



THE SUPREME COURT OF KENYA

KENYA WILDLIFE SERVICE Vs SEA STAR MALINDI LIMITED

SC PETITION NO. E022 of 2024

DATE OF JUDGMENT: 27TH JUNE, 2025

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Orders: The Court allows the appeal.

Background

On 15th August, 1996 Sea Star Malindi Limited (the respondent) obtained approval from the Municipal Council of Malindi (Municipal Council), the predecessor of the Kilifi County Government, to put up a hotel on its parcel of land described as L.R No. 3170 Malindi (suit land). The construction on the suit land, which is adjacent to the Malindi Marine National Reserve and Park (Marine Park), was projected to be completed on 1st December, 1997. However, by a letter dated 20th August 1997, Kenya Wildlife Services (the appellant) directed the respondent to stop the construction on the ground that it was encroaching on a protected area (100 feet from the high-water mark of the Indian Ocean) which is part of the Marine Park. According to the appellant, the encroachment had the effect of interfering and adversely affecting the delicate eco-system of the Marine Park. This prompted the respondent to file judicial review proceedings in the High Court, **Misc Suit No. 982 of 1997**, mainly seeking an order of *certiorari* to quash the appellant's decision as set out in the letter dated 20th August, 1997. Thereafter, on 9th November, 1997 the appellant's wardens took possession of the suit land and remained thereon in order to stop or bar any further construction thereon.

While the judicial review proceedings were pending, the respondent filed another suit in the High Court, **HC Civil Suit No. 579 of 1998**, against the appellant, which was subsequently transferred to the Environment and Land Court (ELC). The respondent in this suit claimed that the appellant's conduct of stopping/barring it from continuing and completing construction of the hotel was unconstitutional since it infringed on its right to property. As a result, the respondent sought an injunction against the appellant as well as damages for violation of its rights and for the losses it had suffered on account of the appellant's conduct. Before the ELC suit against the appellant was heard, the judicial review proceedings were determined by a ruling dated 8th November, 2002 wherein an order of *certiorari* was issued quashing the appellant's decision dated 20th August 1997 restricting, and/or restraining the respondent from constructing a hotel on the suit land. In doing so, court in the judicial review

decision found that, the appellant’s conduct was manifestly unjust and presented an undue interference with the respondent’s enjoyment of its property.

Consequently, ELC by a judgment dated 31st July, 2018 pertaining to the suit against the appellant, found that the issue of liability against the appellant had been conclusively determined by the judicial review decision, which had neither been reviewed nor challenged on appeal. Rather, that the only outstanding issue in the suit against the appellant was the assessment of quantum of damages that should be awarded to the respondent. In that regard, ELC awarded the respondent Kshs. 90,000,000 as costs for reconstruction of the hotel since portions thereof had to be pulled down; general damages in the sum of Kshs. 30,000,000; and interest at commercial bank rates until payment in full.

The Court of Appeal by a majority judgment agreed with the ELC that the judicial review decision had conclusively determined the liability of the appellant in the subsequent ELC suit. The court also upheld the award of Kshs. 90,000,000 as the costs for reconstruction of the hotel. However, the appellate court set aside the award of Kshs 30,000,000 as general damages and substituted the same with an award of Kshs. 3,000,000. Equally, the Court of Appeal substituted the award of interest at commercial rates, with an order of interest at court rates from the date of filing of the suit in the trial court until payment in full.

The following issues arose for consideration by the Supreme Court:

- i. *Whether the Court of Appeal, and the trial court, properly assessed evidence on liability; and*
- ii. *What relief(s) should issue?*

Upon consideration, the Supreme Court allowed the appellant’s appeal for the reasons that:

1. **Issue 1:** A judicial review proceeding that is confined to examining procedural impropriety cannot be regarded as conclusively resolving all issues of liability in a subsequent civil claim. The trial court’s reliance on the judicial review decision as the sole basis for determining liability in the suit subject of this appeal denied the appellant a hearing on liability in the said suit. It is a fundamental principle of justice that each cause of action must be determined on the evidence and legal principles applicable to that specific cause of action. While the findings of the judicial review proceedings could be admissible in evidence to support the claim, they could not substitute the trial court’s duty to conduct its own merits-based evaluation of liability for the civil claim.
2. **Issue 2:** The issue of liability, in the context of this matter, requires an evaluation of the evidence adduced to determine whether it supports the pleaded cause of action or the defence. Consequently, it is more appropriate to remit the matter back to the Court of Appeal to re-evaluate the evidence tendered before the trial court as against the parties’ pleadings in determining the question of liability, and other consequential reliefs.

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