



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CIVIL CASE NO. 5 OF 2014

JOSEPH MUNYOKI KALONZO.....PLAINTIFF

VERSUS

KENYA WILDLIFE SERVICES.....DEFENDANT

JUDGMENT

By a plaint dated 27th October 2014 and filed on 31st October 2014, the plaintiff as legal representative of the estate of M M sued the defendant. The plaintiff is the father of the deceased who was alleged to have been fatally injured by a on 1/03/2014 while she fetched water at Tana River in Tseikuru District.

It was alleged that the defendant was negligent and as a result M M aged 13 who enjoyed good health died and that she suffered loss and damage under the Land Reform and Fatal Accidents Acts. Particulars of negligence of the defendant were listed in the plaint. Particulars of the two above statutes were also listed.

It was stated in the plaint that the deceased was survived by the plaintiff the father and by NGOKI MUNYOKI the mother. It was also stated in the plaint that the deceased was in Standard Six (6) at the time of death. Particulars of special damages of Kshs. 40,000/= as costs for the obtaining letters of administration were given.

The plaintiff asked for a declaration that he be compensated in the sum of Kshs. 5,000,000/= as provided under section 25 of the Wildlife Conservation & Management Act 2013, and that he be awarded special damages, and costs and interest.

The defendant filed a statement of defence on 27th November 2014. They denied the occurrence of the accident and the death. In the alternative, they stated that the accident, if it occurred, was caused by the negligence of the deceased and the plaintiff. Particulars of negligence of the deceased and the plaintiff were listed in the defence, and the doctrine of volenti non fit injuria was relied upon. The defendants also pleaded that the suit was bad in law and did not disclose any cause of action and that they would move the court to have it struck out with costs and interest.

The plaintiff on 2nd February 2015 filed a reply to defence denying the contents of the statement of defence and denying the application of the doctrine of volenti non fit injuria.

On 31st March 2015, parties counsel filed a written consent dated 9th March 2015 which was in the following terms:-

“By consent of the parties and their respective advocates liability be and is hereby agreed at the ratio of 80:20 in favour of the plaintiff”.

Thereafter, on 11th June 2015 which was the date of hearing, defendant’s counsel filed a preliminary objection in the following terms:-

“TAKE NOTICE that the defendant’s counsel shall raise a preliminary objection, on a point of law before the next hearing date to have the matter dismissed for abuse of court process and the law as stipulated under the Wildlife Conservation and Management Act 2013”.

As I have said above 11th June, was actually the hearing date which had been taken earlier in the registry by the plaintiff’s counsel on 30/04/2014. The preliminary objection was not argued before the tendering of evidence, though Mr. Mwanzia was present for the plaintiff and Mr. Kobia was present for the defendant. It was in any event a very general objection.

The plaintiff’s counsel called two witnesses.

PW1 was JOSEPH MUNYOKI KALONZO the plaintiff. It was his evidence that on 1st March 2014, he went to fetch water in Tana River at Tseikuru with MALIA KIMWELE and his daughter M the deceased. It was his evidence that the deceased was attacked by a crocodile while fetching water, and MALIA ran and informed them, but as he tried to go to the river people restrained him and took him home. He then went to the Assistant Chief Wikithuli and reported the incident. He was advised to be patient and people searched for M for three days. After that he reported that incident to Kyuso Police Station and obtained a police abstract which he produced in court as exhibit. It was his evidence that the chief issued him with a letter which he produced as an exhibit. It was his further evidence that he also reported the incident at Kenya Wildlife Services office Kora Station and they issued him with a form and advised to go home. He produced the form as exhibit. He later went back to the Kenya Wildlife Services Office and they advised him to pursue his own cause.

Since he was advised to pursue his cause, he went to the High Court and obtained limited grant of letters of administration of which he produced a copy as an exhibit. He then instituted the present court proceedings. It was his evidence that at Meru High Court his advocate charged him Kshs. 40,000/= for obtaining letters of administration. He produced a receipt as an exhibit.

According to him, before filing the case at Garissa he served a notice of intention to sue on Kenya Wildlife Services. He produced copy of the notice as exhibit. It was his evidence that Kenya Wildlife Services did not respond to his notice.

He testified further that the deceased was 13 years of age and attended [Particulars Withheld] Primary School in Class 6, and that the mother was Ngoki Munyua. He stated that he sued the defendants because his daughter was eaten by a crocodile. He asked for grant of the prayers in the plaint.

In cross-examination, he stated that he made an initial report to Kenya Wildlife Services and went back after about three months. He maintained that villagers searched for the body of his daughter for three days. He stated that the incident occurred on a Saturday and his daughter was thus not in school that day. He stated that from the scene to his home was about 5 Kilometres and that ordinarily. They fetched water from Tana River though they knew that it was infested with crocodiles.

He stated also that he had 5 children and that the deceased was his third born. He stated that the incident occurred at around 4pm. He stated that when he first reported to Kenya Wildlife Services, they received the report and told him to come back later without giving him a time frame.

When referred to the Chief’s letter and police abstract, he stated that he took time before reporting the incident to the police because he had been told that Kenya Wildlife Services would follow up the matter. He could not explain why Kenya Wildlife Service did not file part of their report form. He stated that his

lawyer took the form to the police to fill and admitted that the form was dated 25th August while the accident occurred in March – about 6 months earlier. He stated that the letter from his lawyer to Kenya Wildlife Services was dated 12/09/2014 and that after one month he went to court after no action was taken by Kenya Wildlife Services.

In re-examination he stated that he reported the incident to Kora Kenya Wildlife Service office after 3 months.

PW2 was Malia Kimwele a farmer from Tseikuru. It was her evidence that on 1/03/2014 at 4pm, while at the river fetching water M was attacked by a crocodile. She screamed and called her father who tried to go to the river but was restrained by villagers who took him back home. She testified that they did not see Magain. She stated that people searched for M for three days in vain.

In cross-examination, she stated that she went to fetch water with M and that she saw one crocodile attack M. She stated that she was an aunt to M, and that they reported the incident to the Assistant Chief on Sunday.

At this point, the plaintiff's counsel closed the plaintiff's case. By consent of the parties counsel, the court adopted the written consent on liability which I referred to earlier in this judgment.

Mr. Kobia for the defendant elected to close the case of the defendant without calling any witness. Both counsel then opted to file written submission before delivery of judgment, which they did.

I have considered the evidence on record, documents filed and the submissions on both sides.

The first issue is whether this court has jurisdiction to entertain the matter. In the defence, the defendant did not state that this court has no jurisdiction to entertain or hear the suit. Under paragraph 7 of the defence, the defendant merely stated that the suit was bad in law and disclosed no cause of action against them and that they would move the court to have it struck out with costs and interest. The fact that a suit discloses no cause of action is not the same as saying that the court does not have jurisdiction. Jurisdiction is the legal power of the court to hear and determine a matter. Cause of action deals with whether the plaintiff or litigant has a legal claim which he can pursue in court. Therefore, in my view the defence did not challenge the power of the court to adjudicate over the matter, but challenged the ability of the plaintiff to sustain the claim. The issue of jurisdiction was thus not raised in the defence.

On the date of hearing, the defendant's lawyer filed a preliminary objection, without prior notice. The same asked that the matter be dismissed as an abuse of the court process under the law as stipulated under the Wildlife Conservation and Management Act 2013.

This objection, which was said to be on a point of law, was firstly filed late in the day, on the hearing date 11th June 2015. Secondly, it neither specified the sections or section of the Wildlife Conservation and Management Act 2013 that were violated by the proceedings, nor did it indicate the nature of the alleged violation which could amount to an abuse of court process.

In effect the objection was so uncertain that it would be futile to delve into it, on that day, as it just appeared to be a delaying tactic to the hearing of the case. In my view, the said objection could also not satisfy the requirements for a preliminary objection strictly speaking - See the case of **MUKISA BISCUIT MANUFACTURING CO. LTD. VS. WEST END DISTRIBUTORS LTD [1969] EA. 696.**

In the written submissions, counsel for the defendants has dwelt at length with the provisions of section 25 of the Wildlife Conservation and Management Act, and asserted that this court is the wrong forum to adjudicate in this matter.

In my view, in the circumstances of this case, he is wrong. Firstly, counsel and the defendant did not raise that issue in their defence or pleadings. They also did not raise it in their written preliminary objection. They did not raise it in the hearing of the case either through cross – examination or tender their own

evidence on that issue. In addition, it is on record that a report was made to the Kenya Wildlife Service about the incident and there is no evidence that they advised or directed the plaintiff to pursue through the Compensation Committee. Lastly, 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.

I therefore dismiss the contention that this court has no jurisdiction.

With regard to liability, the parties counsel filed a written consent. The same counsel on both sides asked this court to adopt the same as an order of the court, after the closure of the plaintiff’s case. The court so adopted the consent. It was a proper recorded consent and it was thus contractual and binding on all parties and their counsel. In the said consent it was agreed that the defendant takes 80% liability and the plaintiff 20% I so find. I uphold that consent as binding on the parties. That settles the issue of liability.

With regard to quantum, the plaintiff has relied on the Law Reform and Fatal Accidents Act, and the Wildlife Conservation Act and Management Act 2013. The defendant relies on the provisions of the Law Reform Act and the Fatal Accidents Act.

In my view, the plaintiff is entitled to compensation under the Wildlife Conservation and Management Act 2013, which is the specific Act that deals with accidents and fatalities associated with wildlife conservation, and the deceased was killed by wildlife. Since the Act is also a more recent law, “it has to be the guide in determining awards for damages or death, or injuries caused by wildlife, as Parliament has it its wisdom decided to treat damage, injuries and deaths cause by wildlife differently. The general law under the Fatal Accidents Act and Law Reform Act cannot thus be used in determining damages as Parliament has made specific provision sfor the same under the Act of 2013.

Since in my view, it was proved that the deceased died due to an attack by a crocodile, I hold that a figure of Kshs. 5,000,000/= is awardable to her estate as damages as compensation, as provided under Section 25 of the Wildlife Conservation and Management Act 2013.

In my view also, the plaintiff has proved special damages of Kshs. 40,000/= for costs of litigation to obtain letters of administration.

I am mindful that the liability is admitted by the defendant at 80%. The above figures or awards will thus be reduced by the admitted or consented to contribution of 20%.

The damages awarded are therefore as follows:-

Under the Wildlife Conservation and Management Act 2013,

Compensation	Kshs.	5,000,000/=
Less 20% contribution		<u>1,000,000/=</u>
Sub Total		<u>4,000,000/=</u>
Special damages		40,000/=
Less 20% contribution		<u>8,000/=</u>
		<u>32,000/=</u>
TOTAL		<u>4,032,000/=</u>

I award the costs of the proceedings to the plaintiff, as well as interest.

Dated and delivered at Garissa this 12th October, 2015

GEORGE DULU

JUDGE