IN THE COURT OF APPEAL

AT NAKURU

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A.)

CIVIL APPEAL NO. 260 OF 2013

BETWEEN

PETER MUTURI NJUGUNA.....APPELLANT

AND

KENYA WILDLIFE SERVICE.....RESPONDENT

(An appeal from the Judgment and Order of the High Court of Kenya

at Nakuru (W. Ouko, J) dated 17th November, 2010

in

H. C. C. A. No. 160 "A" of 2007)

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JUDGMENT OF THE COURT

1. The case before us may well be dubbed ***"The Wild pig case",*** but it exemplifies a common feature of human *versus* wildlife conflict in this country. How do we deal with the damage to property and personal injury or death caused by wildlife which we love and treasure as a major contributor to the national economy? Should it be left to the common law system of claiming damages in courts or should it be confined to quick and less bureaucratic administrative processes or should it be open to claimants to choose either process? Those are the issues raised in the appeal, which is based on the law as it existed before the year 2000 when the cause of action accrued under **The Wildlife (Conservation & Management) Act,** Cap.376 Laws of Kenya. The saving grace came 13 years later when the **Wildlife Conservation and Management Act, No. 47 of 2013** was enacted with elaborate provisions and procedures for addressing the shortcomings of the past.

2. The facts are brief and straight forward. On or about **21st February, 2000**, the appellant was working in his farm at Kabazi area in Nakuru when he was suddenly and viciously attacked by a wild pig. It bit off his right index finger causing severe pain and other minor injuries. Following the attack, the appellant reported to the offices of the respondent **(KWS)** and was advised to lodge his claim for compensation, which he did. But KWS did nothing thereafter for over four years. The appellant then went before the Magistrate's court in Nakuru and sought extension of time to file suit and was allowed to do so. In the suit, he blamed KWS for negligence and/or breach of statutory duty in allowing wild pigs to roam freely outside Game Reserves; failing to detect, pursue and control stray pigs; failing to secure National Parks to prevent escape of wild pigs; and failing to have any regard to the safety of members of the public, including the appellant, from stray pigs. He sought special damages as well as general damages for pain, suffering and loss of amenities.

3. KWS denied the claim and gave notice in its statement of defence that it would raise a preliminary objection **(PO)** on the jurisdiction of the court to hear and determine the suit. It listed three grounds but in the end rested the objection on the following ground:

> ***"(b) The suit against the defendant is bad in law, misconceived and unsustainable in view of the express provisions of the Wildlife (Conservation and Management) Amendment Act 1989 that specifically makes provisions governing matters relating to compensation for wildlife transgression in section 62 of the Act."***

4. KWS was basically saying it did not own wild animals since they were wild and can only be sued if the animals caused damage to property. If they caused any injury to the person, there was a procedure set up under ***section 62*** of the **Wildlife (Conservation and Management) Act** (now repealed) (herein **"the Act"**) which stipulates:

> ***"62. (1) where any person suffers any bodily injury from or is killed by any animal, the person injured or in the case of a deceased person, any other person who was dependant upon him at the date of his death may make application to a district committee established by this section, for the award of compensation for the injury or death...."*** [Emphasis added].

5. Under that section, KWS contended, the claim is made to a committee which was not under KWS and therefore the suit filed against it was incompetent. The appellant contended that the court was properly seized of the matter but the trial magistrate, **B. Atiang**', (RM) upheld the PO and dismissed the appellant's suit. The court found and held that the appellant should have filed his claim with the district committee.

6. Aggrieved by the dismissal, the appellant filed an appeal to the High Court contending that ***section 62 (1)*** of the Act is permissive as the word **"may"** has been used and that a victim of a wildlife attack could choose to go either to court or to the district committee. **Ouko, J** (as he then was) was not persuaded by that argument and upheld the trial magistrate. In doing so, he observed that compensation for damage to or loss of crops or property caused by wildlife had been removed from ***section 62 (1)*** of the Act leaving only compensation for bodily injury or death. The court distinguished the case of ***Ngera & Another vs Kenya Wildlife Services Limited [1998] KLR (E & L) 311***, which held that although there was no provision for compensation for destruction of crops or property under the Act, the Act created a statutory duty on KWS to the farming and ranching communities for the protection of agriculture and animal husbandry against destruction by wildlife, and that a breach of that duty entitles the victim to a common law remedy.

7. Unlike the ***Ngera case,*** which was about destruction of crops and property, the court observed, this case was about personal injury and the process laid down for compensation in the Act was quick and less bureaucratic. It also had an inbuilt appellate system for assurance of fairness in the process. It held:

> ***"I come to the conclusion that the jurisdiction of the court is not ousted as the decision of the district committee or the tribunal can be challenged by way of judicial review.***
>
> ***However, there is a clear intention that the process laid down in the Act be followed. It has been stated time and again that where the Constitution or a statute spells out a procedure to be followed, that procedure ought to be adhered to. The rationale is quite obvious. Absurdity and confusion would rein if, for instance, in this case, the victim had an option to approach the district committee and the courts simultaneously or alternatively or even if he was not satisfied with the award of one to move to another."***

The court also found that the appellant was in abuse of court process by pursuing his claim simultaneously before the District Committee and the court.

8. That decision provoked the present appeal.

The memorandum of appeal listed nine grounds of appeal which may be summarized:

> ***That the learned Judge erred in law by -***
>
> ***i. sustaining a preliminary objection founded upon facts contrary to the precepts set out in Mukisa Biscuits vs West End Distributors (1969) EA 691.***
>
> ***ii. failing to find that the respondent had common law duty to care for persons such as the appellant and that duty had been breached.***
>
> ***iii. failing to consider the appellant's submission and authorities.***
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> ***iv. finding that section 62 (1) excluded damages to loss of crops or property caused by wildlife.***
>
> ***v. upholding a preliminary objection when the same had absolutely no basis in law.***
>
> ***vi. holding contrary to its findings that a breach of the duty created by the Act upon the respondent entitles the appellant protection to a common law remedy.***
>
> ***vii. Ousting the jurisdiction of the court, yet the law provided for an option to the appellant to file his claim in court or in the district committee.***
>
> ***viii. finding that CMCC NO. 2492/2004 amounted to an abuse of the court process.***
>
> ix. ***Dismissing the appellant's appeal without considering the merits of the appeal.***

9. The appeal was disposed of by way of oral submissions. Learned counsel for the appellant **Mr. Lawrence M. Karanja** took the view that the main issue for determination is whether the use of the word **"may"** in ***section 62 (1)*** ousts the jurisdiction of the court. In his submission, it was only directory and not compulsory and does not therefore oust the jurisdiction of the court. He relied on the case of ***Peter Wasonga Laktar -vs- Bomas of Kenya Limited [2003] eKLR*** to buttress that submission. In his view, if the legislature intended otherwise, it would have used the word **"shall"**. For that reason, the appellant had the option of going to court or the district committee to pursue his claim. According to counsel, the existence of the claim before the court and the Committee at the same time, which was admitted, was not in

abuse of court process since the court was at liberty to stay the proceedings before it rather than dismissing the whole suit.

10. In response, learned counsel for KWS **Ms. G. Morara Mong'eri** submitted that all the grounds of appeal amount to abuse of court process. That is because the appellant had admitted having filed his claim with the district committee which matter was still pending and therefore, raising the same matter in court was a clear abuse of process. The statutory procedure laid out by Parliament under ***section 62*** ought to be followed since it was enacted for good reason, he urged.

11. We have considered the decisions of the two courts below, the grounds of appeal, the submissions of learned counsel as well as the applicable law. In our view, the two critical issues that commend themselves as determinative of this appeal are these:

> ***i. Whether the provisions of Section 62 (1) of the Wildlife (Conservation and Management) Act, Cap 376, Laws of Kenya, oust the jurisdiction of court.***
>
> ***ii. Whether the preliminary objection was properly upheld.***

12. ***Section 62 (1)*** of the Act has been reproduced above with the relevant emphasis. It provides for the procedure to be followed when one suffers bodily injury from or is killed by any wild animal, and spells out the first port of call -- the District Committee. The appellant's argument is that the permissive word ***"may"*** in the section allows for an option which the victim is at liberty to exercise to either go to court or before the district committee. ***Black's Law Dictionary, 9th Edition***, gives several definitions of the word **"may"** including:

> **"to be permitted to"**
>
> **"to be a possibility"**
>
> **or loosely put:**
>
> **"is required to".**

13. On the interpretation of statutes where the words **"may"** and **"shall"** have been used, this Court has held before that:-

> ***"It cannot, therefore, be overemphasized that while the court must rely on the language used in a statute or in the rules to give it proper construction, the primary purpose is to discern the intention of the Legislature (or Minister) in enacting or making of the provision..... Whether the words "shall" or "may" convey a mandatory obligation or are simply permissive, will depend on the context and the intention of the drafters."***
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> See the case of ***Sony Holdings Ltd –vs- Registrar of Trade Marks & Another [2015] eKLR.***

14. In the Australian case of ***Johnson's Tyne Foundry Pty Ltd v Maffra Shire Council (1948) 77 CLR 544 at 568,*** **Williams, J** stated:

> ***"'May', unlike 'shall', is not a mandatory but a permissive word, although it may acquire a mandatory meaning from the context in which it is used, just as 'shall' which is a mandatory word, may be deprived of the obligatory force and become permissive in the context in which it appears."***

15. The true construction therefore lies in the context. Ordinarily the word ***"may"*** is permissive and not mandatory but the contextual meaning would vary with the intention of the drafters. In this case, the argument is not so much the meaning of the word but the effect of it; whether it ousts the jurisdiction of the court. The High Court found, correctly in our view, that the decision of the district committee was amenable to challenge by way of Judicial Review and therefore in that sense the jurisdiction of the court is not ousted. Nevertheless, and again we agree, there was compulsion to exhaust the procedure provided under the section before going to court. To that extent therefore, whereas the appellant was under no compulsion to make any claim, once he chose to do so, as he might, he was compelled to lodge it at the appointed forum, being the District Committee.

16. The issue of exhausting specific procedure has been considered at length by this Court as well as the High Court in many decisions. In *The Speaker of the National Assembly -vs- Karume [2008] 1 KLR 426 (EP)*, this Court stated that, where there is a specific procedure provided for redress of grievances, that procedure ought to be strictly followed. *Similarly in* ***Kimani Wanyoike -vs- Electoral Commission Civil Appeal No. 213 of 1995 (UR)*** which was decided before the cause of action in this matter arose, the Court held:-

> ***"where there is a law prescribed by either a constitution or an act of Parliament governing a procedure for the redress of any particular grievance, that procedure should be strictly followed".***

The rationale was explored in the latter case of *Diana Kethi Kilonzo -vs- IEBC and 2 Others [2013] eKLR* as follows:

> *"We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."*

The same could be said about the retired Constitution.

17. Jurisdiction is everything. That much we know from the oft-cited case of ***The Owners of the Motor Vehicle M. V. Lillians -vs- Caltex Oil (Kenya) Limited (1989) KLR 1***.

> ***"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like mean. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the action and matters of which the particular court has cognizance of or as to the area over which the jurisdiction shall extend; or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal including an arbitrator depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal has been given power to determine conclusively whether the fact exists where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing."***

18. From the foregoing, it is abundantly clear to us that where there is a specific procedure as to the redress of grievances, the same ought to be strictly followed. Having arrived at that conclusion, we are satisfied that the learned Judge of the High Court did not err by upholding the lower court's finding. ***Section 62 (1)*** of the Act is explicit on the procedure to be followed by any person who suffers bodily injury from or is killed by any animal. Such person, is required to make an application to the District Committee. It is good practice intended to foster public confidence and trust to let each organ perform its mandate. The appellant ought to have approached the District Committee first and followed the appellate system designed under the Act. The avenue of Judicial Review which the Committee is always subject to, was also available. Filing the claim before the District committee as the appellant appears to have done and filing a suit for negligence based on the same facts is certainly in abuse of court process. The trial court and the High Court were right in rejecting the suit. However, the two courts made orders dismissing the suit which is ordinarily the consequential order for matters heard and determined on merits. The correct order, in our view, ought to have been the striking out of the suit. The order for dismissal shall thus be set aside and substituted accordingly.

19. For those reasons we find no merit in this appeal and we order that it be and is hereby dismissed. We make no order as to costs.

Dated and delivered at Nakuru this 22nd day of November, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR