



Ngera & another v Kenya Wildlife Service

Court of Appeal, at Nairobi October 2, 1998

Gicheru, Tunoi & Pall JJ A

Civil Appeal No 171 of 1997

(Appeal from the Ruling/ Order of the High Court of Kenya at Nakuru (Hon Justice D M Rimita) dated 21st February 1995 in HCCC No 268 of 1992)

Wildlife – *management and conservation – the obligation and duty of Kenya Wildlife Services (KWS) – whether the law imposes an obligation on KWS to render services necessary to protect a limited class of persons – Wildlife (Conservation and Management) Act (cap 376).*

Wildlife – *humans and wildlife conflict - destruction of property – remedy for destruction occasioned by wild animals – the obligation of KWS – where the law imposes a statutory obligation on KWS to render services to a certain class of persons – whether the absence of a remedy under the Act bars a right of action by a claimant – whether a claim can be brought under the common law*

Statutes – *interpretation of statutes – where an Act of Parliament creates a statutory obligation but does not provide for a remedy – whether the absence of a remedy bars a claimant from raising an action – whether such a claim can be raised through the common law - Wildlife (Conservation and Management) Act (cap 376).*

By a plaint in the superior court the appellants, averred that they were the owners and/or beneficial owners, of a portion of land surrounding the Lake Nakuru National Park on which they jointly planted 480 acres of

wheat in 1991. Between the months of April and October, 1991 when the appellants' wheat crop had been planted and had ripened, birds from the Lake Nakuru National Park descended onto the wheat crop and totally destroyed it resulting in loss and damage estimated at Ksh 5,520,000.00.

The appellants attributed this loss and damage to the respondent on account of its alleged breach of statutory duties under the provisions of section 3A (c) and (1) of the Wildlife (Conservation and Management Act) Act, cap 376. The appellants apart from claiming general and exemplary damages, also claimed special damages of Ksh 5,520,000.00 against the respondent. In its defence the Kenya Wildlife Service stated that under section 62(1) of the Act no case could be brought against it in respect of losses resulting from damage to property occasioned by wild animals or birds, therefore

the suit against them ought to have been struck off the court records.

At the hearing of the suit the High Court upheld and sustained the preliminary objection and accordingly dismissed the suit with costs to the defendant hence this appeal.

Held:

1. Giving plain and ordinary meaning to to section 3A (1) of the Wildlife (Conservation and Management) Act, Parliament intended to impose and did impose an obligation upon the respondent to render services necessary to protect a limited class of persons, namely the farming and ranching communities.
2. It is correct that Act No 16 of 1989 removed compensation for damage or loss of crop property by any animal in terms of the Wildlife (Conservation and Management) Act but in place thereof it provided that one of the functions of the respondent is rendering services to the farming and ranching communities in Kenya for the protection of

agriculture and animal husbandry against destruction by wildlife.

3. If Kenya Wildlife Services failed to carry out its functions, as above, then it would be in breach of a statutory duty notwithstanding the nonprovision of a remedy for such breach.

4. In the absence of any remedy provided by the Wildlife (Conservation and Management) Act for loss resulting from damage by birds, the appellant could always pursue his common law remedy.

5. 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.

6. The appellants were persons in the farming communities in Kenya to whom Kenya Wildlife Services was to render services necessary for the protection of agriculture against destruction by wildlife. Whether or not section 3A (1) of the Wildlife (Conservation and Management) Act No 16 of 1989 imposes a remedy for their breach of the statutory obligations, such a provision does not bar a right of action against the respondent.

Appeal allowed.

Cases

Attorney General of Duchy of Lancaster v L & N W Ry Co (1892) 3 Ch 274 CA

Texts

1. Dworkin, E (Ed) (1967) *Odgers' Construction of Deeds and Statutes*

London: Sweet & Maxwell 5th Edn p 398

2. Simmonds, V *et al* (Eds) (1961) *Halsbury's Laws of England* London: Butterworths 3rd Edn Vol XXXVI para 684

3. Dugdale, A M (Ed) (1961) *Clerk & Lindsell on Torts* London: Sweet & Maxwell 12th Edn para 1407

Statutes

1. Wildlife (Conservation and Management) Act (cap 376) sections 2(b); 3A; 3A (c) (i); 62 (1) (2)
2. Agriculture Act (cap 318)

Advocates

Pravin Bowry for the Appellant

PJ Mwiti for the Respondent

October 2, 1998, the following Judgments were delivered.

Gicheru JA. Under the provisions of section 2 (6) of the Wildlife Conservation and Management) (Amendment) Act, No 16 of 1989 which came in to 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 LR 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 Agriculture 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 appellants wheat crop and totally destroyed it resulting in loss and damage to the appellants estimated at Ksh 5,520,000.00 which loss and damage 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 Ksh 5,520,000.00 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 Mwititi 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 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 the Laws of Kenya but in place thereof it provided as one of the functions of the respondent as is relevant this appeal the rendering of services to the farming and ranching communities in Kenya for the protection of agriculture and animal husbandry against destruction by 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 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 aside the order of the superior court dismissing the appellant's suit in that Court which 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 agree, it is so ordered.

Pall JA. This is an appeal from the judgment and decree of the High Court of Kenya at Nakuru (Rimita J) dated 21st February, 1995 in Nakuru High Court Civil Case No 268 of 1992.

The appellant sued the respondent Kenya Wildlife Service which is a body corporate established under the Wildlife (Conservation & Management) Act cap 376 (the Act). The plaintiffs claimed that under ss 3A(c), 3A(i) and 3A(I) of the Act the respondent is responsible *inter alia* to:-

(i) manage national parks and national reserves and render services to the farming and ranching

communities in Kenya necessary for the protection of agriculture and animal husbandry against destruction by wildlife and

(iii) provide advice to the government on conservation and management.

The appellants further claimed that in or around the months of April to

October, 1991 when their wheat crop was planted in 480 acres forming part of LR No 4790/453 jointly owned by them and later on when the crop was ripe birds from Lake Nakuru National Park descended on the said wheat plantation and totally destroyed it resulting in loss and damage to them.

In the particulars of loss and damage, the appellant alleged that 9600 bags of wheat of the total value of Kshs 5, 520,000 had been lost.

It is further alleged in the plaint that the said loss and damage was occasioned because of breach or breaches of the respondent's statutory duties under the said section 3A of the Act. The particulars of several alleged breaches of statutory duties on the part of the respondent as also particulars or alleged negligence are given in the plaint. In the alternative it is alleged that during the aforementioned period the respondent although duty bound failed to abate public nuisance caused by the birds from the Lake Nakuru National Park in the outside vicinity of the park. The appellant claimed special damages in the said sum of Kshs 5,520,000/= and general and exemplary damages against the respondent.

By its defence the respondent inter alia denied liability; in particular raising a preliminary point that by virtue of s 62(1) of the Act no action could be sustained in respect of loss to property occasioned by wild animals and birds. The defence also raised a further preliminary point that even if the

appellant had a cause of action, the same was not against the respondent as under s 62(2) of the Act there was a specific machinery and procedure for compensation through the District Committee which compensation was in any event to come out of the consolidated fund of the government. The defence also pleaded that sub-sections 3A(c) (i) and (l) of the Act did not place any liability on the respondent for losses occasioned by wild animals or birds.

The issues were framed by the parties and one of the agreed issues was:

“Is the defendant obligated to compensate the plaintiff for losses as alleged and does the defendant owe a duty of care under s 3A(a) to (l) of the Act?”

At the hearing the respondent argued a point of law that the whole suit was bad in law. By his ruling which in fact is his judgment, the learned judge dismissed the appellant’s suit upholding the respondent’s preliminary objection and said:-

“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.”

By Act No 16 of 1989, s 62 was amended and reference therein to “damage to or loss of crops or property” was deleted therefrom.

The appellants now appeal. There are several grounds of appeal but gravamen of the appellants appeal is that the learned Judge misconstrued the provisions of the Act and wrongly held that the appellants had no recourse under the Act for breach of a statutory duty on the part of the respondent.

Counsel for the appellants pointed out that although the appellants had

specifically pleaded that under the aforesaid provisions of s 3A, particularly s 3A(1) of the Act there was a statutory duty imposed upon the respondent “to render services to the farming and ranching communities in Kenya necessary for the protection of agriculture and animal husbandry against destruction by wildlife.” The learned judge completely ignored to consider the appellants claim in the light of section 3A of the Act and summarily dismissed the appellants’ claim. He further argued that although under the amended s 62(1) of the Act a statutory claim for loss or damage to property through destruction by wildlife has been excluded if there is a breach of duty by a statutory body, the aggrieved party can make his claim for damages under the common law. It cannot be said that a duty is cast upon the respondent and for breach thereof there is no remedy available to the appellants, he said. He further argued that the superior court should have allowed the suit to proceed in the normal manner instead of summarily dismissing it and in the course of the proceedings his clients would have shown that there was a statutory duty under s 3A that the respondent had been guilty of breach of it. *Odgers on Construction of Deeds and Statutes* 5th Edition at p 398 says:

“The first question is whether a remedy given by statute ousts the remedy at common law. The matter was summarised in the following way by Willi J in *Wolverhampton New Waterworks Co vs Howkesford*:
There are three classes of case in which liability may be established founded upon a statute. One is, where there is a liability existing at common law and that liability is affirmed by statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute

contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class is where the statute gives the right to sue merely, but provides no form of remedy, there the party can only proceed by action at common law. But there is a third class viz where a liability not existing at common law is created by a statute..... The remedy provided by the statute must be followed.....”

Halsbury Laws of England 3rd Edition Vol 36 at paragraph 684 says:

Essentials of a Cause of Action. In order to succeed in an action for damages for breach of a statutory obligation which on the proper construction of the statute was intended to be a ground of civil liability to a class of persons of whom he is one he must establish an injury or damage of a kind against which the statute was designed to give protection and he must establish the breach of statutory obligation caused or materially contributed to his injury or damage.

Clarke & Lindsell on Tort 12th Edition at paragraph 1407 reads:

“If the statute creates a duty but imposes no remedy, civil or criminal for its breach, there is a presumption that the person who is injured thereby will have a right of action, for otherwise the statute would be but a pious aspiration.”

Counsel for the respondent said that the Court should look at the Act in its

entirety and hold that the superior court was right in dismissing the suit in *limini*. I have carefully gone through the judgment of the superior court.

Whereas it talks about the powers given to the respondent under the Act, it is completely silent about its obligations under the Act. It says:

“It (the respondent) has been given certain powers under cap 376 to manage the wildlife. The ownership or possession of the wildlife is not passed by the Act to the defendant. The animals in my opinion remain wild despite the Act.”

It is true that wild animals or birds remain wild. But section 3A(1) does say *inter alia* that the respondent is to render services to the farming communities for protection of agriculture against destruction by wildlife.

The learned judge was specifically invited to interpret and to give effect to this provision of the Act. His judgment is completely silent about it.

Giving plain and ordinary meaning to section 3A(1) of the Act, my view is that Parliament intended to impose and did impose an obligation or duty upon the respondent to render services necessary to protect a limited class of persons namely the farming and ranching communities. In the absence of any remedy provided by the Act, the appellant can always pursue his common law remedy.

Summary process ie without a trial in the normal way to stay or dismiss an action should only be adopted when it is clearly seen that the claim on the face of it is unsustainable (*Attorney General of Duchy of Lancaster vs L & N W Ry Co* (1892) 3 Ch 274 CA).

In the final result I would allow the appeal, and set aside the said judgment or ruling of the superior court and order that trial of the suit should proceed in the normal manner before a judge of the superior court other than Rimita

J. I would award costs of the appeal to the appellant.

Tunoi JA. I agree with the judgment of Pall JA. I would allow appeal in the terms proposed by him.