



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appeal 173 of 1991

JOSEPH BORO NGERA

SUPADUKA NAKURU LIMITED..... APPELLANTS

AND

KENYA WILDLIFE SERVICE..... RESPONDENT

**(An appeal from the Ruling/Order of the High Court of Kenya
Nakuru (Rimita, J.) dated 21st February, 1995 In
H.C.C.C. NO. 268 OF 1992)**

JUDGMENT OF GICHERU, J. A.

Under the provisions of section 2(6) of the *Wildlife (Conservation and Management) (Amendment) Act, NO. 16 of 1989* which came into operation on 15th January, 1990, "Service" means the Kenya Wildlife Service established under section 3 of the said Act - the respondent herein. Section 3A. (c) and (1) of that Act is in the following terms:

"3A. The function of the Service shall be to -

(c) manage National Parks and National Reserves;

(1) render services to the farming and ranching communities in Kenya necessary for the protection of agriculture and animal husbandry against destruction by wildlife."

By a plaint in the superior court dated 22nd May, 1992 the appellants herein, where material for the purpose of this appeal, averred that they were owners and/or beneficial owners, of land surrounding the Lake Nakuru National Park being L.R. NO. 4790/453 on which during the year 1991 they jointly planted 480 acres of wheat, cultivated and supervised it as by practice and good husbandry is required under the Jerri culture Act, Chapter 418 of the Laws of Kenya. Between the months of April and October, 1991 when the appellants' wheat crop had been planted and had ripened and headed with seed, birds from the Lake Nakuru National Park, in particular Guinea Fowls, descended onto the appellant's wheat crop and totally destroyed it resulting in loss and damage to the appellants estimated at K. Shs. 5,520,000/- which loss and damage the appellants attributed to the respondent on account of its breach of statutory duties under the provisions of section 3A. (c) and (1) of the Act referred to above and as are set out thereto. The appellants therefore besides claiming general and exemplary damages also claimed special damages of K.Shs. 5,520,000/- against the respondent.

In its statement of defence dated 1st July, 1992 the respondent inter alia averred that at the hearing of the appellants' suit in the superior court, it was to raise a preliminary point of law to the effect that by

virtue of section 62(1) of the *Wildlife (Conservation and Management) Act*, Chapter 376 of the Laws of Kenya as amended by *Act NO. 16 of 1989* no action can be sustained in respect of losses resulting from damage to property occasioned by wild animals or birds and consequently the appellants' suit ought to be struck out with costs.

When the appellants' suit came up for hearing in the superior court on 25th January, 1995, counsel for the respondent, Mr. Mwitwa, raised the preliminary point of law referred to above and the same was debated in that court by the opposing parties thereto and in his ruling dated and delivered at Nakuru on 21st February, 1995, Rimita, J. had this to say:

"Act NO. 16 of 1989 removed compensation for loss of property. As it is now, the Act provides no compensation for loss of property. I believe this was deliberate by our legislature.

All what I can say is that the Act in question, that has created the defendant, places no liability on the defendant for loss of property occasioned by wildlife. It is unfortunate but that is the law as I understand it.

The upshot is that the defendant's preliminary objection is upheld and sustained.

The suit is accordingly dismissed with costs to the defendant."

It is correct that *Act NO. 16 of 1989* removed compensation for damage or loss of crop or property by any animal in terms of the *Wildlife (Conservation and Management) Act* chapter 376 of the laws of Kenya but in place thereof it provided as one of the functions of the respondent as is relevant to this appeal the rendering of

services to the farming and ranching communities in Kenya for the protection of agriculture and animal husbandry against destruction of wildlife. If the respondent failed to carry out this function, then it would be a breach of a statutory duty notwithstanding the non-provision of remedy for such breach: and as is stated in *Clerk and Lindsell on Tort, 12th Edition, paragraph 1407 at page 741*

If a statute creates a duty but imposes no remedy, civil or criminal, for its breach, there is a presumption that a person who is injured thereby will have a right of action, for otherwise "the statute would be but a pious aspiration." This may be subject to qualification, however, which has often been stated, though also emphatically denied that there will be no right of action unless the statute was intended to benefit designated individuals or particular class of persons rather than the public at large.'

The respondent is a body corporate with power to sue and be sued. In the instant appeal, the appellants were persons in the farming communities in Kenya to whom under *section 3A. (1) of Act NO. 16 of 1989* the respondent was to render services necessary for the protection of agriculture against destruction by wildlife. Whether or not the provisions of this section imposes no remedy for their breach by the respondent is no bar for a right of action in the circumstances such as obtains in the present appeal against the respondent otherwise such provisions should never have found any space in the statute book. The learned superior court judge may not therefore have been right in upholding the respondent's preliminary point of law that no action can be sustained in respect of losses resulting from damage to property occasioned by wild animals or birds. In the result, I would allow this appeal, set suit in that court with costs to the respondent and order that the appellants' Civil Suit No. 268 of 1992 be reinstated and proceed to hearing before a judge of the superior court other than Rimita J. The appellants shall have the costs of this appeal. As Tunoi and Pall, JJ.A. agree, it is so ordered.

Dated and delivered at Nairobi this 2nd day of October, 1998.

J. E. GICHERU

JUDGE OF APPEAL