

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ISIOLO
CIVIL APPEAL NUMBER E048 OF 2024

**KENYA WILDLIFE
SERVICEAPPELLANT**

VS

**ETURI
NUOBONGIO.....RESPONDENT**

*(Being an Appeal from the Ruling of Hon. L.Mutai (CM)
delivered on 12th November 2024 in Isiolo CMCC NO. E44
of 2024)*

JUDGMENT

1. The Respondent filed suit in the lower court seeking for damages for loss to the Estate, and dependants of Kichuchu Ngarawae Laupolmai (Deceased) who died following a attack by a herd of Elephants on 11th day of June, 2022. In response, the Appellant herein filed a defence denying the claim , and at the same time challenging the jurisdiction of the Magistrate’s court to try the suit. The appellant subsequently filed the preliminary objection dated 23.10.2024 to the effect that pursuant to the provisions of Section 25 of the **Wildlife Conservation and Management Act 2013** (The Act), the trial court had no jurisdiction to try the suit.
2. The trial court heard the preliminary objection and dismissed it. It is the said dismissal that has given rise to this Appeal.

Memorandum of appeal

3. The Appellant has listed the following grounds:

a). *The Learned Magistrate erred in law and fact in dismissing the Appellant's Preliminary Objection challenging the original jurisdiction of the trial court to hear and determine the Respondent's suit.*

b). *The learned Magistrate erred in law and in fact by failing to appreciate that the claim is a preserve of the County Conservation and Compensation Committee pursuant to Provisions of Section 25 of Wildlife Conservation and Management Act.*

c). *The learned Magistrate erred in fact and in law in failing to consider the written submissions made by the Appellant and in failing to consider the legal Authorities tendered therewith.*

6. The parties filed submissions in respect of the appeal

The appellant's submissions

4. It is the Appellant's first submission that whereas the Chief Magistrate's Court has jurisdiction to determine tortious claims, it has no jurisdiction to determine those which arise from attacks by wildlife. It is submitted that the original jurisdiction to determine claims arising from attacks by wildlife is vested in the *County Wildlife Conservation and Compensation Committee* established under Section 18 of the Act (The committee): that section 25 of the Act sets out a comprehensive mechanism for compensation of persons who suffer loss, bodily injury or death, caused by wild life.

5. It is further submitted that whereas there is no compulsion for anyone who suffers injury to pursue compensation, in the event that compensation is sought, it must strictly follow the procedure set out under section 25 of the Act.
6. The Appellant further argues that there is a mechanism for compensation set out in the statute; that this mechanism takes precedence over common law and that this internal mechanism constitute the original jurisdiction of the court. In this regard the Appellant had relied on the Court of Appeal decision in **KWS -Vs- Kanini (Suing as next friend of Edward Koome (2024) KECA 1127 (KLR)**, and **Peter Muturi Njuguna - VRS- KWS (2017) KECA 42 (KLR)** .
7. It is further submitted that filing the suit at the trial court went against the doctrine of exhaustion which was aptly set out in the case of **Albert Chaurembo-Vrs- Maurice Munyao & 148 Others (2019) eKLR** by The Supreme Court. The case of **NGO's Coordination Board -VRS- E.G & 4 Others , Katiba Institute (Amicus Curiae) (2023) KESC 17 (KLR)** and **Kimani Wanyoike -Vs- Electoral Commission & another (1995) KECA 128 (KLR)** have also been relied on to demonstrate the emphasis placed on the internal remedies in resolution of disputes.
8. The Appellant has then gone ahead to distinguish the findings on the above cited decisions with that by **KWS -VRS- Rift Valley Agricultural Contractors LTD (2018) KESC 48 (KLR)** stating that the said decision was made on the basis of the Wildlife Conservation and Management Act Cap 376 (now repealed), which had not made provisions for

compensation for material loss; that unlike the repealed Act, the current Act outlines the procedure of compensation. Consequently, it is submitted, the respondent ought to have pursued the statutory remedies prescribed under the Act.

9. It is further argued that, it is only if the compensation process is delayed that the respondent would be entitled to approach the court for a judicial review remedy. In this regard the appellant has relied on the decision in the case of **KWS - VRS- KANINI (Supra), Peter Muturi Njuguna-VRS- KWS** (Supra).
10. The appellant further contends that having initially filed his claim before the County Compensation Committee, then proceeding to file another similar claim before the Chief Magistrate's court, constituted an abuse of the court process; That having opted to pursue the compensation under statute, the respondent has disintitiled himself of the claim in negligence, under a civil court.
11. It is the Appellant's final submission that allowing this appeal will not be an impediment to the respondent's right to access to justice as the respondent can still approach the court by way of judicial review if it feels aggrieved by the Appellant's inaction.
12. On costs it is the appellant's submissions that costs follow the event.
13. The respondent did not file any submissions.

Determination

14. The only issue for determination in this appeal is whether the Magistrate’s Court has jurisdiction to determine claims arising from loss, or injury arising from attacks by wildlife Animals.

15. I will start this determination by looking at the relevant provisions of the Act that touch on compensation

Section 25 provides as follows:

1)Where any person suffers any bodily injury or is killed by any wildlife listed under the Third Schedule, the person injured, or in the case of a deceased person, the personal representative or successor or assign, may launch a claim to the County Wildlife Conservation and Compensation Committee within the jurisdiction established under this Act.

2)The County Wildlife Conservation and Compensation Committee established under section 18 shall verify a claim made under subsection (1) and upon verification, submit the claim to the Cabinet Secretary together with its recommendations thereon.

3)The Cabinet Secretary shall consider the recommendations made under subsection (2) and where appropriate, pay compensation to the claimant as follows—(a)in the case of death, five million shillings;(b)in the case of injury occasioning permanent disability, three million shillings;(c)in the case of any other injury, a maximum of two million shillings, depending on the extent of injury.

4).....

5).....

6) *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.*

16. The question of whether the chief Magistrate's court has jurisdiction to determine claims arising from injury or loss occasioned by wildlife has been the subject of a number of decisions of the High Court and the Court of Appeal. A reading of the decisions indicate that the point of contention is whether the word "*may*" used under section 25 (1) of the Act, ousts the jurisdiction of the courts to entertain suits seeking for compensation for injury or loss caused by wild life attacks.

17. There is a general consensus that the provisions of section 25 (3) does not ousts the jurisdiction of the Court. It has been observed, for instance, that a party can invoke the supervisory jurisdiction of the High Court by way of Judicial Review, a fact conceded to by the Appellant, in its submissions.

18. However apart from the judicial Review jurisdiction, the question still remains; who has the original jurisdiction to determine such claims?

19. In the case of ***Kenya Wildlife Service v Joseph Musyoki Kalonzo [2017] KECA 234 (KLR)*** the Court of Appeal, while addressing the provisions of section 25 of the Act , held:

"In other words, there is no ouster clause in the Wildlife and Conservation Management Act, that bars a party from seeking relief outside the process

*provided for under that Act. An ouster, or privative clause specifically divests the court of jurisdiction to hear or entertain any matters arising from the specific statute. In this case, **Section 25** of the Act only gives an aggrieved party an option to pursue its claim either through the process stipulated under the Act, or through the court.*

The respondent could either lodge his claim through the Act, which he did but no remedy was forthcoming, or pursue the remedy under common law through the courts. Every person has a right to pursue a remedy under common law, for a wrong or injury suffered.

20. The above decision was delivered on October, 2017. However in November of the same year the Court of Appeal differently constituted, delivered another Judgment addressing the same provision, then domiciled under section 62(1) of the predecessor to the current Act. That was the case of **Peter Muturi Njuguna -VRS- KWS (2017) eKLR**. The court held :

*“Ordinarily the word "**may**” is permissive and not mandatory but the contextual meaning would vary with the intention of the drafters. In this case, the argument is not so much the meaning of the word but the effect of it; whether it ousts the jurisdiction of the court. The High Court found, correctly in our view, that the decision of the district committee was amenable to challenge by way of Judicial Review and therefore in that sense the jurisdiction of the court is not ousted. Nevertheless, and again we agree, there was compulsion to exhaust the procedure provided under the section before going to court. To that*

extent therefore, whereas the appellant was under no compulsion to make any claim, once he chose to do so, as he might, he was compelled to lodge it at the appointed forum, being the District Committee”.

21. Further in ***KWS -VS- Purity Kanini (suing as next friend to Edward Koome) (2024) KECA 1127 (KLR)***, while borrowing heavily on the exhaustion principle the same court held:

“in our considered view, the intention of the framers of Section 25 of the Act was to cause claimants who had been injured or those whose relatives had died, by actions of wildlife, to benefit from the dispute resolution mechanism under the Act, a mechanism that was less cumbersome and which would benefit from the specialized knowledge on matters human - wildlife Interaction we do not agree that the Respondent had the option either to lodge the claim in court or to go to the County Wildlife Conservation and Management Committee. The claim belonged to the County Wildlife Conservation and Management Committee”.

22. In further seeking to answer the question of whether the court process option was available to the respondent , one must consider the principle of exhaustion. The nature of the doctrine was amplified by the Court of Appeal in ***Speaker of the National Assembly v Karume [1992] KECA 42 (KLR)*** as follows:

“ In our view, there is considerable merit in the submission that where there is a clear procedure

for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.....”

23. The principle and rationale of the doctrine was also expounded in the case of ***Muthiga Kabiru & 2 others vs-Samuel Munga Henry & 1756 others [2015] eKLR*** where the court aptly explained it as follows:

“ it is imperative that where a dispute resolution mechanism exist outside the courts, the same be exhausted before the jurisdiction of the Court is invoked. Courts ought to be a last resort and not the first port of call the moment a story brews.... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanism in place of resolution outside the court”.

24. Thus recent trends indicate that the courts are placing emphasis on the exhaustion of available internal remedies before parties resort to the courts. I associate myself with this position. It accords with the constitutional imperative that calls on courts to promote alternative forms of dispute resolutions mechanisms.

25. This court has also considered the various provisions of the Act, and it is clearly discernable that a good number of those provisions were geared

towards taking care of compensation of loss or injury caused by wildlife. Apart from section 25, which stipulates the procedure and other particulars of compensation, there are other provisions which are instructive in this regard, as demonstrated hereafter:

a) **Section 18** establishes the compensation and management committee of each county. The constitution of these committees is instructive. The membership includes experts in fields evidently meant to assist the committee in assessment of compensation claims. There is an Agricultural officer, a medical officer and a livestock officer .

b). Under section **19(a)** one of the functions of the compensation committee is to “ *review and recommend payment of compensation on claims resulting from loss or damage caused by wildlife.*

c). **Section 24 (1)** of the Act establishes a **wildlife compensation scheme** and under **section 24(b)** , the funds therein are to be used for ‘ financing compensation claims for human death or injury or crop or property damage caused by wild life. (Emphasis Added)

d). Finally section **25 (3)** provide the ceiling in terms of what can be paid in respect of fatal and non- fatal injuries.

26. In view of the foregoing ,to conclude that a claimant can opt to pursue his or her claim in court is to render useless the elaborate provisions on compensation laid out in the Act , and water down the work of the compensation committee whose key function is evidently to deliberate on and compensate claimants. Such committees just like

tribunals, must be allowed to carry out the functions for which they were set up in the first place.

27. To the extent therefore, that the Respondent had not exhausted the remedies that are provided in the Act then the trial court had no jurisdiction to entertain the suit.

28. In the end the Appeal has merit. The Ruling of the trial court delivered on 12th November 2024 is hereby set aside and is hereby substituted with an order upholding the preliminary objection.

29. The respondent suit is hereby struck off with costs to the Appellant. The costs of this Appeal are further awarded to the Appellant.

Dated, signed and delivered at Isiolo this 22nd day of January 2026.

S. Chirchir.

Judge.

In the presence of:

Roba Katelo- court Assistant.

Mr. Mutai for the Appellant.

ORIGINAL