IN THE COURT OF APPEAL AT NAKURU

CORAM: NA MBUYE , M'INOTI, J. MOHA MMED, JJ.A .

CIVIL APPEAL NO. 212 0F 2013

KENYA WILDLIFE SERVICES ……
APPELLANT

AND

RIFT VALLEY AGRICULTURAL CONTRACTORS LIMITED ..... RESPONDENT

(Being an appeal from the Judgment & Decree of the High Court of Kenya at Nakuru (Ouko, J) dated 27th July, 2011

in

HCCC NO. 256 OF 2002)

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JUDGMENT OF THE COURT

Background

This appeal arises from a decision of the High Court of Kenya at Nakuru made on 27th July, 2011, which awarded the respondent a sum of KShs.31,500,000/= plus costs, being compensation for damages and loss suffered as a result of the appellant's negligence.

The respondent, *RIFT VALLEY AGRICULTURAL CONTRACTORS LIMITED,* filed a suit against the appellant, *KENYA WILDLIFE SERVICES,* seeking compensation for general, special and exemplary damages for the loss occasioned to the respondent's crops by wild animals.

The respondent, vide its plaint dated 4th November 2002, averred that between the months of March and July 2000, droves of wild animals from the appellant's Maasai Mara National Park invaded the respondent's farm and destroyed crops that it had planted and were ready and ripe for harvest. The crops included wheat planted on 1,600 hectares of land and barley planted on 400 hectares of land. The estimated value of the destroyed crops and inputs was pleaded as KShs.64,160,130/=. The respondent averred that the loss and damage to its crops were caused by the appellant's breach of its statutory duties as provided for under *section 3 A(c), 3 A (I) & (l) of the Wildlife (Conservation and Management) Act Cap 376 Laws of Kenya (as amended by Act 16 of 1989), (hereinafter referred to as Cap 376)*. Alternatively, the respondent averred that the said loss was as a result of negligence on the part of the appellant, its servants or agents and asserted that the claim against the appellant was a claim under the rule in *RYLANDS V FLETCHER, (1866) L.R. 1*

Ex 265.

The appellant vide its defence dated 25th November 2002 denied the claim by the respondent. The appellant denied the allegations of its breach of statutory duty and negligence as set out in the plaint and that the Maasai Mara National Game Park was its property. The appellant asserted that the respondent had wrongly sued it and should have instead sued the Government of Kenya who are the owners of wildlife in Kenya.

Upon hearing both parties, the High Court in its judgment found in favour of the respondent and awarded it damages plus costs of the suit.

Aggrieved by that decision, the appellant has preferred this appeal.

The Appellant's Memorandum of Appeal raises the following grounds of appeal:

1. The learned Judge erred in law and in fact in wrongly analyzing the statutory duties of the Defendant as set out in section 3A of the Act, and in particular in finding that one of the statutory duties of the appellant is to ensure the protection of crop and other domestic animals against destruction by wild animals. The statute does not provide so.

2. The learned Judge erred in law and in fact in finding that the rule in Rylands v Fletcher is applicable to this case. There is no common law duty imposed on the appellant when the statute is quite clear on what its responsibilities are.

3. The learned Judge erred in law and fact in failing to evaluate the

evidence tendered in court especially showing that Masai Mara Game Reserve is not a national reserve but a game reserve controlled by the Narok County Council.

4. The learned Judge erred in law and in fact in evaluating the evidence tendered and in failing to find that the migration of

wildebeest is a natural phenomenon and anything that happens during that migration is an act of God.

5. The learned Judge erred in law and in fact in failing to distinguish this case with the case of Joseph Boro Ngera & Supaduka Nakuru Limited v Kenya Wildlife Services, Civil Appeal No.

171 of 1997. The holdings in the two cases are separate and distinct.

6. The learned Judge erred in law and in fact in failing to find that due to the provisions of the Act, wildlife is a natural heritage belonging to the Government of the Republic of Kenya and therefore it is the Government which is responsible for compensation in case of claims relating to injury or damage to property. The Act is clear on the procedure.

7. The learned Judge erred in law and in fact in finding that the

Plaintiff/Respondent had proved its claim specifically. The record

shows the following:

a. There was no evidence that the Respondent had leased any of the land as alleged or at all.

b. The Respondent's alleged loss was purely based on estimates. The estimates

could not be verified and could not specifically prove the claim.

Submission by counsel

At the hearing of this appeal, learned counsel for the appellant, Mr Murugara submitted that the learned judge misinterpreted the appellant's responsibilities as set out in *section 3, Cap 376*; that the responsibilities set out therein did not include protection of farmers' crops from destruction; that *section 3 (A) (l)* only required the appellant to ensure that the process of agriculture was not interfered with. On the question of application of the rule in

Rylands v Fletcher, Mr Murugara submitted that the rule did not apply in this instance arguing that the wild animals that damaged the respondent's crops did not belong to the appellant but to the Government of Kenya; that the Maasai Mara Game Reserve was not under the management of the appellant but under the control of Narok County (previously Narok County Council). As a result, he argued that the appellant could not be held responsible for the respondent's alleged loss. Mr Murugura further submitted that the learned Judge failed to appreciate that the wildlife migration that led to the alleged destruction of the respondent's crops was an Act of God and, therefore, beyond human intervention and control. In his view, therefore, the appellant cannot be held responsible for the loss and destruction to the crops; that the learned Judge failed to distinguish the current case from that of *JOSEPH BORO NGERA & SUPADUKA NAKURU LIMITED V KENYA WILDLIFE SERVICES, CIVIL APPEAL NO. 171 OF 1997*, whereas the two cases were separate and distinct and have no correlation with each other.

It was Mr Murugura's further submission that the respondent had an obligation to prove its claim which it failed to do; that the applicable statute did not provide for compensation for wildlife destruction of crops, and that it was wrong for the learned Judge to apply common law in view of the fact that there was a specific applicable statute. On the issue of damages, Mr Murugura stated that the respondent had only proved that he had leased 2,000 acres of land, yet he was awarded damages for wheat grown on 6,000 acres; that the respondent should have specifically proved that he had leased all the parcels of land from which the crops were damaged; further, that the award of damages was based on estimates contrary to the rule that damages must be specifically proved. He urged us to allow the appeal with costs.

In response, learned counsel, Mr Kipkoech for the respondent submitted that the respondent's case was founded on the appellant's failure to carry out its duty as set out in *Section 3A of Cap 376*. He argued that by virtue of that provision, the appellant should have ensured that wildlife did not destroy the respondent's crops; that the failure by Parliament to expressly provide for compensation under Cap 376 in such instances did not mean that the same could not be inferred through interpretation; that since the appellant had a duty under *Section 3A* the same could not be a duty without an obligation.

On the rule in *Rylands v Fletcher*, Mr Kipkoech submitted that wildlife belonged to the Government and that the appellant was the responsible state organ of the Government; that the damage caused by the wildlife was not an Act of God; that the appellant had a duty to manage human-wildlife conflicts and in this instance it had failed to do so. He argued that the learned Judge had correctly relied on the High Court case of *JOSEPH BORO NGERA & SUPADUKA*

NAKURU LIMITED V KENYA WILDLIFE SERVICES, CIVIL APPEAL NO. 171 OF 1997. Mr Kipkoech submitted that the damages awarded by the learned Judge were properly awarded since the respondent had sufficiently proved its loss to the required standard. He urged the court to dismiss the appeal with costs.

Analysis and Determination

We have carefully evaluated the entire evidence on record.This being a first appeal, we are entitled to reconsider the evidence, evaluate it and draw our own conclusions but making allowance for the fact that we have not seen or heard the witnesses. See *SELLE V ASSOCIATED MOTOR BOAT CO LTD, (1968) EA 123, 126 PARAS H-I, KENYA PORTS AUTHORITY V KUSTON, (KENYA) LTD, (2009) 2 EA*

212 and *PIL KENYA LTD V OPPONG, (2009 KLR 442).*

It is common ground that the respondent's crops were destroyed by wild animals. The point of contestation is on liability and quantum – whether the appellant is liable for the destruction of the appellant's crops by wild animals and if liable, the compensation payable.

The Wildlife Conservation and Management Act, Cap 376 which is applicable in this case was repealed by Wildlife Conservation and Management Act No. 47 of 2013. The latter Act was assented to on 24th December, 2013 and the date of its operation is 10th January, 2014.

Section 3A of Cap 376 lists the appellant's functions as to:

> *"(a) formulate policies regarding the conservation, management and utilization of all types of fauna (not being domestic animals) and flora;*
>
> *(b) advise the Government on establishment of National Parks, National Reserves and other protected wildlife sanctuaries;*
>
> *(c) manage National Parks and National Reserves;*
>
> *(d) prepare and implement management plans for National Parks and National Reserves and the display of fauna and flora in their natural state for the promotion of tourism and for the benefit and education of the inhabitants of Kenya;*
>
> *(e) provide wildlife conservation education and*
>
> *extension services to create public awareness and support for wildlife policies;*
>
> *(f) sustain wildlife to meet conservation and management goals;*
>
> *(g) conduct and co-ordinate research activities in the*
>
> *field of wildlife conservation and management;*
>
> *(h) identify manpower requirements and recruit*
>
> *manpower at all levels for the Service for wildlife conservation and management;*
>
> *(i) provide advise to the Government and local*
>
> *authorities and landowners on the best methods of wildlife conservation and management and be the principle instrument of the Government in pursuit of such ecological appraisals or controls outside urban areas as are necessary for human survival;*
>
> *(j) administer and co-ordinate international protocols, conventions and treaties regarding wildlife in all its aspects in consultation with the Minister;*
>
> *(k) solicit by public appeal or otherwise, and accept and receive subscriptions, donations, devises and bequests (whether movable or immovable property and whether absolute or conditional) for the general or special purposes of the Service or subject to any trust;*
>
> *(l) render services to the farming and ranching communities in Kenya necessary for the*

protection of agriculture and animal husbandry against destruction by wildlife." *Section 3A of Cap 376*, creates a statutory duty on the part of the appellant to *inter alia* formulate policies regarding the conservation, management and utilization of wildlife and to ensure, among other things, the

protection of crops against destruction by wildlife.

In the case of *Joseph Boro Ngera, (supra)* Gicheru, J.A. in his judgment stated:

> *"It is correct that Act No. 16 of 1989 removed compensation for damage or loss of crop or property by any animal in terms of the Wildlife (Conservation and Management) Act, Chapter 376 of the Laws of Kenya but in place thereof it provided as one of the functions of the respondent as is relevant to this appeal the rendering of services to the farming and ranching communities in Kenya for the protection of agriculture and animal husbandry against destruction by wildlife. If the respondent failed to carry out this function, then it would be a breach of a statutory duty notwithstanding the non-provision of remedy for such breach."*

In the same case, Pall, J.A., stated:

> *"It is true that wild animals or birds remain wild. But section 3A (1) does say inter alia that the respondent is to render services to the farming communities for protection of agriculture against destruction by wildlife. … Giving plain and ordinary meaning to section 3A(l) of the Act, my view is that Parliament intended to impose and did impose an obligation or duty upon the respondent (KWS) to render services necessary to protect a limited class of persons namely the farming and ranching communities in the absence of any remedy provided by the Act, the appellant can always pursue his common law remedy."*

The Court held that the absence of provision for compensation in itself was no bar to an aggrieved party claiming damages under the common law. *Halsbury's Laws of England 3rd Edn Vol. 36* at paragraph 684 illuminates this point as follows:

> *"Essentials of cause of action. In order to succeed in an action for damages for breach of statutory duty the plaintiff must establish a breach of a statutory obligation, which on the proper construction of the statute was intended to be a ground of civil liability to a class of person of whom he is one; he must establish an injury or damage of a kind against which the statute was designed to give protection; and he must establish that the breach of statutory obligation caused, or materially contributed to, his injury or damage."*

Further, *Clarke & Lindsell on Tort 12th Edn* at paragraph 1407 states that:

> *"If a statute creates a duty but imposes no remedy, civil or criminal for its breach, there is a presumption that the person who is injured thereby will have a right of action, for otherwise the statute would be but a pious aspiration."*

The respondent vide its plaint sought general, special and exemplary damages. Its written submissions and the testimony of its Chairman, Mr B.T. Karanja, highlighted the special damages sought. There are many authorities to the effect that special damages must first be pleaded and then strictly proved.

See *COAST BUS SERVICE LTD V MURUNGA & 2 OTHERS, CA 92 OF 1992.*

The case of *OUMA V NAIROBI CITY COUNCIL, (1976) KR 304* further illuminates this point:

> *"after stressing the need for a Plaintiff in order to succeed on a claim for specified damages, Chesoni J. quoted in support the following passage from Bowen L.J's judgment*

> *on pages 532, 533 in Ratcliffe v Evans (1892) 2 Q.B. 524, an English leading case of pleading and proof of damage: " The Character of the acts themselves which produce the damage, and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much as certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."*

With regard to the proving of the special damages pleaded the court goes on to state:

> *"What amounts to strict proof must of course depend on the circumstances as was stated in Ratcliffe's case, namely the character of the acts producing the damage, and the circumstances under which those acts were done."*

It is not in contention that the respondent pleaded special damages in its claim. What is in contention is whether or not they were proved. The appellant argues that the respondent did not tender evidence of having leased any of the land alleged and that the respondent's loss was purely based on estimates which could not be verified.

From the copy of the proceedings before the High Court, PW1, who was the respondent's Chairman, claimed that the farms on which its crops grew had been leased from the Masai community, and he adduced 10 agreements as proof thereof marked as PMF1(i) – (x).

The respondent further adduced evidence of the value of loss to crops which were contained in reports prepared by independent parties. The Respondent also adduced in its *"Summary of Cost of Losses Incurred"* a number of receipts and invoices in relation to the cost of the damaged crops. The High Court in awarding the special damages indicated that it had analyzed what had been proved and what had not. For instance, the court felt that a second assessment of the loss of wheat which estimated further loss at KShs.11million as claimed in the plaint had not been proved by the respondent. The court also rejected the Kenya Breweries Limited's report which put the loss of barley at KShs.7,470,820/= and opted for the lower amount of KShs.4.5million contained in the report of the Divisional Agricultural Officer.

The respondent was seeking special damages with regard to amounts of crop damaged on its property and the independent reports indicated the amounts of damaged crop and their value. Accordingly, special damages for the total amount of KShs.31.5million as awarded by the High Court were proved on a balance of probabilities.

On the defence that the destruction of crops by wildlife was an act of God, *Winfield and Jolowicz on Torts 18th Edn, 2010, para 15-17* states:

> *"In law, then, the essence of an act of God is not so much a phenomenon which is sometimes attributed to a positive intervention of the forces of nature, but a process of nature not due to the act of man and it is the negative side which deserves emphasis. The criterion is not whether or not the event could reasonably be anticipated, but whether or not human foresight and prudence could reasonably recognize the possibility of such an event."*

It follows, therefore, that whether an act is an act of God is a question of fact. The tort which the High Court awarded damages in relation to is breach of statutory duty. The appellant argues that the movement of wild animals was due to drought and migration. In view of the fact that the appellant as the statutory entity in charge of wildlife should have foreseen the possibility of such an event, this was not an act of God. Accordingly, we find that the defence of Act of God does not apply in the circumstances of this case.

Accordingly, we find that the appellant had a statutory duty to protect the respondent's crops from damage which it failed to do. The absence of provision for remedy for breach of that statutory duty was no bar to the respondent to claim damages under the common law. The respondent pleaded and proved the special damages owed to it and the court awarded damages. We find that the learned trial Judge arrived at the correct finding that the respondent was entitled to payment of damages of KShs.31.5 million. We accordingly dismiss the appeal with costs to the respondent both on appeal and in the High Court.

Dated and delivered at Nairobi this 10th day of October, 2014.

R. N. NAMBUYE

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

DEPUTY REGISTRAR