



**Kenya Society for the Protection and Care of Animals v Mukhwana (Civil Suit E035 of 2022) [2024] KEMC 179 (KLR) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEMC 179 (KLR)

**REPUBLIC OF KENYA  
IN THE NGONG LAW COURTS  
CIVIL SUIT E035 OF 2022  
P ACHIENG, SPM  
JANUARY 18, 2024**

**BETWEEN**

**KENYA SOCIETY FOR THE PROTECTION AND CARE OF ANIMALS ..... PLAINTIFF**

**AND**

**JOHAM NYAVERA MUKHWANA ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff filed this suit against the defendants seeking the following orders;
  - a. An order of permanent injunction barring the defendant from engaging in horse rearing, keeping, breeding or in any manner whatsoever engaging in any business involving horses.
  - b. An order of permanent injunction barring the defendant, his agents, employees, partners, associates and or anyone else working under his direction, instruction and or employment from further harassing, intimidating or disturbing the Plaintiff or trespassing on their premises and/ or attempting to seize, take away or remove the horses under the protection and care of the Plaintiff.
  - c. Special damages for the sum of Ksh. 813,028/= for the expenses incurred by the Plaintiff in treatment, feeding and housing of the horses.
  - d. The costs of this suit together with interest thereon at court rate from the date of filing suit until payment in full.
  - e. Such other and further relief that this Honourable Court may deem just and fit to grant.
2. The Plaintiff sates that it carries on the business of horse rearing and keeping and hiring of horses to racers and riders. In 2019, the Plaintiff had been receiving various reports of the defendant's ill treatment of the horses under his care at Korr Stables, which constituted animal welfare violations.



When approached regarding the condition of the horses, the defendant made commitments and undertakings to improve practice, which were however not honored despite the Plaintiff following up with the care and providing support to the defendant for instance through vaccinations. The Plaintiff wrote to the defendant vide a letter dated 17<sup>th</sup> May 2019 informing him that it was formally taking steps to seize the horse with a club foot and that it would also seize the remaining horses with the assistance of the relevant authorities if they were seen being ridden before receiving formal clearance from the Plaintiff's inspectors.

3. On 6<sup>th</sup> June 2019, the Plaintiff visited the defendant's stable to monitor the condition of the horses as agreed in previous meetings, and seized 7 saddles, 4 head collars and 2 leading reins due to their poor condition. On 8<sup>th</sup> June 2019, the Plaintiff seized 2 more horses which were taken for proper medical attention and care. More horses were seized on 10<sup>th</sup> June 2019 and on 12<sup>th</sup> June 2019. After conducting thorough examinations, the County Vet and the Plaintiff concluded that the horses had been subjected to serious abuse and neglect and it was imperative for their welfare that the police together with the Plaintiff's authorized officers and the County Vet pursuant to Section 31 of the [Prevention of Cruelty to Animals Act](#) Cap. 360 seize 7 horses. One mare had to be humanely euthanized due to her poor physical condition. The Plaintiff states that the remaining horses seized in 2019 are still in their custody, and they have incurred expenses in keeping and caring for them.
4. In 2021, the Plaintiff received reports from members of the public regarding horses which were roaming free in a section of Oloolua forest near Bulbul market, which also appeared to be in poor condition. One of the Plaintiff's officers visited the area on 2<sup>nd</sup> November 2021 and found 4 horses roaming in the bush, 3 of which were with poor body condition and one was limping. Upon making inquiries on who was responsible for the horses, the officers were informed that it was the defendant. They attempted to contact him but he was unavailable. As the Plaintiff's officers and police officers who were present waited to load the horses in order to seize them the defendant arrived and claimed that he owned the horses. He denied that they were in poor physical state despite that being obvious. Though the defendant stated that two horses which were thin and weak were ill and under the veterinary care of one Dr. Desmond Tutu, the said doctor was contacted by the Plaintiff's Executive officer and he denied that.
5. It is the Plaintiff's claim that the defendant has continuously harassed and intimidated the Plaintiff and its officers to return the horses to him. The Plaintiff states that it has incurred costs and expenses since 2019 in treatment, shelter and feeding of the animals though it is a non-profit charitable organization that relies on donations to fund its activities.
6. The defendant filed a defence and counter-claim. He denies having mistreated the animals and states that he has over 10 years experience in rearing the horses. The Plaintiff denied liability for the alleged loss suffered by the Plaintiff in caring for the horses and states that the Plaintiff voluntarily assumed the loss despite him objecting, and the Director County Veterinary Services advising the Plaintiff against holding property that does not belong to them. The defendant states that he has suffered loss of his business and is at the verge of losing 13 horses, 1 donkey, a dog and its puppies, thus he seeks redress.
7. In his Counter-Claim, the defendant states that the Plaintiff without any just cause or excuse trespassed on his property and seized his property without lawful orders, as per the particulars of trespass stated in the Counter-Claim. The defendant states that the Plaintiff's action has caused him loss of business as he cannot hire out the horses, teach horse riding, breed among others. The defendant has provided particulars of financial and business loss at paragraph 15 of his Counter-claim. The defendant therefore seeks that the Plaintiff's claim be dismissed with costs and Judgment be entered against the Plaintiff as follows;



- a. Special damages in paragraph 15.
  - b. An order that the 13 horses and a donkey seized by the Plaintiff being the property of the defendant and his business stock be immediately returned to him.
  - c. In the alternative to prayer (b), the Plaintiff compensates the defendant a value of Ksh. 1,000,000/= for each horse seized and Ksh. 400,000/= for the donkey.
  - d. An order for the return of the seized leading reins, head collar and saddles and in the alternative compensate the defendant the value of the same at market price.
  - e. A permanent injunction restraining the Plaintiffs, their associates, servants, workmen and agents from entering on and/or from making seizures or causing to be seized horses on Korrs Stable or in any way interfering with the defendant's business of horse keeping, horse rearing, horse breeding, horse importing and horse teaching without the express leave of the defendant and/or that of the Nairobi County Veterinary Services.
  - f. Economic damages for loss of business calculated at each day's loss since 3<sup>rd</sup> November 2021.
  - g. General and aggravated damages.
  - h. Costs of the suit.
  - i. Interest at commercial rate.
  - j. Any other relief the Court deems fit to grant.
8. The Plaintiff filed a Reply to the defence and defence to the Counter-Claim. The matter proceeded for hearing and both parties called witnesses. I have considered the Plaintiff's claim, the defence and Counter-claim, the Reply to defence and Counter-claim, the evidence tendered and the written submissions filed. The two broad issues to determine are as follows:-
- a. Whether the Plaintiff lawfully took possession of the defendant's horses, donkey and dog.
  - b. Whether the Plaintiff is entitled to the reliefs sought.

**Whether the Plaintiff lawfully took possession of the defendant's horses, donkey and dog**

9. The guiding statute in the instant case is the *Prevention of Cruelty to Animals Act* Cap. 360. The preamble to the said Act is as follows:-

"An Act to make better provision for the prevention of cruelty to animals; to control experiments on animals; and for matters incidental thereto and connected therewith".

10. Section 36 of the *Act* deals with appointment of authorized officers who are to assist in ensuring its enforcement. It provides as follows;

"Appointment of authorized officer

The Minister may, after consulting with the East African Society for the Prevention of Cruelty to Animals by notice in the Gazette, appoint such persons as he thinks fit to be authorized officers for the purposes of this Act."

11. Upon conducting a research to ascertain the status of the Plaintiff under the Act, I noted from the Gazette notices issued by the Minister pursuant to Section 36 that the Plaintiff organization has the status of the East African Society for the Prevention of Cruelty to Animals, as it is the one being



consulted by the Minister before appointment of authorized officers. In his written submissions, the defence counsel submitted that the Plaintiff organization was not an authorized officer under the Act, and could not purport to act as such on its behalf, despite having authorized officers under its employment. PW1 Emma Ngugi who is the Executive Officer of the Plaintiff organization stated that the Plaintiff is part of the umbrella of the East African community. Having been recognized by the Minister and having taken the position of the East African Society for the Prevention of Cruelty to Animals as stated above, I do not find validity in the said argument by the defence counsel. There is also no law barring the Plaintiff from instituting civil proceedings against a party. There is however need to look into the Act herein with a view to ensuring that the Plaintiff is properly recognized for clarity purposes.

12. The defence counsel also invited the Court to rule on the rights and locus standi of the Plaintiff organization to institute private prosecution against persons in enforcement of criminal cases and charges. These proceedings have however not been brought under the Criminal Procedure Code as they are civil in nature. The provisions of the Criminal Procedure Code cannot therefore be invoked as submitted by counsel.
13. In order to ascertain whether or not the Plaintiff lawfully took into its possession the defendant's animals, it is crucial to consider the provisions of Section 30, 31 and 32 of the Act, which provide as follows;

#### Section 30

##### Any person authorized to prevent cruelty

If any person has reason to believe that any offence is being or is about to be committed under this Act or against any regulation made thereunder in relation to any animal it shall be lawful, where to summon an authorized officer or a police officer will occasion unreasonable delay and unnecessary suffering to such animal, for such person to take such reasonable steps as are necessary to prevent the commission of such offence.

#### Section 31

##### Power to enter and inspect land, premises or vehicle

1. An authorized officer, on production of his authority, or for any police officer of or above the rank of Sub-Inspector, may enter without warrant and inspect any land, premises or vehicle in or upon which he has reason to believe an offence under this Act or against any regulation made thereunder has been or is about to be committed and may therein—
  - a. seize any animal, vehicle or any other thing which he has reasonable grounds for believing to be evidence of an offence;
  - b. require the owner or occupier of the land or premises or the owner or driver of such vehicle to render such explanation and such information relating to any animal as may be reasonably required by such officer in the performance of his duties:

But no such person may be required to answer any question the answer to which may tend to expose him to any criminal charge, penalty or forfeiture.

2. The power to act under subsection (1) of this section shall only be exercised without a warrant if the officer so acting has reasonable cause to believe that



the delay occasioned in obtaining a search warrant would seriously hinder him in the performance of his duties, and such power shall be exercised only by or under the directions of a police officer of or above the rank of Sub-Inspector unless the person exercising it has reasonable cause to believe that the delay occasioned in summoning such police officer would, or would tend to, defeat the purposes of this section.

3. Before removing anything under the provisions of paragraph (a) of subsection (1) of this section, the officer removing it shall furnish the person in whose custody or possession the article is at the time of removal with a written receipt therefor.
4. Every seizure under this section shall be reported without unnecessary delay to a magistrate.

## Section 32

### Power to seize animal or vehicle

1. Where a person having charge of a vehicle or animal is apprehended by an authorized officer or a police officer for an offence under this Act or any regulation made thereunder, it shall be lawful for such officer or any other police officer to seize such vehicle or animal, and to deposit the same in some place of safe custody, until the termination of the proceedings in respect of such offence or until the court directs such vehicle or animal to be delivered to the person charged or the owner thereof, and the reasonable costs of detention, including the reasonable costs of veterinary treatment where such treatment is required, shall, in the event of a conviction in respect of the said animal, be recoverable from the owner as if such costs were a fine.
  2. Where any animal, whether drawing a vehicle or otherwise, shall appear to an authorized officer or police officer to be so diseased or injured as to be unfit for work or to have suffered such ill-treatment as would be an offence under this Act or against any regulation made thereunder it shall be lawful for such officer to detain or seize such animal or vehicle and take charge of and deal with the same in like manner as is provided for under subsection (1) of this section, and the reasonable costs and expenses incurred shall be recoverable in the manner therein provided.
  3. A seizure under this section shall be reported without unnecessary delay to a magistrate.
14. It was the evidence of the Plaintiff witnesses that the defendant's animals were seized for the reason that they had been neglected leading to poor health, which amounts to cruelty to animals. According to the letter dated 2<sup>nd</sup> July 2019 to the County Director of Veterinary Services from Dr. JM Wanguru the Sub-County Veterinary Officer Langata, the horses were malnourished and in very poor body condition, they had skin infection and wounds on various parts of the body, they had damaged hooves which made their movement difficult and painful and they had not been dewormed for a long time. The doctor's concluding remarks were that the horses required immediate treatment and the cost to be met by the owner failure to which he should be prosecuted and the horses be confiscated.
15. Seizure of animals as provided for under Sections 31 and 32 of the [\*Prevention of Cruelty to Animals Act\*](#) is to be done with a view of instituting proceedings, and there is a requirement that the seizure be



reported without unnecessary delay to a magistrate. The evidence on record however points to the fact that the Plaintiff did not comply with the said provisions as the seizure was not reported to a magistrate. Though police officers were involved and were present at the time of seizure, the defendant was never charged with any offence defined under the Act, and the Plaintiff continued to detain the horses. There were no court proceedings relating to the confiscated animals until 2021 when the defendant filed suit against Nairobi County Government and the Plaintiff herein. The suit was however withdrawn by the defendant who was the Plaintiff in the said suit, following negotiations with representatives of Nairobi County Government, as per the email conversations produced by the Plaintiff herein.

16. According to the email by Daniel K. Karugu the Acting County Director of Veterinary Services Nairobi City County to PW1 dated 22<sup>nd</sup> March 2022, he issued instructions for release of the horses to the defendant in the spirit of Article 40 and 47 of the *Constitution*, further stating that they will monitor the horses for welfare frequently in future. Mr. Karugu further stated that the matter was laid to rest unless new offences are detected in future upon monitoring. The Plaintiff was however against the said settlement of the suit, as a result of which they brought the present suit.
17. Though the Act recognizes several offences, the defendant was never charged for any offence upon his animals being seized. It will therefore be unfair and against the rules of natural justice to condemn him and conclude that he was guilty of continuous animal welfare violations, when he has not been tried and convicted for any offence in respect to the animals. It will therefore not be in the interest of justice to bar the defendant from engaging in horse rearing business as sought by the Plaintiff, or issuing a permanent injunction as sought. The Plaintiff also detained the animals for an inordinately long time without reporting the seizure to a magistrate as required by law. They cannot now seek to recover damages incurred in treating, feeding and housing the horses following the illegal detention of the animals. The Plaintiff's noble intentions and passion for the protection of the welfare of the animals is evident. However, they ought to have complied with the law in their actions. The upshot is that the Plaintiff's claim does not succeed.
18. In regard to the defendant's counterclaim, his claim for return of the seized animals succeed, though I decline to award him damages as prayed for the reason that he has derived a benefit from the care and treatment of his animals by the Plaintiff, considering the condition in which they were at the time of seizure
19. I therefore find no merit in the Plaintiff's claim and dismiss the same. I order that all the animals belonging to the defendant which are in the custody of the Plaintiff be released to the defendant forthwith. Each party to bear their own costs of the suit.

**DATED DELIVERED AND SIGNED AT NGONG THIS 18<sup>TH</sup> DAY OF JANUARY 2024**

In the Presence of:

Plaintiff - Mr. Olute holding brief for Mr. Mabachi

Defendant - Mr. Malinzi

Court Assistant -Dan

**HON P. ACHIENG**

**SENIOR PRINCIPAL MAGISTRATE**

