



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: VISRAM, KARANJA & KOOME, J.J.A

CIVIL APPEAL NO. 306 OF 2015

BETWEEN

KENYA WILDLIFE SERVICE.....APPELLANT

AND

JOSEPH MUSYOKI KALONZO.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Garissa (Dulu, J.) delivered on 12th October, 2015

in HCCC NO. 5 OF 2014)

JUDGMENT OF THE COURT

1. Joseph Musyoki Kalonzo (the respondent) is the legal representative to the Estate of Mwende Musyoki, his 13 year old deceased daughter.

On 1st March, 2014, the late Mwende was fetching water at Tana River in Tseikuru District when a crocodile suddenly emerged from the water and attacked her dragging her away into the water. The remains of her battered body was recovered from the river three days later.

2. Her father, subsequently filed a claim for compensation with Kenya Wildlife Services (the appellant), being the institution that is in charge of Wildlife Management and Conservation. He completed some claim forms as provided for under the **Wildlife Conservation & Management Act 2013 (the Act)** and submitted them to the appellant for processing and payment of damages/compensation as provided for under **Section 25(3)** of the Act. He continued following up the claim but the appellant failed to pay. Left with no other option, the respondent moved to the High Court in Garissa and lodged his claim vide **Civil Suit No. 5 of 2014**.

3. In the said suit, he accused the appellant of negligence in failing to keep its wildlife under control; failing to warn the public of the dangers its wildlife could cause; allowing its wildlife to leave its designated area and cause death to the deceased; and allowing the crocodiles to kill the deceased. The respondent claimed compensation to the tune of Ksh. 5 million which is the maximum compensation

allowed under the Act for loss of life. He also claimed Ksh. 40,000 being the amount he used to obtain letters of administration *Ad-litem* in respect of the estate of his deceased daughter to cloth him with the necessary locus standi to file the suit on behalf of the deceased's estate.

4. The appellant filed its statement of defence on 27th November, 2014 and denied liability, citing the doctrine of "*volenti non fit injuria*", saying that the deceased was the author of her own misfortune for daring to go and fetch water in a crocodile infested river. Before the suit was listed for hearing, the appellant filed a preliminary objection, on 11th June, 2015 challenging the jurisdiction of the Court to determine matters covered by the Wild Life Conservation and Management Act. The preliminary objection was nonetheless dismissed and the matter was heard and determined and judgment rendered on 12th October, 2015.

5. By the said judgment, the learned Judge found the respondent culpable and held it liable for the deceased's death. The parties had however agreed on apportionment of liability at 80:20. The respondent was awarded Ksh. 5 million, less liability contribution of 20%; special damages amounting to Ksh.40,000 less 20% contribution, - entire award amounting to Ksh. 4,032,000 The respondent was also awarded costs of the suit.

6. Aggrieved with the judgment, the appellant filed this appeal in which it has proffered not less than ten grounds of appeal. These grounds can nonetheless be compacted into two broad grounds i.e that the High Court lacked jurisdiction to entertain the matter, which according to the appellant was the preserve of the County Wildlife Conservation Committee under the Act; and that the award was exorbitant.

7. The matter was canvassed before us by way of written submissions with brief oral highlighting of the submissions by learned counsel. In his submissions filed in court on 22nd December 2015, learned counsel for the appellant submitted that **Section 25(3)** of the Act had ousted the jurisdiction of the High Court to hear and determine matters arising from claims premised on the said Act. Leaned counsel posited that **Section 24** of the Act creates a non-fault compensation scheme for injuries or death resulting from human-wildlife conflict, but that the procedure set out in the Act must be followed in order for such compensation to be paid. Although the appellant contends that the award given by the court was excessive, it is noted that the same did not exceed the maximum amount provided for under the Act.

8. In his oral submissions at the plenary hearing, Mr. Kobia, learned counsel for the appellant reiterated his written submissions. He maintained that the High Court lacks jurisdiction to entertain matters pertaining to wildlife claims. He further submitted that the consent entered into by the parties in the suit cannot confer jurisdiction to the court. He however seemed to change the position on quantum and damages and said that they had no issue with the amount awarded to the respondent.

9. The respondent filed his submissions in opposition to the appeal on 21st March, 2017. Learned counsel seemed to suggest that the consent on liability that was entered into by the parties conferred jurisdiction to the court and the appellant cannot therefore resile from it. We shall advert to that issued later.

10. On the issue of jurisdiction of the High Court to entertain matters related to human/wildlife conflict, counsel submitted that the High Court has jurisdiction to entertain such matters as **Section 25(1)** of the Act is permissive and does not use mandatory language. He emphasised that the word used is 'may' and not 'shall'.

He cited this Court's decision in **Kenya Wildlife Services vs Rift Valley Agricultural Contractors Limited, Civil Appeal No. 212 of 2013**; and the High Court decision in **Ngera & Another vs Kenya Wildlife Service**.

11. Mr. Mwanzia, learned counsel for the respondent in his highlight remarks urged the Court to dismiss this appeal. He submitted that the respondent had submitted himself to the jurisdiction of the appellant by completing the necessary statutory forms and submitting them to the appellant as required. The appellant had nonetheless ignored them and in spite of persistent follow-up by the respondent and his counsel, the

appellant had refused to settle the matter telling the respondent to “go wherever else they could get help”. The respondent therefore decided to seek recourse from the High Court where they could find justice. He reiterated that Section 25 of the Act is not couched in mandatory terms and it does not therefore oust the jurisdiction of the High Court in dealing with human/wildlife conflict matters.

12. We have considered the entire record along with the able submissions of learned counsel. We have also read the decided cases presented to us by both counsel. As stated earlier, this appeal revolves around two issues: that of jurisdiction of the High Court; and quantum of damages. As pointed out earlier, learned counsel for the appellant in his submission, said that quantum is not an issue. He appears to have dropped that ground of appeal. We also note that liability is not contested, and we shall not delve into that area either. The only issue remaining for determination in this appeal, therefore, is that of jurisdiction. Since the preliminary objection raised by the appellant before the High Court was on the issue of jurisdiction, we shall not address the preliminary objection separately.

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:-

Section 25(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 country wildlife conservation and compensation committee within the jurisdiction established under this Act.”

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 meant 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. This in our view was meant to ease matters for the poor people whose crops and domestic animals are ravaged by wild animals occasionally, and which people may be far removed from the structured judicial systems. We do note that most of the areas that are prone to wildlife/human conflict are in areas that are outside urban areas where courts are situated. The Act in our view meant to make it easier for such people to access justice that is more easily accessible in terms of not traveling long distances and also in terms of simplicity in lodging their claims. It could not have been meant to shut out everybody else who would prefer to pursue their claims before the conventional courts. That would explain the use of the word ‘MAY’ and the absence of any provision expressly limiting or ousting the jurisdiction of the High Court.

15. Learned counsel for the appellant sought to distinguish the authorities cited to us on the ground that they were determined under the repealed **Cap 376**. It is true that **Section 62(1)** of the **Cap 376** used the word ‘MAY’ which is permissive and not mandatory. However, **Section 25** of the current Act is couched in exactly the same words. This inevitably means that those decisions made before the Wildlife and Conservation Management Act 2013 came into force are relevant today as they were prior to 2013. Neither the repealed Act (**Cap 376**) nor the current Act ousts the jurisdiction of the court to hear and determine the said matter.

16. 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.

17. 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.

Under common law, there cannot be a wrong without a remedy - or in other words,

“Equity will not suffer a wrong to be without a remedy” (ubi jus ibi remedium). The respondent suffered a wrong; he went to the appellant seeking relief and was repulsed.

Was he to remain without remedy? That would be a grave injustice. Luckily for him, he went to court, he was heard and judgment given in his favour. Where else was he expected to go after being sent away by the appellant? We find that he went to the right forum in the circumstances.

18. On the consent order on liability, we need to clarify that parties cannot confer jurisdiction on the court where there is none or can have none, even if it is by consent.

See this Court’s decision on **Mercy Kirito Mutegi vs Beatrice Nkatha Nyaga & 2 Others (2013) eKLR**. Jurisdiction is conferred either by the constitution or by statute and cannot be conferred by the parties where no such jurisdiction exists. It is pertinent to note however that it was not on the basis of the consent order that the court assumed jurisdiction to hear the matter herein. The court had jurisdiction to entertain the matter regardless of the consent on liability.

19. Before we conclude, we would like to observe that the appellant has dwelt at length in its submission on an issue that was not raised before the High Court at all. This is the question as to whether it has the duty to pay compensation or not. We must admit we found this submission self-defeating.

The appellant admits the duty to manage and conserve wildlife. That duty comes with the attendant responsibility to shoulder any claims of loss or damage caused by the breach of that duty. The law on this point as succinctly pronounced in **Joseph Boru Ngera & Another vs Kenya Wildlife Service vs 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 the 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.

20. If there is any conflict of responsibilities or performance of duty between the CEO and the cabinet secretary, that is upon the two to sort out, but that should not be used to deny a party compensation duly owed to it.

The upshot of this is that this appeal lacks merit. We dismiss it with costs to the respondent.

Dated and delivered at Nairobi this 19th day of October, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR