



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 33 OF 2019

(Formerly Kitui HCCA No. 99 of 2018)

MAUA KOMO MULI.....APPELLANT

VERSUS

KENYA WILDLIFE SERVICES.....RESPONDENT

(Being an Appeal from the Ruling of Chief Magistrate's Court at Kitui

in Civil Case No. 20 of 2017 delivered on 27th March, 2018

by Hon. R. Ombata, Resident Magistrate)

JUDGMENT

1. The Appeal arises from the decision (*Ruling*) of the Chief Magistrate's Court in Kitui (*Hon. R. Ombata (Resident Magistrate)*) in CMCC No. 20 of 2017. The Appellant raised nine (9) Grounds of Appeal namely:

- a) That the Learned Judge (sic) erred in law and fact by finding that she did not have the requisite jurisdiction to handle the suit.***
- b) That the Learned Judge (sic) erred in misconstruing the provisions of the Wildlife Conservation and Management Act, 2013 and consequently dismissing the plaintiff's suit;***
- c) The learned Judge (sic) erred in holding that the plaintiff's suit ought to be determined by the Environment and Land Court;***
- d) The learned Judge (sic) erred in law and fact by failing to appreciate that the cause of action was predicated on negligence under common law and therefore not under the jurisdiction of the Environment and Land court as she wrongly held;***
- e) The learned magistrate manifested outright bias against the Plaintiff's whereof she was afoul Article 47 of the Constitution and the express provisions of the Fair Administrative Act;***
- f) The learned magistrate erred in law and fact in her interpretation of the Wildlife Conservation and Management Act, 2013;***
- g) The learned magistrate failed to appreciate the submissions of the Learned counsel for the Appellant by finding in favour of the Respondent herein;***
- h) The learned magistrate erred in law and fact by dismissing the Plaintiffs suit and failing to consider the import of Article 159 of the Constitution.***
- i) In all the circumstances of the case the findings of the learned magistrate were characterized by misapplying the law and wrong exercise of discretion.***

2. In the Memorandum of Appeal, the Appellant prayed that the Appeal be allowed; that the Ruling and orders of the learned Magistrate be set aside; that the Plaintiff's suit and the consolidated suits in CMCC No. 21 to 28 of 2017 be reinstated; that the same to be placed before another trial court for re-hearing and that the Appellant be awarded the costs of the Appeal.

3. The Appeal was canvassed vide written submissions. According to counsel for the Appellant, it is the High Court in Kitui that has the jurisdiction to hear and determine the instant Appeal; that when the matter came up for directions before the High Court Judge, she directed that the Appeal be heard by this court and that the matter in the lower court was premised under the common law. Reliance was placed on the case of *Kenya Wildlife Service vs. Joseph Musyoki Kalonzo (2017) eKLR*.

4. Learned counsel submitted that the trial court had jurisdiction to entertain the suit and that the Appellant's case was founded on the Common Law of Tort of negligence and the mandate bestowed upon the Respondent under the Wildlife Conservation and Management Act, 2013.

5. The Appellant's counsel submitted that under the Wildlife Conservation and Management Act, 2013, there is no provision made to envisage a scenario where a claim can be filed with the Committee out of time; that there is no provision for the enlargement of time and that there is a like hood of locking people out where claims are not filed within the request period.

6. It was submitted by the Appellant's counsel that there is no ouster clause in the Act that bars a party from seeking relief from the court and that his is the position that was taken by the Court of Appeal in the *Joseph Musyoki Kalonzo case (supra)*.

7. The Appellant's advocate submitted that the trial Magistrate misinterpreted and misapplied the law and wrongly exercised her jurisdiction and that under Section 25(6) of the Wildlife Conservation and Management Act, the Act gave the Appellant options to either explore statutory or common law mechanisms in seeking compensation for the sustained injuries. Counsel relied on the case of *Alex Macharia vs. Kenya Wildlife Services (2019) eKLR* where it was observed as follows:

“23. Suffice it to say that the question remains whether the existence of a specific procedure such as the one applicable herein precludes a party from instituting a suit in court.

24. In answering this question, the Court of Appeal in Kenya Wildlife Service v Joseph Musyoki Kalonzo [2017] eKLR stated 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 a first option...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.”

8. Learned counsel urged the court to find that the trial court had jurisdiction to hear the matter, with the appeal lying with the Kitui High Court, and not the Environment and Land Court. Counsel submitted that in the alternative, this court should allow the Appeal and remit the claim back to the lower court for hearing and disposal.

9. In response, the learned counsel for the Respondent framed three issues for determination. Firstly, whether this court has jurisdiction to determine this matter; secondly, whether the decision of the trial court in allowing the Respondent's application to strike out the Appellant's suit ought to be disturbed and finally, whether the trial court was biased against the Appellant.

10. On the first issue, the Respondent's advocate submitted that this court does not have the requisite jurisdiction to determine the Appeal and that the Constitution and Environment and Land Court sets out the jurisdiction of this court.

11. On the second issue, counsel submitted that the trial court was right in holding that the Appellant ought to have first made a claim to the Wildlife Conservation and Compensation Committee; that where the statute has set out a procedure for redress, that procedure ought to be followed strictly and that by failing to lodge a complaint to the Committee, the Appellant had failed to meet the threshold set by the Court of Appeal in the case of *Speaker of the National Assembly vs. Karume (1992) KLR 22*. The Respondent counsel also relied on the case of *Peter Muturi Njuguna vs. Kenya Wildlife Services (2017) eKLR* where it was held as follows:

“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 any 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 first and followed the appellate system designed under the Act. The avenue of Judicial Review which the Committee is always subject to, was also available. Filing the claim before the District committee as the Appellant appears to have done and filing a suit for negligence based on the same facts is certainly in abuse of court process. The trial court and the High Court were right in rejecting the suit.”

12. Counsel submitted that the present case relates to human-wildlife conflict; that it will be a disregard of the law for the Appellant to bypass the statutory mechanisms under the Act in pursuing his claim and that the trial court was right in striking out the suit. The Respondent's counsel finally submitted that the allegations of bias were never proved. Counsel urged the court to dismiss the appeal with costs and uphold the findings of the trial court.

13. The first issue I will deal with is the question of whether this court has the requisite jurisdiction to deal with the Appeal.

14. The suit in the lower court was commenced by way of a Plaint. In the Plaint, the Appellant averred that on 21st March, 2015, while on her daily activities on the farm, she was attacked and bitten by a poisonous snake on his left leg due to the negligence and breach of statutory

duty of the Respondent herein; that as a result of the said bite, she sustained severe bodily injuries and that she suffered loss and damage.

15. The Appellant listed the particulars of the Respondent's negligence and breach of statutory duties in the Pleint. One of the alleged acts of negligence and breach of statutory duty was that the Respondent failed to employ sufficient mechanisms to protect him and the community at large from wildlife attacks as contemplated under the Wildlife Conservation and Management Act. The Appellant went further to plead as follows:

“The Plaintiff claims General Damages under Section 25 of the Wildlife Conservation and Management Act, 2013 and Special Damages from the Defendant which is statutorily liable for the acts of wildlife animals.”

16. Indeed, the ultimate prayer in the Pleint is for an award of general damages under section 25 of the Wildlife Conservation and Management Act. That being the case, and having stated in the Pleint that he is seeking for general damages pursuant to the provisions of section 25 of the Act, it is safe to state that the Appellant's claim is hinged on the provisions of the Act, and not under the common law *per se* as submitted by the Appellant's advocate.

17. Section 25 (6) of the Act provides as follows:

“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.

18. The above provision gives three bodies the mandate to deal with claims made under Section 25 of the Act, that is the County Wildlife Conservation and Compensation Committee, the National Environment Tribunal and the Environment and Land Court. The Act does not make any reference to the High Court in matters pertaining to a claim for compensation pursuant to the provisions of Section 25 of the Act.

19. To the extent that the Appellant's claim is wholly based on Section 25 of the Act, any Appeal in respect to his claim, whether from the decision of the Magistrate or the Tribunal is appealable to this court, and not the High Court. This court therefore has the jurisdiction to deal with the current Appeal.

20. I will now turn to the decision of the lower court. The Appellant has argued that the lower court had the requisite jurisdiction to handle the dispute as filed. As I have stated above, the damages that the Appellant was pursuing after being bitten by a poisonous snake were wholly hinged under the provision of Section 25 of the Act which I have reproduced above. The said damages, at least from the Pleint, had nothing to go with the general principles under the common law of negligence.

21. Having stated that he was pursuing general damages pursuant to the provisions of Section 25 of the Act, the Appellant was under a legal obligation to follow the mechanisms that the Act has put in place for the purposes of compensation. Indeed, this the position that the Court of Appeal restated in the cases of *Speaker of the National Assembly vs. Karume (1992) KLR 22* and *Peter Muturi Njuguna vs. Kenya Wildlife Services (2017) eKLR*. In the *Peter Muturi case (supra)*, the Court of Appeal held as follows:

“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 any 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 first and followed the appellate system designed under the Act. The avenue of Judicial Review which the Committee is always subject to, was also available. Filing the claim before the District committee as the Appellant appears to have done and filing a suit for negligence based on the same facts is certainly in abuse of court process. The trial court and the High Court were right in rejecting the suit.”

22. Section 25 of the Act is explicit on the procedure to be followed by any person who suffers bodily injury from or is killed by the specified animals, or whose crops are damaged by wildlife. That procedure should be followed to the latter, before one can move the National Environment Tribunal and then the Environment and Land Court on Appeal.

23. If indeed the Appellant wanted to avoid the procedure stipulated under Section 25 of the Act, then he should not have pleaded that the claim was filed under that provision. That being so, it is my finding that the learned Magistrate did not err when he found that he did not have jurisdiction to resolve the dispute that was placed before him.

24. For those reasons, I dismiss the Appeal with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE