



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL APPEAL NO. 26 OF 2020

ANN NGUGI NJIRU (suing as legal representative of SILAS GITONGA deceased).....APPELLANT

VERSUS

KENYA WILDLIFE SERVICES.....RESPONDENT

JUDGMENT

1. The appellant herein filed a suit against the respondent in the lower court being Siakago PMCC No. 92 of 2019 - Ann Ngugi Njiru (suing as legal representative of Silas Gitonga deceased) –vs- Kenya Wildlife Service claiming damages under the Fatal Accident Act and the Law Reform Act, special damages and interest thereon. The foundation of the suit therein was negligence on the part of the respondent herein wherein she pleaded that the deceased herein was attacked by a rogue crocodile occasioning him fatal injuries as a result and which was all as a result of negligence by the respondent.
2. The respondent entered appearance and filed its statement of defense and a further Notice of Preliminary Objection challenging the jurisdiction of the trial court. Basically, the Preliminary Objection was premised on the grounds that the trial court was bereft of jurisdiction and that the suit was premature and in total abuse of Sections 18, 19, 24, 25, 26 and 117 of the Wildlife Conservation and Management Act No. 47 of 2003 and which sections provides for the procedure and remedy in cases of human- wildlife conflict.
3. The trial court proceeded to hear the preliminary objection and vide a ruling delivered on 12.08.2020, the trial court upheld the said Preliminary Objection and dismissed the suit before it. It is this ruling which culminated to the instant appeal and which was commenced by way of a memorandum of appeal dated 17.08.2020.
4. The appellant postulated 7 grounds of appeal but basically she faulted the trial court for holding that is was bereft of jurisdiction without considering the applicable law, judicial precedents on the issue at hand and her written submissions. Further that the trial court failed to appreciate that the appellant’s claim was based on tort of negligence and appreciate the law that striking out of a suit is a drastic remedy which ought to be exercised in very clear cases.
5. The appeal was canvassed by way of written submissions. The appellant in support of the appeal submitted that the trial court misapplied the law and relied on section 117 of the Wildlife Management and Conservation Act in determining the issue on jurisdiction whereas the suit was premised on Section 25 of the said Act and which two sections are different. It was submitted that the trial court had jurisdiction over the suit which was before it. Reliance was made on a number of authorities including **Luke Mugania –vs- Kenya Wildlife Services Civil Appeal No. 11 of 2017**, **Rose Ndinda Muluke –vs- Kenya Wildlife Services Civil Appeal No. 73 oof 2016**, and **Kenya Wildlife Services –vs- Joseph Musyoki Kalonzo Nairobi C.A. No.306 of 2015** (amongst others). It was further submitted that the court ought to have been guided by the decision in **Kenya Wildlife Services –vs- Joseph Musyoki Kalonzo (supra)** and not **Civil Appeal No. 260 of 2013 Peter Njuguna Muturi –vs- Kenya Wildlife Services** which the respondents herein relied on, in arguing their Preliminary Objection as the former had been relied on, by superior courts in a number of their decisions.
6. The respondent on its part submitted that section 25 of the Act clearly provides for the procedure to be followed by any person who encounters human- wildlife conflict and further provides for the appellate structure. As thus, the trial court was right in upholding the preliminary objection and rightly applied the law. Further that the court could not arrogate itself jurisdiction it did not have.
7. Reliance was made on the case of **Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Limited & 2 Others SC Application No. 2 of 2012**. Further that, Sections 117 and 25 have the effect of ousting the trial court’s jurisdiction over issues to do with wildlife management and protection and related issues. Further that the suit ought not to be reinstated as the trial court has no jurisdiction over the same.
8. This is a first appeal and from the decision of the lower court and as it is trite, the role of this court on first appeal is to re-evaluate all the evidence availed in the lower court and to reach its own conclusions in respect thereof taking into account the fact that this court had no

opportunity of hearing or seeing the witnesses as they testified and therefore, make an allowance in that respect (See Selle & another -vs- Associated Motor Boat Co. Ltd. & others (1968) EA 123). The appellate court further ought not to interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong because it has misdirected itself or because it has acted on matters which it should not have acted or it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion (See Mwanasokoni – versus- Kenya Bus Service Ltd. (1982-88) 1 KAR 278 and Kiruga –versus- Kiruga & Another (1988) KLR 348). Under Section 78 (2) of the Civil Procedure Act the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of the original jurisdiction in respect of suits instituted therein.

9. I have certainly perused and understood the contents of the pleadings, proceedings, judgment, grounds of appeal, submissions and the decisions referred to by the appellant. It is my considered view that the main issue for determination is whether the trial court has jurisdiction to determine the appellant's case which was before it.

10. It is now trite that jurisdiction is everything and a court cannot arrogate itself jurisdiction which it does not have. (See Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Limited & 2 Others (supra).

11. As I have already stated, the suit revolves around negligence leading to loss of life of the deceased herein. The respondent was being blamed for being negligent in managing, and controlling wildlife leading to the attack of the deceased by a crocodile. The Preliminary objection was raised as to the trial court not having jurisdiction over the said dispute. To be precise, the respondent objected to the jurisdiction of the trial court relying on Sections 18, 19, 24, 25, 26 and 117 of the Wildlife Conservation and Management Act, Section 125 of the Environment Management and Co-ordination Act No. 8 of 1999 and Section 13(4) and 20(2) of the Environment and Land Court Act No. 19 of 2011.

12. The basic argument was that there is a prescribed statutory procedure in cases dealing with wildlife conservation, management and protection disputes. The rival position between the parties herein was on the interpretation of section 25 of the Act. The appellant herein in opposing the said preliminary objection relied on the cases of Luke Mugania –vs- Kenya Wildlife Services (supra), Rose Ndinda Muluke –vs- Kenya Wildlife Services (supra) in support of her position that the court has jurisdiction. The respondent submitted before the trial court that the court was bereft of jurisdiction to hear and determine disputes relating to management, protection and conservation of wildlife by virtue of section 117 as read together with sections 18, 19, 24, 25 and 26 of the Wildlife Conservation and Management Act.

13. In order to determine whether the trial court has jurisdiction to try the case before it, it is my view that the main consideration is on the interpretation of Sections 25 and 117 of the Wildlife Conservation and Management Act and the respondent's administrative duties of managing and protecting wildlife as opposed to compensation of victims and further consider whether the trial court applied the right interpretation of the said provisions.

14. Section 18 of the Act establishes the County Wildlife Conservation and Compensation Committees whereas Section 19 lists its functions to be among others; **develop and implement in collaboration with the community wildlife associations, mechanisms for mitigation of human wildlife conflict (h) and review and recommend claims resulting from loss or damage caused by wildlife for payment of compensation (j)**. Section 24 establishes the wildlife Compensation Scheme whose monies are to be used for financing compensation claims for human death or injury or crop and property damage caused by wildlife.

15. Section 25 provides for the procedure of compensation for personal injury or death or damage to property. Under section 25(1) where any person suffers any bodily injury or is killed by any wildlife listed under the Third Schedule, the person injured, or in the case of a deceased person, the personal representative or successor or assign, such a person may launch a claim to the County Wildlife Conservation and Compensation Committee within the jurisdiction established under this Act. Under sub-section 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. Section 25(6) provides that 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.

16. Section 25 limits the claim made to the County Wildlife Conservation & Compensation Committee to those listed under the Third Schedule. The Third Schedule provides for the following animals; Elephant, Lion, Leopard, Rhino, Hyena, Crocodile, Cheetah, Buffalo, Poisonous snakes. Hippo, Shark, Stone Fish, Whale, Sting ray, Wild dog, and Wild pig. The deceased herein was attacked by a crocodile which falls amongst the categories enumerated.

17. However, the dispute between the parties herein seems to stem from the use of the word "may" and as to whether it makes it compulsory for a party to seek redress from the Committee or the Court.

18. The question therefore is as to the correct interpretation of section 25. However, the interpretation of the said section has been pronounced in a myriad of authorities from this court and the superior courts.

19. In Kenya Wildlife Services -vs- Joseph Musyoki Kalonzo Nairobi Civil Appeal No. 306 of 2015 the Court analyzed Section 25 of the Act and held as follows:-

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 first option this in our view was meant to ease, matters for the poor people whose crops and domestic animals are damaged 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 travelling long distances and also in terms of simplicity in lodging their claim. It could not have meant to shut out everybody else who could 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 the Act... 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.

20. The court further held:-

The respondent could either lodge his claim through the Act, which he did but no remedy was forthcoming, or pursue the remedy under the common Law through the courts. Every person has a right to pursue a remedy under the common law for a wrong or injury suffered.

21. The appellant invited this court to adopt the Court of Appeal's decision in the said in **Kenya Wildlife Service –vs- Joseph Musyoka Kalonzo** (supra) as its more convincing one as it has been followed by High Court judges in subsequent decisions and find that the trial magistrate erred in his finding that he had no jurisdiction to entertain the subject suit.

22. 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's case** that section 25 of the WCMA does not oust the jurisdiction of courts in matters of human-wildlife conflicts.

23. In **Rose Ndinda Mutuku –vs- 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.”

24. In **Kenya Wildlife Service –vs- Karura Bulle Kussen Galgalo, 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 MusyokiKalonzo (Supra) as opposed to the one in Peter MuturiNjuguna -v- Kenya Wildlife Service (Supra). This is because the interpretation in the Joseph MusyokiKalonzo 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.

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.”

25. 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.”

26. 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 suit erred in holding that he had no jurisdiction to entertain the matter.

27. The trial court in making its decision held that the appellant pegged their claim under Section 117 of the Act as read together with Sections 18, 19, 24, 25 and 26 of the Act alongside Article 159 of the Constitution and other laws. The trial court proceeded to quote the said section 117 (which provides that any dispute that may arise in respect of wildlife management, protection or conservation shall at the first instance be referred to the lowest possible structure under the devolved government. In my view, the trial court erred in relying on the said section and applying the same to the case before it. Section 117 is very clear that it refers to disputes in respect of wildlife management, protection or conservation. However, the claim before it was not in relation to such a dispute but was based on the ordinary tort of negligence. In my view, the learned magistrate overstretched the application of the Act to the issue at hand and applied the wrong provisions of the law. If the learned magistrate had analyzed section 25 and applied the same purposively, it is my view that she would have agreed with me and with other superior courts that she had jurisdiction over the matter before her.

28. It is my view therefore, that the trial court has jurisdiction over the issue before it and as thus erred in finding that it was bereft of the same.

29. The upshot is that the appeal is upheld. Consequently, the ruling of the trial magistrate upholding the preliminary objection dated 6.02.2020 is set aside. I do order for the subject suit to be reinstated for hearing and determination on merit by another magistrate of competent jurisdiction other than Hon. W. Ngumi. The costs of the Appeal shall be borne by the respondent.

30. **It's so ordered.**

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF NOVEMBER, 2021.

L. NJUGUNA

JUDGE

.....**FOR THE APPELLANT**

.....**FOR THE RESPONDENT**