



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

HCCA NO. 20 OF 2019

JEDIEL MURITHI NJERU (Suing as the legal representative of the estate of

JOSPHAT KARIJ NJERU (Deceased).....APPELLANT

VERSUS

KENYA WILDLIFE SERVICES.....RESPONDENT

(An appeal from the Judgment of the Senior Principal Magistrate' Court at Marimanti delivered on 11/4/2019 by

HON.P.N MAINA)

J U D G M E N T

1. This appeal arose from the judgment of the Senior Principal Magistrate's Court vide Marimanti SPMCC NO. 1 of 2018. In that suit, the Appellant had filed a suit on 30th May 2018 as legal representative to the estate of one **Josphat Karij Njeru** who was said to have been killed by a stray elephant on 1st May 2017. The appellant sought ***“a declaration that the defendant is enjoined to compensate the plaintiff as provided under section 25(3)(a) of the Wildlife Conservation and Management Act 2013”***. The appellant also sought special damages arising from legal fees to obtain grant *ad litem* as well as costs and interest and any other relief as the court may deem fit to grant.

The Respondent filed its defence and also filed a PO largely on jurisdiction which was dismissed for non-attendance. One witness, the plaintiff who is the deceased's brother, testified for the plaintiff's case. defence called no witnesses. Parties entered into consent on liability before delivery of judgment, in the ratio of 80:20 in favour of the plaintiff.

2. The trial court through its judgment delivered on 11th April 2019 found that though it had jurisdiction under common law to entertain the matter, the Appellant was at fault in the manner or procedure adopted in seeking the reliefs. It found that the Appellant chose the wrong forum to ventilate his issues. It further found that the relief sought was a disguised prerogative order of mandamus which ousted its jurisdiction because it could not order the Respondent to perform a statutory obligation and held that only High Court had such mandate.

3. The Appellant felt aggrieved and filed this appeal raising the following four grounds namely:-

(i) The magistrate erred in law and fact in the manner he analyzed the evidence on record and thus arrived at an erroneous decision.

(ii) The magistrate misapplied the law and arrived at a wrong decision.

(iii) The magistrate's decision is against the weight of evidence tendered.

(iv) The magistrate's decision dealt a blow to the appellant's right to access justice.

4. In his written submissions, the Appellant has reiterated his pleadings and the background of the suit at the trial court. He has faulted the trial court for finding that it lacked jurisdiction to grant the reliefs sought. According to the Appellant he had moved the trial court to make declaration in accordance with **Section 25** of the **Wildlife Management Act 2013**.

5. He submits that courts have previously held that courts have jurisdiction to enforce the provisions as cited above. He has cited the decision in ***Joseph Musyoki Kilonzo -vs- Kenya Wildlife Services [2015] eKLR*** where the High Court observed as follows:

" the Section 25 of Wild Conservation and Management Act 2013 is couched in permissive terms that court had jurisdiction..... Section 25(1) of the Act is permissive and uses the word "may" and does not say specifically that the ordinary courts have no jurisdiction in such claim."

6. The Appellant has further pointed out that the above finding by the High Court was upheld by Court of Appeal on appeal vide Nairobi Court of Appeal No. 306 of 2015 and that the Court of Appeal further held **Section 25** of the **Act** was not meant to shut out everybody else who would prefer to pursue their claims before conventional courts and that the use of the word "**may**" was a clear illustration that the matter could be entertained by courts as there was no express provision limiting or ousting the jurisdiction of the High Court.

7. The Appellant has faulted the trial court for relying on the decision of **Peter Muturi Njuguna -vs- KWS Nakuru Court of Appeal No. 260 of 2013**. The Appellant opines that the Court of Appeal decision related to the previous Act. He has submitted that the issue was clearly distinguished by **Hon. Majanja J** in the case of **Luke Mungania Inebu -vs- Kenya Wildlife Services [2018] eKLR** when he made the following observations;

"The decision of Peter Muturi Njuguna -vs- Kenya Wildlife Service (supra) supports the position taken by the Respondent that where the legislature provides a specific procedure then that procedure must be exhausted before recourse to the courts. That case can be distinguished from Kenya Wildlife Service -vs- Joseph Musyoki Kilonzo - (supra). Although both case dealt with similar provisions, 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 Wildlife Conservation and Management Act. In the latter case the court considered the issue of access to justice which is fundamental right protected under Article 48 of the Constitution. Even though, I would venture of the Statute May, in content of the Wildlife Conservation and Management Act, support the application in principle, that Act provides the exclusive means to agitate cases of injury by wildlife then that procedure must be followed, the interpretation given by the court of Appeal on Section 25 of the Wildlife Management and Conservation Act is authoritative and binding on this court until the court revisits the matter."

8. The Appellant contends that the trial court misinterpreted and misapplied the law and have cited numerous decisions to back up his claims.

9. The Respondent on the other hand has opposed this appeal through its written submissions dated 10th February 2020. In its view, the trial court properly analysed the evidence and adhered to the law. It contends that the Appellant's pleadings were of common law claim but the prayers sought in its view departed from the claim and sought declarations that the trial court could not make for want of jurisdiction.

10. The Respondent further submit the award contemplated under **Section 25 (3) (a)** can only be initiated as provided under **Section 25(1)** of the **Act** and that the Appellant never followed the process. To that end it has cited the provisions of **Section 25(1)** of **Wildlife Conservation and Management Act 2013** which states;-

" 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 deceased person, the person representation or successor or assign, may launch a claim to the County Wildlife Conservation and Compensation Committee within the jurisdiction established under this Act,"

11. The Respondent contends that the Appellant having opted to file his claim under common law, he could not seek declaratory orders from that court and has supported the subordinate court for declining to give the relief sought. According to the Respondent compensation under the Act can only be pursued as provided and faults the Appellant for seeking for a mixed grill kind of solution by bringing a claim under common law and seeking relief under the statute which in its view provides procedures outside claims made through courts.

Determination

12. This court has considered this appeal and the response made. They only issue for determination in this appeal is whether the trial court had jurisdiction to grant the reliefs sought by the Appellant in that court. The trial court opined that it had jurisdiction to entertain and determine wildlife compensation claims under common law but felt that the prayers sought by the Appellant were in the nature of mandamus which in its view was a Judicial Review remedy which it felt was beyond its jurisdiction.

13. To bring the issue into context, it is imperative to look at the provision of **Section 25** of Wildlife Conservation and Management Act No. 47 of 2013 which provides as follows:-

"25. 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."

14. The operative wording of the statute above in regard to a compensation claim is "**may**" rather than '**shall**' which means that a claimant thereof is not precluded from making his/her claim through other legal channels. That is the only plausible interpretation of that Section which I must say has been a subject of a number disputes and the attendant determinations by courts. In the case of Kenya Wildlife Service -vs- Joseph Musyoki Kalonzo[2017] eKLR the Court of Appeal pronounced itself as follows:-

"14. 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.

6. In other words, there is no ouster clause in the Wildlife and Conservation Management Act, that bars a party from seeking relief outside the process provided for under that Act. An ouster, or privative clause specifically divests the court of jurisdiction to hear or entertain any matters arising from the specific statute. In this case, Section 25 of the Act only gives an aggrieved party an option to pursue its claim either through the process stipulated under the Act, or through the court."

15. The above decision and a number of other decisions on the same subject clearly supports the position that the Appellant in this instance was in order to either pursue his claim through the Act or pursue the same remedy under common through the courts because it is trite under common law and equity there is no wrong without a remedy. The Appellant suffered a wrong that Wildlife Services (Respondent) is under a duty to compensate. Its liability in my view was uncontested by the Respondent and the big question posed is why did not they compensate. Why have they not compensated?. In my view that is the fundamental question. The other issues like procedure and other excuses are technicalities which at times have been used by parties to deny or delay rights and justice to others.

16. In my view courts must always protect the litigants right to access justice. It matters not which channel or door a party uses to gain access to justice. The overriding consideration should be the access to justice.

The Appellant in my considered view like most litigants (Wanjiku) only come to court as last resort. In his pleadings at the trial he pleaded that he had filled requisite forms and had made demands to the Respondent in vain. So if the Appellant had made attempts to get compensation and none was forthcoming what was he expected to do? If the Respondent really was kin to compensate him as provided by the law it should have done it in 2017 or early 2018 after establishing the veracity or legitimacy of the claim and had it done so the proceedings in the lower court and this subsequent appeal would not have been necessary.

17. The Respondent has not denied liability. It has only resorted technicalities as an excuse for not compensating the Appellant. In the Kilonzo case (supra) the court of Appeal made the following observations which I find relevant to the facts in this case.

"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 as succinctly pronounced in Joseph Boru Ngera & Another vs Kenya Wildlife Service vs Rift Valley Agricultural Contractors Limited [2014] eKLR among others is still good law on this point. The cabinet secretary referred to in the Act pays the money on behalf of the appellant. Neither the Court nor the parties should concern themselves with the internal arrangements of the appellant as to whether it is the CEO of the appellant or the cabinet secretary who should disburse the money.

20. If there is any conflict of responsibilities or performance of duty between the CEO and the cabinet secretary, that is upon the two to sort out, but that should not be used to deny a party compensation duly owed to it."

18. The trial court in my view was correct when it initially found that it was seized with the requisite jurisdiction to deal with the matter but fell into error when it again kind of contradicted itself by stating that it could entertain the claim but could not grant the prayers sought because the Appellant had sought a declaratory relief. This begs the question can subordinate court give declaratory relief? This question has cropped up in a number of cases and the common position taken is that the subordinate court does have jurisdiction to make declaratory orders by dint of **Section 3(1)(c)** of the **Judicature Act** (Cap 8 Laws of Kenya) which gives the High Court and all subordinate courts power to exercise jurisdiction in conformity with substance of common law, doctrines of equity and states of general application in force in England on the 12th August 1897. In the case of Kenya Power and Lighting Company Ltd -vs- Quentin Wambua Mutisya T/A Bondeni Wholesellers [2018] eKLR Hon. Odunga J. cited a Court of Appeal decision and observed as follows:

"45. Was the Respondent entitled to the declaratory order sought? It was contended that the Learned Trial Magistrate had no jurisdiction to issue a declaratory order based on the decision in Stallion Insurance Company Ltd vs. David K. Nthuku [1997]. That was a decision of the High Court However in Corporate Insurance Company Ltd. vs. Elias Okinyi Ofire Civil Appeal No. 12 of 1998 [1999] 2 EA 61 the Court of Appeal held that:

"...as there is a certain amount of uncertainty in the profession as to whether or not a declaratory suit, such as was filed in the

Senior Principal Magistrate's Court, could be filed in the magistrate's court we find it necessary to deal with the point. Mrs. Nyaundi for the appellant argued that it was a matter of notoriety that such cases can only be filed in the High Court. She quoted no authorities to support her proposition. It is true that there is such a general belief as urged by Mrs. Nyaundi. But that is not correct. Section 3(1)(c) of the Judicature Act, Cap. 8 Laws of Kenya, gives the High Court and all subordinate courts power to exercise jurisdiction in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897. "Court" as defined in the Civil Procedure Act means the High Court or a subordinate court, acting in the exercise of its civil jurisdiction. "Suit" as defined in the Civil Procedure Act means all civil proceedings commenced in any manner prescribed. Order II rule 7 of the Civil Procedure Rules reads:

'7.No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make a binding declaration of right'

As "Court" includes a subordinate court it has jurisdiction to make a declaratory order such as was sought by the respondent, provided the value of the subject-matter is within the jurisdiction of that court."

46. Therefore the ground challenging the jurisdiction of the Learned Trial Magistrate to make a declaratory order must fail."

19. The above decision as observed relied on the Court of Appeal decision in Corporate Insurance Co. Ltd -vs- Elias Okinyi Ofire [1997] eKLR and that position was upheld in the following decisions;

i) **Hesbon Obare Nyakundi -vs- Trident Insurance Co. Ltd [2019] eKLR.**

ii) **Gabriel Mathu Ngugi -vs- Miriam Wangui Njoroge [2019] eKLR.**

Going by the position of the law and the above decision, this court finds that subordinate courts is seized with the jurisdiction to entertain declaratory suit subject to their respective monetary jurisdiction as provided for under the **Section 7 of Magistrate's Court Act, 2015.**

20. There is also another aspect of the judgment delivered by the lower court which I believe deserved a mention for purposes of clarity which is whether a subordinate court can grant a relief in the nature of a Judicial Review. While there is no dispute that Judicial Review proceedings under Order 53 can only be entertained in the High Court as provided in the cited Rules nothing takes away the jurisdiction of the subordinate courts to grant a declaratory order or relief. In Republic -vs- the Senior Resident Magistrate's Court Kilgoris Exparte County Council of Transmara and Another [2012] eKLR the court dealt with a similar matter where a subordinate court stated that the claimants, by the nature of their prayers should have filed a Judicial Review application instead of filing a declaration suit. The court on appeal observed as follows:-

"26. After carefully considering the above matters, I am persuaded that the subordinate court had the requisite jurisdiction to deal with the matters that were before it. I am aware that judicial opinion is divided right in the middle on this issue and that there are decisions such as the Julia Kaburia case (above). I subscribe to the school of thought attended by my learned brothers and sisters who made the decisions which have been relied upon by the Interested Parties. As rightly pointed out by counsel for the Interested Parties the Kaburia decision must be viewed against the background that gave rise to the whole case. The dispute in the case revolved around the resolution machinery as laid out in the Land Adjudication Act. The resolution mechanism was precise and there was no room for deviating from it. The instant case does not fall in that strict category. I have read the Ngige -vs- Chomba case (Peter Gicharu Ngige -v Kiiru Chomba & 3 others [2004] eKLR) and the James Mwangangi Case (above) and I agree with the ratio decidendi in those cases. I am satisfied that in the instant case, the Interested Parties were not prevented from filing a declaratory suit simply because the judicial review mechanism was available to them. They had a choice to make and they made that choice by filing a declaratory suit in the SRM's court at Kilgoris".

21. The Court of Appeal in Nicholas Njeru -vs- AG & 8 others [2017] eKLR has also rendered itself in situations where a prayer sought may appear both declarator or J.R. It stated;

"[23] We agree these prayers could have perfectly fitted the bill under judicial review as they seek to supervise the powers of persons exercising public authority. However, we do not entirely agree with the learned Judge's observation that the court had no jurisdiction to grant a declaratory order. We know of no limit to the powers of the court to grant a declaratory order except such limit as it may in its discretion impose upon itself."

In view of the above authorities this court finds that while subordinate court cannot entertain Judicial Review proceedings because of want of jurisdiction, it can grant declaratory reliefs.

22. In the light of the above this court finds merit in this appeal. The same is allowed. The decision of the lower court dated 11th April 2019 is hereby reversed. I find that the question of liability had been agreed upon by parties in this appeal with the Appellant concluding 20% and the Respondent shouldering 80%. The finding of the trial court that the Appellant was entitled to a compensation of Kshs .5 million was not contested. This court therefore enters judgment for the Appellant at Kshs.5 million less 20% liability which reduces the figure by 1 million. The Appellant is therefore awarded **Kshs.4 million** plus special damages of **Kshs.45,000/-** which was specifically pleaded and proved. Besides the above the Appellant shall have costs and interests both in the lower court and in this appeal at agreed ratio **20:80** in his favour.

Dated, signed and delivered at Chuka this 5th day of March 2020.

R. K. LIMO

JUDGE

5/3/3020

Judgment signed, dated and delivered in the open court in presence of Murithi holding brief for Kariuki for Respondent.

R.K. LIMO

JUDGE