was raised on the basis of determining jurisdiction and in this matter, it was raised to support the contention that the suit was an abuse of the process of the court.

43. Under provisions of Section 7, explanation 4 of the *civil procedure Act*, 'Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such a suit.'

44. In law it is therefore deemed that the new grounds of seeking to strike out the suit based on the same section 25 of the *wildlife conservation and management Act* 2013, are deemed to have been determined when the earlier ruling was made on July 7, 2017, and no back door can be opened for the appellant to re-agitate over the same issue again.

45. In the case of *Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991* (unreported), Kuloba J held that:

> ' If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata…'

46. In the Court of Appeal case of *Siri Ram Kaura v MJE Morgan, CA 71/1960 [1961] EA 462* the then EACA stated that: -

> ' The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...
>
> The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...
>
> The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.
>
> It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit.

47. Ground one of the appeal thus fails.

Ground 2, 3, 4 and 5 of the Grounds of Appeal

48. The appellant submitted that the trial magistrate erred in holding that the mechanism provided for under *wildlife conservation and management Act*, 2013 was optional and erred to suggest that the 1st and 2nd respondent had the option of either pursing their claim under common law or under the statute. secondly the appellants faulted the trial magistrate in failing to find that having been paid a sum of Kshs 200,000/= pursuant to provisions of the *wildlife conservation and management Act*, it was not open for the 1st and 2nd respondent's to still pursue their claim under common law. Finally the appellant also faulted the trial court for failing to uphold the decision of the court of appeal in Nakuru Civil Appeal No 260 of 2013 Peter Muturi Njuguna Vs Kenya wildlife service, where it was held that a party could not file a claim before the district committee and then file a suit based on the same facts in a court of law and such if done constituted an abuse of the process of court. It should be noted at this point that in the appellant's submissions they did abandon ground two of the appeal.

49. In response to the said grounds of appeal the 1st and 2nd respondents reiterated that by abandoning ground two of the appeal, the appellant had confirmed the trial magistrate holding that they had an option to choose which avenue they could use to pursue their claim. Either through filing a suit under common law or filing a claim under the statutory Act. The 1st and 2nd respondents submitted that they had abandoned the claim lodged under their previous Act, before it was amended and opted to file a suit in court after waiting for three years without any progress. There was no parallel claim and this was not an issue for determination before the court.

50. The appellants with full knowledge that the common law suit had been filed mischievously paid the poor and desperate respondent's a paltry Kshs 200,000/=, without consulting them and behind the advocates back and thereafter moved to court to strike out the suit. There was no consent recorded in court prior to the payment marking the said payment as full and final payment and the suit having not been compromised, should be determined on merit and credit given to the appellant as against the final decree to be issued.

51. Section 25 of the *wildlife conservation and management Act* 2013, states as follows;

> (a) Where any person suffers 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 the Act.
>
> (b) The county wildlife conservation and compensation committee established under section 18 shall verify a claim made under sub section (1) and upon verification, submit the claim to the cabinet secretary together with its recommendation's thereon.
>
> (c) The cabinet secretary shall consider the remediation's made under sub section (2) and where appropriate pay compensation to the claimant.

52. Ground 2 of the appeal challenged the trial magistrate interpretation of this section. She had held that the compensation mechanism under the Act was not mandatory but optional. The Act had use of the term 'MAY' in section 25(1) and various legal interpretations and general consensus was that where such term was used in law, it was permissive/optional and not mandatory. The trial magistrate relied on Joseph Munyoki Kalonzo v Kenya wildlife service's [2015] eKLR where Justice Dulu held that '....... Section 25(1) of the Act is permissive and uses the word, 'May' and does not specify that ordinary courts have no jurisdiction in such claims.'

53. In the Australian case of *Johnson's Tyne Foundry Pty Ltd v Maffra Shire Council [1948] 77 CLR 544 at 568* , William J, stated;

> ' May, unlike 'shall' is not a mandatory but a permissive word, although it may acquire a mandatory meaning from the context in which it is used, just as "shall" which is a mandatory word, may be deprived of the obligatory force and become permissive in the context in which it appears.'

54. This ground of appeal was abandoned and rightly so, as the plain and literal meaning of this section is that one has an option to pursue their claim under the said *wildlife conservation and management Act* 2013 or had an option to file a claim under common law in a court of law. Be that as it may and considering the facts in this appeal, the question which arises is that, was the magistrate right in finding that the 1st and 2nd respondent had a right to pursue the suit filed and was what was the effect of paying the 1st and 2nd respondent's Ksh 200,000/=, while the suit subsisted.

55. The deceased was a licenced fisherman. On October 21, 2013, while fishing along the shores Masinga Dam, he was attacked by a hippopotamus, and sustained fatal injuries. The deceased family blamed the incident on failure by the appellant to effectively perform its statutory duty. The deceased dependants applied for compensation under the wildlife (conservation & management) Act, Cap 376 laws of Kenya and submitted their claim forms on October 31, 2013. No payment was made for over three

years and on October 13, 2016, the 1st and 2nd respondent opted to file a suit under common law to seek compensation. The *Wildlife conservation and management Act* meanwhile underwent review and a new Act was passed on January 10, 2014, after the suit had been filed.

56. The New *wildlife conservation and management Act* 2013, unfortunately did not have a transition clause and was silent as to what befell claims filed under the previous Act, Cap 376. It was the 1st and 2nd respondent's contention that they did not file a new claim under the repealed Act and since there was no transition clause, their previous claim could only be deemed to have lapsed. Further when they filed the claim under common law, they clearly indicated in their witness statement that they took the action of filing the civil suit as they had waited for three (3) years without any progress.

57. While the suit was pending and parties dealing with pending matters therein, unknown to 1st and 2nd respondents and their counsel as sum of Ksh 200,000/= was paid into the account of the 1st respondent. As per the documents filed by the appellant the 1st and 2nd respondent's claim was considered by the Embu CWCCC meeting of March 23, 2016 and payment released to the said 1st and 2nd respondent on March 14, 2017.

58. As already determined above all issues raised under the application dated January 19, 2018 were res judicata as the basis of the determination of the said application was an interpretation of Sec 25 of the *wildlife conservation and management Act* 2013. The trial court had made its determination thereof vide its ruling dated July 7, 2017 and no appeal was filed to challenge the same.

59. Secondly the 1st and 2nd respondents had made their claim under the wildlife (conservation and management) Act 376, on October 31, 2013.They were not compensated and one week before the statutory period of filing a claim under tort and lapsed, they filed the primary suit on October 13, 2013. The Wildlife (conservation and management) Act, Cap 376 was repealed and a new Act came into force on January 10, 2014.The repealed *wildlife conservation and management Act*, did not provide for a transition clause and further did not provide a statutory structure under which claims filed under the old Act would be dealt with. The 1st and 2nd respondent too did not file a new claim under the new *wildlife conservation and management Act*, 2013. Therefore, on what legal basis where the 1st and 2nd respondent paid the Ksh 200,000/=

60. The 1st and 2nd respondent's had made a claim under the old repealed wildlife (conservation and management) Act, Cap Cap 376, which became inoperable/ abated so to speak, once the said act was repealed. They did not file a new claim under the new Act and there was therefore no basis upon which the Embu CWCCC could purport to determine their claim on 23rd March 2016. The said committee was operating in a legal vacuum with regard to claims made earlier and were not saved by any transition clause. The law too does not operate retrospectively.

61. In *Macfoy v United Africa Co. Ltd [1961] 3 All ER 1169* Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> ' If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.'

62. The transition clause provided for under sec 118 of the *wildlife conservation and management Act* 2013, only address the issue of properties managed by the appellant and transition of its employee's. It did not provide for how previous claimed lodged would be addressed.

63. I do hold that the Embu CCWCC decision to award the 1st and 2nd respondent Kshs 200,000/= as compensation, without even affording them a hearing, was a nullity as there was no claim filed by the said parties under the repealed Act. It thus follows that the subsequent payment made cannot under the circumstances of this case be held to have been a lawful payment made pursuant to a lawful claim under the *wildlife conservation and management Act*, 2013.

64. Further on the same basis, it cannot be held that the 1st and 2nd respondent's had opted to follow the compensation procedure under the statue. By the time they were filing the suit October 13, 2016, they were perfectly within their right to do so. The 1st and 2nd respondents were clear in their pleadings (Replying affidavit dated February 15, 2018), that the Ksh 200,000/= deposited into their account was done unilaterally, without hearing them nor was their advocate consulted and thus the payment was done in bad faith. In the witness statement filed by the 1st respondent dated October 13, 2016, the 1st respondent was also clear that she followed up her claim with the appellants to no avail and finally opted to file the suit to claim compensation.

65. The suit filed therefore did not run foul of provisions of section 25 of the wildlife compensation and management Act, 2013. As for the Kshs 200,000/= already paid, it was without doubt paid un-procedurally. The same should be refunded and/or credit given once the primary suit is heard and determined.

66. The final issues raised in the above grounds was that the trial magistrate erred in law in failing to follow and be guided by the obiter dicta in the court of appeal case In Nakuru Civil Appeal No 260 of 2013 Peter Muturi Njuguna v Kenya wildlife services , where it was held that 'filing a claim before the District committee as the appellant appears to have done and filing a suit for negligence based on the same facts is an abuse of the process of court.'

67. There is no doubt that the above finding is the correct position in law, but for the reasons already proffered above, the facts of this case did not support the contention that the 1st and 2nd respondent's filed a claim under statutory law and also common law. It is clear from the analysis that the initial claim under the old Wildlife (conservation and management) Act, Cap 376 abated when the said Act was repealed and no transition clause was provided on how to determine claims made thereunder. The 1st and 2nd respondent never filed any claim under the new *wildlife conservation and management Act* 2013, and therefore there was no statutory claim pending as alleged.

Ground 6 of the Grounds of Appeal

68. The final ground of appeal by the appellants was that the trial magistrate erred in law and fact by going into extraneous issues that were not addressed in the subject application when writing the ruling. The learned trial Magistrate had remarked that; 'I have carefully and respectfully considered the Defendant's application and tend to agree with the plaintiff's the issues raised are res judicata when I consider ruling delivered on July 7, 2017; either Defence counsel who was absent, never read the ruling for appeal purposes or is simply deploying delay tactics in this matter.'

69. The appellant submitted that the fact that they did not appeal from the ruling of July 7, 2017 was no bar to them challenging the respondent's act of maintain two claims arising from one cause of action under common law and statutory law. The appellant had not applied any delaying tactic and therefore the magistrate erred in so holding.

70. Nothing much on this appeal turns on this ground of appeal. The observation by the trial magistrate were basically 'obiter dicta' and had no bearing on the main determination earlier made within the said ruling. The trial magistrate was also wrong to insinuate that the appellant was deploying delaying

tactics as the application filed was not mischievous and raised important issues which had to be determined.

Disposition

71. Having fully analysed all the grounds of appeal, I do find that this appeal has no merit and the same is dismissed with costs to the 1st and 2nd respondent.

72. The costs are hereby assessed at Ksh 170,000/= all inclusive.

73. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 14TH DAY OF JUNE 2023.

RAYOLA FRANCIS OLEL

JUDGE

Delivered on the virtual platform, Teams this 14th day of June 2023.

<u>In the presence of;</u>

....for Appellant

....for Respondent

....Court Assistant