

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT HOMABAY
JUDICIAL REVIEW E010 OF 2024

**IN THE MATTER OF AN APPLICATION FOR THE JUDICIAL
REVIEW ORDER OF MANDAMUS
AND
IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF THE WILDLIFE CONSERVATION AND
MANAGEMENT ACT, NO. 47 OF 2013 LAWS OF KENYA**

BETWEEN

**REPUBLIC.....APPLICAN
T**

VERSUS

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

**COUNTY WILDLIFE COMPENSATION
COMMITTEE,
RESPONDENT HOMABAY.....2ND**

**MINISTERIAL WILDLIFE
COMPENSATION
RESPONDENT COMMITTEE.....3RD**

AND

JUDITH ACHIENG OKETCH

(Suing as the legal representative of the Estate of

EBENNEZAR ONYANGO

**OKETCH (DCD).....EX PARTE
APPLICANT**

JUDGMENT

[1] This court granted leave to the *ex parte* applicant to file a substantive judicial review motion. The substantive Notice of Motion is dated 24th July 2024 and was brought under **Sections 8 and 9** of the Law Reform Act (Cap 26), **Order 53 Rule 3** of the Civil Procedure Rules, 2010 and all other enabling provisions of the law for the following orders:

[a] An Order of Mandamus to compel the Respondent to immediately release Kshs. 5,000,000 to the Applicant's Advocate.

[b] Costs of this application be provided for.

[2] The application was based on the grounds set out in the Statutory Statement and Verifying Affidavit sworn by the *ex parte* applicant, **Judith Achieng Oketch** (hereinafter, "the applicant"). She averred that she is the next of kin and legal representative of **Ebennezar Onyango Oketch** (the deceased); and that on the 30th May 2020, the deceased was viciously attacked by a hippopotamus while bathing at Sekeka beach on the shores of Lake Victoria, thereby occasioning him fatal injuries. The applicant blamed the accident on the 1st Respondent in accordance with the provisions of the Wildlife Conservation and Management Act No. 47 of 2013.

[3] The applicant averred that the incident was reported at the Kendu Bay Police Station under OB No. 30/30/05/2020 and that the 1st respondent's officers availed themselves, took their details and promised to compensate the *ex parte* applicant for the loss of her son; which compensation is yet to be paid.

[4] The applicant further averred that she applied for compensation by filling a claim form in the year 2020 to which she attached a Postmortem Form in proof of death of the deceased. She also deposed that, although claim was approved by the Community Wildlife Conservation Committee (CWCC) and the Ministerial Wildlife Compensation Committee (MWCC), she was yet to receive the compensation on behalf of the deceased.

[5] The respondents filed a Replying Affidavit sworn on 14th January 2025 by **Amos Nyaoro**, the 1st respondent's Assistant Warden III. The respondents deposed that it is not within the statutory mandate of the 1st respondent to review the applicant's claim or to recommend payment of compensation. **Mr. Nyaoro** contended that the 1st respondent is only a secretary to the 2nd and 3rd respondents as mandated under **Section 18** of the Wildlife Conservation and Management Act. He added that the 1st respondent had performed its duty and endeavoured to update the applicant on the status of her claim through phone calls and personal visits by the applicant.

[6] **Mr. Nyaoro** confirmed that the Homa Bay County Wildlife Compensation Committee that is mandated to review and recommend payment of compensation in respect of claims arising from death or injury caused by wildlife, in accordance with **Sections 19(1)** and **25(2)** of the Act deliberated on the claim and approved payment in terms of the letter marked Annexure A.N. 1 to the Replying Affidavit and payment is being processed. Thus, the position of the respondents was that the instant suit lacks merit and ought to be dismissed with costs.

[7] The application was canvassed by way of written submissions. The applicant filed written submissions dated 18th March 2025, and proposed the following issues for determination:

[a] Whether the 1st respondent is statutorily bound to manage national parks and reserves.

[b] Whether the 1st respondent is mandated to compensate the applicant.

[c] Whether the applicant is entitled to an order of Mandamus.

[8] The applicant referred to **Sections 6 and 7** of the **Wildlife Conservation and Management Act** which set out the 1st respondent's duties as a statutory body. The applicants also relied on **Section 25** of the Act to demonstrate that the 1st respondent is under obligation to compensate the estate of the deceased through the applicant. **Section 25** 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 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) Any person who suffers loss or damage to crops, livestock or other property from wildlife specified in the Seventh Schedule hereof and subject to the rules made by the Cabinet Secretary, may submit a claim to the County Wildlife Conservation and Compensation Committee who shall verify the claim and make recommendations as appropriate and submit it to the Service for due consideration.

(5) The County Wildlife Conservation and Compensation Committee shall review the claim and award and pay a compensation valued at the ruling market rates:

Provided that no compensation shall be paid where the owner of the livestock, crops or other property failed to take reasonable measures to protect such crops, livestock or property from damage by wildlife or his land use practices are in compatible with the ecosystem-based management plan for the area.

(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.

(7) The Cabinet Secretary may, by notice in the *Gazette*, prescribe such regulations and guidelines as are necessary and appropriate to carry out the purposes of this section.

[9] The applicant also relied **Kenya Wildlife Service v Joseph Musyoki Kalonzo [2017] eKLR** and **Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited [2018] KESC 48 (KLR)** among other authorities, to underscore the obligation of the respondents to compensate the estate of the deceased, and consequently, to demonstrate that the application for an order of Mandamus is well-founded.

[10] It is not in dispute that the on 30th May 2020 the deceased was fatally attacked by a hippopotamus while bathing in Lake Victoria; or that the applicant, as the administrator of the deceased's estate reported the incident at Kendu Bay Police Station. It is also not in dispute that the matter was reported to the 1st respondent and a claim form duly filled and submitted to the 1st respondent for processing.

[11] The respondents conceded, vide their Replying Affidavit, that the subject claim was duly processed and approved for payment; and that the Treasury was in the process of making payment. There was however no documentary proof that funds had been disbursed for the first tranche of the sums due to the estate of the deceased herein. It is my finding therefore that the 1st respondent owes the estate of the deceased Kshs. 5,000,000/=, being compensation for the death of **Ebenazar Onyango**.

[12] An order of Mandamus issues to compel the performance of a public duty where a public body or officer has failed,

neglected, or refused to act in accordance with the law, to the prejudice of an aggrieved party (see **Republic v Town Clerk, Kisumu Municipality Ex parte East African Engineering Consultants [2007] KEHC 147 (KLR)**, For such an order to issue, the Court must be satisfied that the action sought to be compelled is a statutory obligation and that it is the only lawful course open to the public body, and further, that there exists no other adequate legal remedy to vindicate the infringed right. This position was reaffirmed in **Republic v Jomo Kenyatta University of Agriculture and Technology Ex parte Elijah Kamau Mwangi [2021] KEHC 1162 (KLR)**.

[13] In the case of **Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another [2018] KEHC 9433 (KLR)**, the court held:

Mandamus is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. vs. Canada (Attorney General)*,^[23] and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*.^[24] The eight factors that must be present for the writ to issue are:-

(i) There must be a public legal duty to act;

(ii) The duty must be owed to the Applicants;

(iii) There must be a clear right to the performance of that duty, meaning that:

a. The Applicants have satisfied all conditions precedent; and

b. There must have been:

I. A prior demand for performance;

II. A reasonable time to comply with the demand, unless there was outright refusal; and

III. An express refusal, or an implied refusal through unreasonable delay;

(iv) No other adequate remedy is available to the Applicants;

(v) The Order sought must be of some practical value or effect;

(vi) There is no equitable bar to the relief sought;

(vii) On a balance of convenience, mandamus should lie.

[14] The applicant has no other way of enforcing payment of her claim because in **Section 21(4)** of the **Government Proceedings Act**, Chapter 40 of the Laws of Kenya it is stipulated that:

“(4)...no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Government, or any Government department, or any officer of the Government as such, of any money or costs.”

[15] Similarly, in **Republic v Permanent Secretary, Ministry of State For Provincial Administration And Internal Security Ex parte Fredrick Manoah Egunza** [2012] KEHC 1643 (KLR), it was held:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act...”

[16] In my view, the applicant has met all the legal requirements for compensation, having duly lodged her claim with the 1st respondent. Although the 1st respondent tried to distance itself from the responsibility to pay contending that it

is the statutory duty of the 2nd respondent, the Supreme Court made it clear in **Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited** (supra), that:

“A global comparison of laws and jurisprudence relating to animal and wildlife management normally provide that an entity charged with such a management task also collects the revenues generated from activities relating to the same. The rationale being that such revenue supports the costs of management and any related outcome, including compensation for damage made by animal and wildlife...The Wildlife Act gives the responsibility to Kenya Wildlife Service as the park revenue collector to compensate for damage occasioned by wild animals.”

[17] The Court of Appeal was of the same posturing in **Kenya Wildlife Service v Joseph Musyoki Kalonzo** [2017] eKLR that:

“The appellant admits the duty to manage and conserve wildlife. That duty comes with attendant responsibility to shoulder any claims of loss or damage caused by the breach of that duty. The law on that point as succinctly pronounced in Joseph Boru Ngera & another v Kenya Wildlife Service v Rift Valley Agricultural Contractors Limited [2014] eKLR among others is still good law on this point. The cabinet secretary referred to in the Act pays money on behalf of the appellant. Neither the court nor the parties should concern themselves with the internal arrangements of the appellant as to whether it is the CEO of the appellant or the Cabinet Secretary who should disburse the money.”

[18] The applicant has also shown that a prior demand for payment was issued, that the respondents were afforded reasonable time to comply, yet no payment has been made on the claim. Consequently, the duty to pay has crystallized, warranting the issuance of an order of Mandamus.

[19] In the premises, I find merit in the Notice of Motion dated 24th July 2024. The same is hereby allowed and orders granted as follows:

[a] An Order of Mandamus be and is hereby made to compel the 1st respondent to pay Kshs. 5,000,000/= to the

ex parte applicant on behalf of the estate of the deceased,
Ebenazar Onyango.

[b] Costs of the application to be borne by the respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA
BAY THIS 13TH DAY OF MARCH 2026**

.....

**OLGA SEWE
JUDGE**

ORIGINAL