Del Monte Kenya Limited v Waita & another (Civil Appeal E271 of 2024) [2026] KEHC 3564 (KLR) (12 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3564 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL APPEAL E271 OF 2024

TW OUYA, J

MARCH 12, 2026

BETWEEN

DEL MONTE KENYA LIMITED ..... APPELLANT

AND

DAVID MBATHA WAITA ..... 1ST RESPONDENT

KENYA WILDLIFE SERVICE ..... 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Thika before Hon. V. Asiyo, Principal Magistrate delivered on 19th September 2024 in Thika CMCC No. E255 of 2025)

JUDGMENT

1. The instant appeal emanates from a claim for compensation for injury occasioned by wildlife. The 1st Respondent had brought a suit claiming that on 2nd September 2022, he was lawfully walking along Kakuzi public road when near the Del Monte farm he was abruptly attacked by a hippopotamus hidden in a thicket. As a result, he sustained serious injuries to with an open fracture left radius bone and blunt injuries to the anterior chest wall.

2. It was his contention that the appellant's negligent failure to fence its farms and dams or any warning or hazardous sins put him in harm's way thus occasioning the attack against him by the hippo. He was therefore seeking compensation for future medical expenses for removal of metal implants and for surgical clinics, physiotherapy, medicine and further investigations. He pleaded special damages of Kshs. 36,660.00 consisting medical report, medical expenses and motor vehicle search.

3. Prior to the accident, the 1st Respondent was a security guard earning Kshs. 1,000.00 per day, the accident thus diminished his earning capacity and occasioned him loss of earning of 1 year.

4. The 1st Respondent therefore claimed general damages for pain and suffering, future medical expenses, loss of future earning capacity and or loss of earnings for 12 months and special damages.

5. The Appellant denied the claim maintaining that it did not own any dam along Del Monte Makongeni public road as alleged or at all.in any case, the road crosses Chania River, a natural resource bordering the Appellant's land and Makongeni Estate within Kiambu County which has wildlife, the same is not in any way owned by the appellant. It was the appellant's case that the responsibility of wildlife conservation and management is solely on the 2nd Respondent.

6. The 2nd Respondent denied the claim and instead pleaded contributory negligence in that the 1st Respondent carelessly wandered into an area he knew or ought to have known was dangerous. By putting himself close to an area known to be inhabited by wildlife, the 1st Respondent exposed himself to impending danger.

7. The matter proceeded to trial where the 1st Respondent adopted his witness statement and bundle of documents. He testified that he was walking on a public road that does not belong to the Appellant when the attack happened. Had the Appellant fenced the dam, he would not have been attacked by the hippo that bit his arm. He was working as a miner prior to the accident and was aware that the hippos exist. However, there was no other road to access his working site other than that passing near the Delmonte dam.

8. The Appellant called Mr. Moses Machayo who testified as the in-charge environment. He confirmed that there are dams in Delmonte dams and that the Appellant has no permit from the 2nd Respondent to keep hippos. The hippos keep migrating from one water source to another; therefore, they have no control over them. He also confirmed that neither the dams nor the farms are fenced and clarified that fencing the dams would not be practical.

9. The 2nd Respondent called Mr. Fredrick Kisera, a warden in charge of Oldonyo Sabak Park who testified that the 2nd Respondent has no partnership with the appellant regarding wildlife. He also clarified that the 1st Respondent did not report the injury. He clarified that the Appellant has no wildlife conservancy and that the hippos are in their natural habitat.

10. The trial court found both the appellant and the 2nd Respondent liable for knowing about the existence of the hippos but failing to take any remedial action to guarantee safety to the community. Thus, liability was apportioned at 70:30, with the appellant bearing liability at 70%.

11. On damages, the 1st Respondent pleaded an award of Kshs.1,000,000, while the Appellant submitted that an award of Kshs. 300,000.00 would be sufficient. The trial court determined that an award of Kshs. 600,000.00 would be fair compensation taking into account the injuries sustained by the 1st Respondent. No award was made for loss of one year income or loss of earning capacity, thus there was no award on this limb. Special damages were awarded at Kshs. 35,520.

12. Aggrieved and dissatisfied with the finding of the trial court, the appellant lodged an appeal citing the following grounds:

    i. That the honourable court erred in law and in fact when it failed to analyse the contradiction between the Claimant/ Respondent's pleadings and his evidence before court thereby arriving at an erroneous judgment.

    ii. That the honourable court erred in law and in fact when it failed on its duty to interrogate the evidence adduced, relating to wildlife compensations thus arriving at an erroneous judgment.

13. The appellant therefore prayed that the appeal be allowed with costs.

14. The appellant submitted that it did not owe any duty of care to the 1st Respondent as he was attacked while walking on a public road and not on the appellant's property. There was no evidence led to demonstrate that the hippopotamus came from the appellant's dam or that the appellant's were aware of the existence of the hippopotamus. The appellant submitted that he had no legal duty to contain or fence off wild animals which are not within his control as that obligation rests with the 2nd Respondent. Reliance was placed on the case of Kenya Wildlife Service v Joseph Musyoki Kalonzo [2017] KECA 234 (eKLR) to urge the position that it is the role of the 2nd Respondent to shoulder any claims or loss or damage caused by the breach of duty to conserve wildlife.

15. The appellant further submitted that the trial court erred in failing to interrogate the law relating to compensation for loss occasioned by wildlife. There was no evidence from the 1st Respondent demonstrating that the appellant in any was enabled the attack. The proper forum to lodge the complaint was thus with the Wildlife Conservation and Compensation Committee pursuant to Section 25 of the *Wildlife Conservation and Management Act*, 2013.

16. It was further submitted that should the court be inclined to find the appellant liable, the same should be apportioned at 20:80 in favour of the 1st Respondent with the appellant shouldering the 20%. Ultimately, the appellant urged that the appeal be allowed.

17. The 1st Respondent submitted that Section 25 (1) of the *Wildlife Conservation and Management Act* 2013 does not oust the jurisdiction of the magistrate court to determine claims emanating from human wildlife conflict as long as the litigant has not lodged a claim before the Committee. Therefore, a claimant who suffers any loss occasioned by wildlife has the option to present his case to the committee or to a court of competent jurisdiction to handle the matter.

18. In the instant case, it was submitted therefore that the claim was properly before court as the 1st Respondent had not lodged any claim elsewhere nor was any evidence to the contrary tendered.

19. The 1st Respondent urged this honourable court to uphold the finding of the trial court on liability and quantum as the same was reasonable in law.

20. The 2nd Respondent submitted that the trial court properly exercised its discretion in apportioning liability at 70:30. The 2nd Respondent's liability assessed at 30% was commensurate to its statutory obligation and mandate of ensuring wildlife protection.

21. On the issue of whether the trial court erred in failing to rely on the Wildlife Management and Conservation Act in apportioning liability, the 2nd Respondent submitted that the 1st Respondent did not lodge any claim under the Wildlife Conservation and Management and Conservation Act, 2013 therefore, the trial court was right in determining the case on the basis of negligence as pleaded as parties are bound by their pleadings.

22. On the question of damages, the 2nd Respondent submitted that the appellate court should be reluctant to disturb the trial court's finding on quantum unless it can be demonstrated that the same is inordinately high or low and based on manifestly wrong principles of law.

23. The 2nd Respondent therefore urged that the instant appeal be dismissed in its entirety.

24. I have considered the record of appeal, the pleadings herein and the submissions by the parties. As the first appellate court, I have the duty to reevaluate the evidence and make my own determination while warning myself that I had no opportunity to see the witnesses.

25. The instant appeal is against the finding of liability. To begin with, it is trite that there is no ouster clause in the Kenya Wildlife Management and Conservation Act. Therefore, a party injured by wildlife

has the option of either persuading compensation through the Compensation Committee or the court system.

26. In Kenya Wildlife Service v M'Ndiene (Civil Appeal E158 of 2024)[2025] KEHC 2478 (KLR) (13 February 2025) (Judgment the court observed that:

> " ...I find that the two processes cannot be undertaken simultaneously. A claimant who has exercised the option of going before the Committee cannot subsequently file a claim in tort over the same cause of action. Doing so would be contrary to the sub-judice rule. There is a possibility of there being two different awards to the same claimant over the same cause of action, hence the said rule."

27. The 2nd Respondent has admitted that it has the duty of wildlife management and conservation. According to Kenya Wildlife Service v Joseph Musyoki Kalonzo [2017] KECA 234 (KLR), this means that it is the body with the sole responsibility to shoulder any claims of loss or damage caused by the breach of that duty.

28. In the instant case, it is admitted by the 2nd Respondent that the Appellant did not have any license to own, possess or control wildlife within its territory. There was no license from the 2nd Respondent authorizing the 2nd Respondent to have any hippopotamus on its farm. In fact, the 2nd Respondent testified that the hippos often roamed around looking for water points having come from the Chania River. Therefore, the appellant's dams offered an opportune water point for the hippos.

29. This testimony is corroborated by that of the appellant, who maintained that they do not own any hippos and therefore, they had no responsibility to fence their dams or their farms as the same would be cumbersome and impossible.

30. For the appellant to be found to have been liable for the injuries sustained by the 1st Respondent, it is necessary to prove that the appellant in fact owed the 1st Respondent a duty of care. It is also crucial to demonstrate that the said duty of care flowed directly from the appellant's failure to breach such duty.

31. Because court disputes must be determined on the pleadings filed and the evidence offered, it is the duty of the trial court to give to every piece of evidence adduce all the due regard.

32. The evidence led by both sides on causation, especially by the 1st Respondent does not link the appellant to the ownership or control of the hippos that had strayed into the appellant's space.

33. It is trite law that pursuant to Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya places the legal burden of proof on a claimant. On the other hand, the evidential burden of proof is imposed under section 109 and 112 of the same Act on both parties. See Anne Wambui Ndiritu vs. Joseph Kiprono Ropkoi & Another [2005] 1 EA 334, where the Court of Appeal stated that: -

> " As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

34. The principle governing apportionment of liability in tort is that it is a discretionary exercise and that the appellate court should only interfere when it is clearly wrong and based on no evidence or on the

application of wrong principle. This was the holding in Khambi and Another vs. Mahithi and Another [1968] EA 70, where the court stated that: -

> " It is well settled that where a trial Judge has apportioned liability according to the fault of the parties his apportionment should not be interfered with on appeal, save in exceptional cases, as where there is some error in principle or the apportionment is manifestly erroneous, and an appellate court will not consider itself free to substitute its own apportionment for that made by the trial Judge."

35. From the pleadings and proceedings, it is not disputed that the 1st Respondent was attacked by hippos. The issue in dispute is whether the hippos were within the ownership or control of the 1st Respondent to warrant apportionment of liability.

36. The 2nd Respondent indeed admitted that the hippo's from Chania River might have left their natural habitat to look for waterpoints around. The fact that the appellant's waterpoints were used by the hippos did not in any way mean that the appellant had assumed control and ownership of the hippos. At all material times, the said hippos, being wildlife, remained under the management and conservation of the 2nd Respondent.

37. Accordingly, the 2nd Respondent had the duty and responsibility of ensuring that the hippos were not a danger to the society around their Natural habitat. Going by the finding of the court in Kenya Wildlife Service v Joseph Musyoki Kalonzo [2017] KECA 234 (KLR), it is the 2nd Respondent or any such licensee which bore the sole responsibility of shouldering any claims of loss or damage occasioned by wildlife.

38. Flowing from the above, the trial court erred in finding the appellant liable for the injury on the 1st Respondent when in fact, the appellant owed no duty of care to the 1st Respondent. I therefore find the 2nd Respondent wholly liable for the injury occasioned on the 1st Respondent.

39. Consequently, I set aside the trial court's finding on liability and substitute it with a finding that the 2nd Respondent was 100% liable for the injury.

40. I find no reason to disturb the trial court's finding on damages as the same is commensurate and comparable to similar injuries.

41. The upshot is that the appeal succeeds and the finding of the trial court on liability is set aside and substituted with a finding that the 2nd Respondent was 100% liable for the injury sustained by the 1st Respondent. Costs to the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 12TH DAY OF MARCH, 2026.

HON. T. W. OUYA

JUDGE

For Appellant.....Magaini

For 1st Respondent....Ngige

For 2nd Respondent.....No Appearance

Court Assistant.....brian