

IN THE HIGH COURT OF KENYA AT GARSEN

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW NO. 31 OF 2025

REPUBLIC

.....APPLICANT

VERSUS

**KENYA WILDLIFE SERVICE.....1ST
RESPONDENT**

**CABINET SECRETARY MINISTRY OF
TOURISM & WILDLIFE2ND
RESPONDENT**

**THE HON. ATTORNEY GENERAL3RD
RESPONDENT**

**ABDALLA DIRIVO HAMESA.....EX PARTE
APPLICANT**

RULING

1. The Ex parte Applicant has filed a Judicial Review application seeking for an order of mandamus to issue against the 1st Respondent, Kenya Wildlife Service, compelling it to pay compensation to the Ex parte Applicant in the sum of Ksh.3,000,000/= as contemplated under section 25 (3) (b) of the Wildlife Conservation and Management Act (herein referred to as WCM Act). The application is based on the grounds that the ex parte applicant was injured by a hippo on the 9th May 2022. He filed a claim with the 1st Respondent as laid out under Section 25 of the WCM Act but the 1st Respondent sat on the claim for 3 years thus necessitating him to file the Judicial Review herein. The Hon. The Attorney General, representing the 2nd and 3rd

Respondents, has thereupon filed a Preliminary Objection to the Judicial Review application on the grounds that:

(1) This court lacks the jurisdiction to hear this matter in view of the provisions set out under section 25 (6) of the WCM Act.

(2) That the application is not ripe for hearing since the ex parte applicant has not exhausted the compensation mechanisms under section 25 of WCM Act.

2. The Preliminary Objection was canvassed by way of written submissions of the Principal Litigation Counsel for the Attorney General and those of the counsel for the ex parte Applicant.

3rd Respondent`s submissions

3. The 3rd Respondent submitted that section 25(6) of the WCMA provides that -

“A person who is dissatisfied with the award of compensation by either the County Wildlife Conservation and Compensation Committee or the Service may within 30 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.”

4. It was submitted that the High Court is not the proper court for handling a dispute under section 25 of the Act. That it is the Environment and Land Court which has that jurisdiction even where the ex parte applicant seeks judicial review remedies like in this case.

5. It was further submitted that the application is incompetent and premature in that the ex parte applicant has failed to exhaust the internal mechanisms laid out under section 25(1) of the WCM Act, 2013 which stipulates that in case a person suffers any bodily injury or death caused by wildlife, such claim may be launched with the County Wildlife Conservation and Compensation Committee. That it is trite law that where the law sets a procedure for redress of any particular grievance that procedure

should be followed, as held in **Speaker of National Assembly v Karume (19192) KECA 42 (KLR)**.

6. It was submitted that Article 159 (2) of the Constitution of Kenya 2010 calls for promotion of alternative dispute resolution mechanisms. The case of **NGOs Co-Ordination Board v EG and 4 others; Katiba Institute (Amicus curiae) Petition 16 of 2019) (2023) KESC 17 (KLR)** was cited where the court stated that:

This is further firmly rooted in article 159 of the Constitution which requires the courts to promote alternative dispute resolution mechanisms. The moment a storm begins to brew; courts should not be the first port of call but rather the final resort. Before using the court's jurisdiction, it is essential to exhaust any available alternative dispute resolution options. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his interests within the mechanisms in place for resolution outside the courts. The exhaustion doctrine acts as a safeguard to delay judicial consideration of cases to ensure that a party is vigilant in protecting his interests within the channels available for dispute settlement methods. In this way, the doctrine serves to promote an efficient justice system and an autonomous administrative state.

7. It was argued that the ex parte Applicant seems to have come to this court as the first port of call despite the law laying down clear procedure for dealing with the complaints as filed herein. It was submitted that the County Wildlife and Compensation Committee is clothed with enough powers to hear and determine claims of such nature as provided for under section 25 of the Act. That the ex parte applicant has commenced the process of compensation with the County Wildlife Conservation and Compensation Committee. That his coming to

this court may lead to two parallel proceedings with two decisions on the same issue. That his contention that he has not been compensated is premature as he has not established that he filed complete documents with the Committee so as to enable consideration of his claim.

8. The 3rd Respondent argued that the application is premature and the ex parte applicant is barred from bringing the matter to this court and the same should be struck out with costs.

Ex parte Applicant`s submissions

9. The ex parte Applicant submitted that the Environment Land Court (ELC) has jurisdiction on appeal from the National Environment Tribunal where a payment has been made by the County Wildlife Conservation and Compensation Committee in accordance with section 25(1) of the Act. That as concerns the claim herein, no payment has been made by the Committee to the ex parte Applicant and therefore section 25(6) of the Act does not apply. The ex parte applicant in this respect cited the case of **Kenya Wildlife Service v Awuor (Civil Appeal E013 of 2022) (2023) KEHC 3721 (KLR) (26 April 2023) (Judgment)** where the court emphasized that the ELC has jurisdiction to entertain appeals from the National Environment Tribunal where payment has been made by the Committee. Said court:

The above authority which is binding on this court lays to rest the question of jurisdiction, and also settles the issue as to whether common law remedies are available in such a claim. I understand the position therefore to be that where a party opts for the compensation route through the County Compensation Committee, then if he is dissatisfied with the award of compensation by either the Compensation Committee or the Service may, his recourse is to 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.

10. It was submitted that Section 106 of the Act contemplates that a person may apply specifically to the High Court for a writ of mandamus where an officer of the first Respondent fails to perform a duty imposed by the Act. That the Compensation Committee is an office under the 1st Respondent. That in the case for the ex parte applicant the office failed to make recommendation for payment to the 2nd Respondent. That this court has jurisdiction to compel the said office make the requisite compensation and therefore that the court has jurisdiction to entertain the matters arising from WCM Act.

11. The ex parte Applicant relied on the Court of Appeal decision in Kenya Wildlife Service v Joseph **Musyoki Kalonzo (2017) eKLR** to emphasize that the High Court has jurisdiction to entertain matters arising from WCMA. The court stated that:

13. Does the High Court have jurisdiction to deal with matters arising from the Wildlife conservation and Management Act” Has Section 25 of the Act ousted the jurisdiction of the Court” Section 25 provides as follows:-.....

14. In our view, even from a literal interpretation, this provision does not oust the jurisdiction of the High Court to hear any matters raised under that Act. If the Act means to remove those matters from the realm of the High Court or the other courts, then it would have expressly stated so. It gives an aggrieved party an option to go to the committee as a first option.

12. Counsel also cited the case of **Republic v Kenya Wildlife Service & others; Mlongo Tsuma (Exparte Applicant)**, Kwale High Court JR Misc Application No.E006 of 2024 where it was held that section 106 of the WCM Act confers the High Court with jurisdiction to issue orders of mandamus in respect to claims under the Act.

13. It was submitted that the suit herein is to compel the 1st Respondent to pay compensation.

Analysis and determination

14. I have considered the grounds proffered in regard to the Preliminary Objection and the grounds tethered in opposition to the same. The issues for determination are:

- (1) Whether the Preliminary Objection raises pure point of law.
- (2) Whether the doctrine of exhaustion divests the court of the jurisdiction to determine human/wildlife claims.

Whether the Preliminary Objection raises pure point of law

15. On the first issue the 3rd Respondent submits that the grounds set in the application raise pure points of law as they touch on the jurisdiction of the court. It was submitted that the High Court is not the proper court for handling disputes under section 25 of the WCM Act. That it is the Environment and Land Court that has that jurisdiction even where a party seeks judicial review remedies.

16. On whether the application raises pure points of law, the 3rd respondent cited the case of **John Omollo Nyakongo t/a H.R. Ganjee & sons v Kenya Power & Lighting Company Limited (2022) eKLR** where the court stated that:

It is not in doubt that the issue of limitation goes to the jurisdiction of the Court and the same does not require ascertainment of facts. The Court is only required to determine what the law says and whether indeed the suit is barred by Limitation of Action will not require the probing of evidence. All that the Court is expected to do is determine what

the law says and this means that the same raises a pure point of law.

17. A preliminary Objection was defined in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696** as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

18. In **Attorney General & Another - Versus - Andrew Mwaura Githinji & another [2016] eKLR**, the court explained the scope, nature and meaning of a Preliminary Objection as follows:-

(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

(ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

19. In the case of **Oraro v Mbaja [2005] eKLR**, Justice Prof J.B Ojwang J. (as he then was), succinctly addressed the issue of preliminary objection as follows:

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

20. In the case of **Quick Enterprises Ltd v Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, the Court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

21. It is clear from the above citations that a Preliminary Objection is supposed to raise pure points of law. It has to

proceed on the basis that the facts pleaded by the other side are true. Where facts are to be ascertained or are contested and are liable to proof by way of evidence, that disqualifies the matter from the realm of preliminary objection. The question then is whether the Preliminary Objection herein can be determined without ascertainment of facts from elsewhere.

22. The 3rd Respondent argues that the reason why the claim for the ex parte applicant has not been finalized with is because he has not submitted some documents to the 1st Respondent. The ex parte applicant denies that and contends that he submitted the documents in the year 2022. That the 1st Respondent has sat on the claim for 3 years without taking any action on it which has necessitated him to move to this court.

23. It is then clear from the averments of the parties that there are contested facts as to who is to blame for the delay in processing the claim. The 1st Respondent blames it on the ex parte applicant while the ex parte applicant blames the 1st Respondent for the delay. The contested facts have in that case to be proved by way of evidence. The court in the circumstances will have to probe the facts and the evidence so as to make a determination on the issues. It is then clear that the application cannot be ascertained without the court ascertaining the facts. Consequently, the application does not raise pure points of law and should be dismissed for that reason.

Whether the doctrine of exhaustion is applicable

24. It is an elementary principle in law that a Court cannot adjudicate on matters in which it lacks jurisdiction. The jurisdiction of the Court is derived from the Constitution or Statute. If a Court finds that it lacks jurisdiction to hear and determine a matter, it is obligated to halt the proceedings. It cannot expand or arrogate to itself jurisdiction which is not conferred upon it by the law, see the Supreme Court in the case of **Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others (2012) eKLR**. This court then has to be satisfied that it has jurisdiction to entertain the matter.

25. The 3rd Respondent submits that this court does not have jurisdiction to entertain the Judicial Review Application because the applicant has not exhausted the mechanism of compensation established under the WCM Act. That the Applicant has lodged a claim under the Act which process is not finalized. That they can only appeal to the National Environment Tribunal. Additionally, that a Judicial Review application should be filed before the Environment and Land Court.

26. The ex parte applicant on the other hand argues that they have moved to the High court because the 1st Respondent has sat on the claim for the last 3 years. That their recourse is to the High Court which has jurisdiction under Section 106 of the WCM Act to issue orders of mandamus to compel the respondents to act on his claim.

27. As I can discern from the pleadings and the submissions, the issue for determination is whether the ex parte applicant is right in filing the judicial review application with this court when compensation has not been made and approved as provided for under section 25 of the WCM Act. In other words can they file the application before this court when they have not exhausted that procedure.

28. Section 25 of the **Wildlife Conservation and Management Act** provides:-

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 representatives 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 the injury.

6. A person who is dissatisfied with the award of compensation be 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.

29. The court in that case has to examine the parameters and scope of the doctrine of exhaustion of remedies so as to examine whether the same is applicable in the circumstances of this case. The doctrine as exemplified by the Court of Appeal in the case of **Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others [2015] eKLR** is that:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The

exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a 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 mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

30. The Supreme Court in **NGOs Co-ordination Board vs. EG & 4 others; Katiba Institute (Amicus Curiae) [2023] KESC 17 (KLR)** held the following on the doctrine:

87.This is further firmly rooted in article 159 of the constitution which requires the courts to promote alternative dispute resolution mechanisms. The moment a storm begins to brew; courts should not be the first port of call but rather the final resort. Before using the court's jurisdiction, it is essential to exhaust any available alternative dispute resolution options. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his interests within the mechanisms in place for resolution outside the courts. The exhaustion doctrine acts as a safeguard to delay judicial consideration of cases to ensure that a party is vigilant in protecting his interests within the channels available for dispute settlement methods. In this way, the doctrine serves to promote an efficient justice system and an autonomous administrative state.

31. It is therefore imperative where the law provides an internal procedure of settling disputes a party must first exhaust the procedure provided therein before resorting to court. The ex parte applicant herein contends that he followed the procedure for compensation as provided by the WCM Act and forwarded

documents to the 1st Respondent who sat on them for 3 years without acting on them. He then employed the provisions of section 106 of the WCM Act and filed the instant judicial review application seeking orders of mandamus to compel the 1st Respondents to:

- (A) pay compensation to the exparte applicant in the sum of Ksh3,000,000/=as contemplated under section 25(3) (b) of the WCM Act.
- (B) That upon grant of prayer (A) above, the payment be made within 14 days thereof.
- (c) Interest be allowed on order (A) above at 12% from 19/5/2022 when the cause action arose until payment in full.

32. Section 106 (2) of the WCMA provides as follows:

(2) Any person who has reason to believe that the provisions of this Act have been, are being, or are about to be violated, may petition the High Court for —

(a);

(b) ;

(c) the writ of mandamus against an officer or a person who has failed to perform a duty imposed by or under this Act; or any remedy at law or equity for preventing or enforcing the provisions of this Act.

33. It is to be noted that a writ of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons had failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. The Court of Appeal in **Republic vs Kenya National Examinations Council ex parte Githinji & 8 Others [1997] eKLR** citing with approval Halsbury's Laws of England 4th Vol. 7 p. 111 para 89 said the following on the order of mandamus:-

The order of mandamus is the most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative remedy, yet that mode of redress is less convenient, beneficial and effectual....

34. It is then clear that this court has jurisdiction to issue writs of mandamus against 1st and 2nd Respondents where they have failed to perform a duty imposed under the WCM Act. The Respondents have taken unduly long in determining the Applicant's claim. The ex parte applicant contends that the 1st Respondent has sat on his claim for 3 years without taking any action on it. The question then is what a party is to do when he has presented a claim to the 1st respondent who then ignored, refused, delayed and or neglected to act on the claim presented to it. I have perused the WCM Act and noted that the Act does not provide a remedy in such a scenario where there is inordinate delay in determining the claim. Is the party then helpless?

35. The exhaustion doctrine does not bind a party where the remedy sought by a party is not available under the dispute resolution mechanism provided by the concerned body. There being no remedy under the alternative dispute resolution in mechanism provided by the WCM Act where 1st respondent has ignored, refused, delayed and or neglected to act on the claim presented to it, the ex parte applicant had to look elsewhere for remedy. In **Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC**

113 (KLR) (28 December 2023) (Judgment) the Supreme Court of Kenya held as follows:

Flowing from the above findings and in that context, it is our view that, where the reliefs under the alternative mechanism are not adequate or effective, then there is nothing that precludes the adoption of a nuanced approach, as we have stated. What must matter at the end is that a path is chosen that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. This is because, to achieve a harmonious and effective legal framework, it is imperative to strike a judicious balance between the emphasis on providing the initial opportunity for resolution to entities established by law and the assertion of a litigant's right to access the court. However, such convergence requires a case-by-case assessment by considering issues such as the nature of the dispute and the adequacy of the alternative dispute mechanism. See also our decision in *Bia Tosha Distributors Ltd v Kenya Breweries Ltd & 6 Others (Pet No 15 of 2020) [2023] KESC 14(KLR) (Const. and JR) (17 February 2023) (Judgment)*.

36. I would say that similar principles are applicable where the remedy is not available in the parent statute. A party cannot be denied access to justice because a dispute resolution mechanism does not provide a remedy. I find that the path chosen by the ex parte applicant to file a judicial review application before this court is proper. An order of mandamus would issue to remedy the ends of justice like in this case where there is no recourse under the Act when there is inordinate delay in determining the claim.

37. The 2nd and 3rd Respondents argued that it is the Environment and Land Court that has jurisdiction over the matter. In view of the provisions of section 25(6) of the WCM Act that provides that 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, it is apparently clear that the section is only applicable where an award has been made. In this case no award has not been made and therefore there is nothing to appeal against before the National Environment Tribunal or Environment and Land Court.

38. In view of the forgoing I do find that the Judicial Review application is properly before this court. I do not find any merit in the Preliminary Objection and consequently the same is dismissed with costs to the Ex parte Applicant.

Delivered, dated and signed at GARSEN this 12th day of March 2026.

J. N. NJAGI
JUDGE

In the presence of:

Mr. Mwendwa for Applicant

Mr. Nyaga for 1st Respondent

Ag Absent

Court Assistant - Rahma