REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

CIVIL APPEAL NO 2 OF 2020

GALSARACHO TETEYA.....1ST APPELLANT & 5 OTHERS

VERSUS

KENYA WILDLIFE SERVICE.....RESPONDENT

(*From the ruling of Hon.T.M. Wafula, SRM, in Marsabit PMCC No.6 of 2019*

as consolidated with Nos.2,3,4,5 &7 of 2019 delivered on 15/7/2019)

RULING

1. This is an appeal in respect of the ruling of the trial court wherein the court upheld the preliminary objection by the respondent dated 8th April 2019 that the court had no jurisdiction over the above stated suits whereupon the court struck out the suits with no order as to costs. The appellant was aggrieved by the ruling of the trial court and filed the instant appeal. The grounds of appeal are that:

> **1. That the learned Trial Magistrate erred both in law and fact in striking out the suits on the issue of jurisdiction.**
>
> **2. That the learned Trial Magistrate misapprehended both law and fact in failing to appreciate the fact that he had jurisdiction to entertain the suits.**
>
> **3. That the learned magistrate was in error of both law and fact in failing to give effect to the overriding principles of sections 1A, 1B, and 3A of the Civil Procedure Act, Chapter 21, Laws of Kenya.**
>
> **4. That the learned magistrate failed to consider the established law in Judicial precedent conferring jurisdiction to him to entertain the suits.**
>
> **5. That the learned magistrate failed to appreciate the law that striking out a suit is drastic remedy that should be exercised only in very clear cases where circumstances permit and the instant cases do not fall within the purview of such cases fit for striking out.**

2. The appeal was strenuously opposed by the respondent. Grounds 3 and 5 of the appeal were abandoned by the advocates for the appellants during submissions.

3. The background facts of the case are that the appellants are residents of Marsabit County. In the year 2019 they filed the subject suits against the respondent at the lower court claiming compensation in damages. In 4 of the suits the appellants sought for compensation in special damages on allegations that their cattle and goats had been attacked and killed by hyenas which were under the control of the respondent. In the other 2 suits the respective appellants sought for compensation in damages on the grounds that their kins had been attacked and killed by wild animals that were under the control of the respondent. The appellants attributed the incidents to breach of duty of care owed to them by the respondent to take care of the wildlife. The suits were consolidated for purposes of hearing.

4. The respondent however filed a notice of preliminary objection dated 8th April 2019 seeking for the suits to be struck out with costs on the grounds that:

> **1. That this suit is bad in law under the doctrine of exhaustion of statutory provided dispute resolution mechanism and ought to be struck out with costs.**

2. That this suit is premature and this Honorable Court lacks original jurisdiction to hear the same in that it has been filed in total abuse and disregard of Sections 18, 19, 24, 25, 26 and 117 of the Wildlife Conservation and Management Act No.47 of 2013 read together with Article 159 of the Constitution, Section 125 of Environmental Management and Co-ordination Act, No.8 0f 1999, Sections 13(4) and 20(2) of Environmental and Land Court Act, 19 of 2011.

3. That this Honorable Court lacks original jurisdiction to hear this suit in that it is only the Environment and Land Court that can entertain disputes touching on management, protection and conservation of wildlife at an appellate level and as such this suit is fatally defective for failure to comply with the mandatory statutory dispute resolution mechanism provided under Wildlife Conservation and Management Act No.47 of 2013.

4. That the remedy provided under the Wildlife Conservation and Management Act, No.47of 2013 is only available to those claimants who seek the same through the provided statutory procedure.

5. That the procedure and remedy provided under the Wildlife Conservation and Management act No.47 of 2013 is mandatory, specific, simple, cheap, efficacious, sufficient and competent to address wildlife conservation, management and protection disputes.

5.Upon hearing the P.O. the trial magistrate held that the appellants were in the first instance required to take the dispute before the County Wildlife Conservation and Compensation Committee as provided by sections 25 and 117 of the Wildlife Conservation and Management Act No. 47 0f 2013.That since the appellants had by- passed the dispute resolution mechanism provided for by the Act he upheld the submissions by the advocates for the respondent that he had no jurisdiction over the matters and consequently struck out the suits.

Submissions -

6.The advocates for the appellant, **M/s Khan & Associates**, submitted that the trial magistrate erred in holding that he had no jurisdiction to hear the matters. That section 25 of the WCMA gives discretion to a claimant to choose on whether to seek compensation through the County Wildlife Conservation and Compensation Committee or to directly file a case with the court. That the law is that our courts have jurisdiction to entertain cases related to human-wildlife conflict. The advocates relied on the Court of Appeal decision in **Kenya Wildlife Service vs Joseph Musyoka Kalonzo** Nrb Civil Appeal no.306 of 2015 (2017) eKLR where it was held:

"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 accessible in terms of not travelling 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.

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."

7.The advocates for the respondent, **Mithega & Kariuki**, on the other hand submitted that the trial magistrate was right in his finding that the first level for dispute resolution of human-wildlife conflict is bestowed upon the County Wildlife Compensation Committee as established under section 25 of the WCMCA No. 47 of 2913. That the section creates an elaborate procedure that must be followed before a claimant moves to court. Therefore, that original proceedings relating to human-wildlife animal conflicts filed in court were fatally defective for want of jurisdiction. Counsel relied on the case **of Peter Muturi Njuguna vs Kenya Wildlife Service Nakuru** Civil Appeal no 260 of 2013 (2017) eKLR where the Court of Appeal held that courts have no direct jurisdiction in such matters and that the procedure set out in the Act must be followed. Said the court:

"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 an 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 and followed the appellate system designed under the Act."

8.Counsel submitted that it is a settled principle of law that where the law provides a statutory mechanism for dispute resolution, a party seeking relief must follow the set-out procedure. The advocates relied on the case of **Narok County Council v Trans Mara County Council & Another**,Civil Appeal no.25 of 2000 where the Court of Appeal held that:

"Although Section 60 of the constitution gives the High Court unlimited jurisdiction, it cannot be understood to mean that it can be used to clothe the High court with jurisdiction to deal with matters which a statute has directed should be done by a Minister as part of his statutory duty; it is where the Statute is silent on what is to be done in the event of a disagreement… Where the Statute provides that in case of a dispute the Minister is to give direction, the jurisdiction of the Court can be

invoked only if the Minister refuses to give a direction or in purporting to do so, arrives at a decision which is grossly unfair or perverse…..If the court acts without jurisdiction, the proceedings are a nullity….Where the law provides for procedure to be followed, the parties are bound to follow the procedure provided by the law before the parties can resort to a Court of law would have no jurisdiction to entertain the dispute."

See also **Speaker of National Assembly vs Njenga Karume** (2008)1KLR 425.

9.Also cited was the case of **Diana Kethi Kilonzo v IEBC & 2 Others**, Constitution Petition no. 359 of 2013 where it was held that:

"We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reversed for other authorities."

10. It was submitted that the trial magistrate properly upheld the preliminary objection. The respondent`s counsel urged the court to dismiss the appeal.

11. In face of the two conflicting judgments from the Court of Appeal, the advocates for the appellant submitted that the Court of Appeal decision in **Kenya Wildlife Service vs Joseph Musyoka Kalonzo** (supra) that they relied on is the more convincing one as it has been followed by High Court judges in such cases as in **Luka Mungania Inebu vs Kenya Wildlife Service** Meru HCCA No.114 of 2017(2018)eKLR and **John Kimathi Marete vs Kenya Wildlife Service** Meru HCCA Civil Appeal No.90 of 2017(2018)eKLR (Majanja J.), **Rose Ndinda Mutuku vs Kenya Wildlife Service** Embu HCCA No.73 of 2016 (2018)eKLR (Muchemi J.) and in **Kenya Wildlife Service vs Kinyua Ikabu**, Civil Appeal no.49 of 2017(2019) eKLR (Gikonyo J.). Counsel urged the court to be persuaded by these decisions and find that the trial magistrate erred in his finding that he had no jurisdiction to entertain the subject suits.

Analysis and Determination –

12. The question for determination in this appeal is whether a magistrate`s court has original jurisdiction to entertain matters relating to human-wildlife conflicts in face of section 25 of the Wildlife Conservation and Management Act that provides that:

"(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)……..

(4) Any person who suffers loss and 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."

13. It is the case for the respondent that the court has no such jurisdiction as there is an elaborate procedure for compensation provided under section 25 of the WCMA which procedure must be followed for any claim to be sustainable. The respondent makes reliance on the Court of Appeal decision in the ***Peter Muturi Njuguna case*** (supra) where it was held that the procedure set out in the Act must be followed. The appellants on the other hand contend that the magistrate`s court has the requisite jurisdiction. They made reliance on the Court of Appeal decision in the ***Joseph Musyoka Kalonzo*** case (supra) where such a position was taken.

14. I have considered the rival submissions by the respective advocates for the parties. It is apparent from the authorities cited by the advocates for the appellant that many High Court judges have preferred the interpretation given by the Court of Appeal in the **Joseph Musyoka Kalonzo case** that section 25 of the WCMA does not oust the jurisdiction of courts in matters of human-wildlife conflicts. In **Rose Ndinda Mutuku v Kenya Wildlife Service** (supra), Muchemi J. while supporting the decision in the Joseph Musyoka Kalonzo case as opposed to the other one held that:

"It was explained clearly by the Court of Appeal that the use of the word "may" in Section 25 of the Act is permissive and gives the claimant an option of filing his claim in court. This interpretation of the law is correct in my view.

If the legislature intended to shut out the courts, it would have used the word "shall" to make it mandatory that all compensation claims should be filed before the County Board."

15. In **Kenya Wildlife Service v Karura Bulle Kussen Galgallo**,Meru HCCA No.78 of 2018 (2019)eKLR, Mabeya J. considered the conflicting positions in the two Court of Appeal judgments and held that:

> **"15.I would prefer the interpretation given to the word 'may' by the Court of Appeal in the Kenya Wildlife Service -v- Joseph Musyoki Kalonzo (Supra) as opposed to the one in Peter Muturi Njuguna -v- Kenya Wildlife Service (Supra). This is because the interpretation in the Joseph Musyoki Kalonzo case does not limit the constitutional right to access to justice under Article 46 of the Constitution. Further, it is a general rule of interpretation that, where a law seeks to restrict and or take away a citizen's right, that law should be expressed so to that effect not by implication.**
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> **16.It is clear from the reading of WCMA that the use of the term "may" in Section 25 is not mandatory but permissive. Further, the absence of an express ouster provision in the WCMA means that the jurisdiction of the court is not ousted. If the intention of the Legislature was to oust the jurisdiction of the courts in WCMA, nothing would have been easier than to expressly state so. What Section 25 does is to permit and not compel an injured party or one who suffered loss and damage to have the first option of approaching the County Wildlife Conservation and Compensation Committee."**

16. In **Joseph Munyoki Kalonzo vs Kenya Wildlife Service**, Garissa HCCC No.5 of 2014 (2015) eKLR, Dulu J.held that:

> **"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 claims."**

17. I am in entire agreement with the interpretation favouring the Court of Appeal decision in the **Joseph Musyoka Kalonzo case** to the effect that section 25 of the WCMA does not oust the original jurisdiction of courts in matters relating to human-wildlife conflicts. It is my finding that the trial magistrate in the subject suits erred in holding that he had no jurisdiction to entertain the matters.

18. The upshot is that the appeal is upheld. Consequently, the ruling of the trial magistrate upholding the preliminary objection dated 8th April 2019 is set aside. I do order for the subject suits to be reinstated for hearing and determination on merit by another magistrate of competent jurisdiction other than Hon. T. M. Wafula.

Orders accordingly. The appellants to have the costs of the appeal.

DELIVERED, DATED AND SIGNED AT MARSABIT THIS 13TH DAY OF APRIL 2021

J. NYAGA NJAGI

JUDGE

In the presence of:

Mr. Halake holding brief Mr. Amule for Appellants

Mr. Kariuki for Respondent

Court Assistant: Galgalo

30 days R/A.