

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
JUDICIAL REVIEW NO. E012 OF 2025

REPUBLIC.....APPLICANT
S

VERSUS

KENYA WILDLIFE SERVICE.....
.....RESPONDENT/JUDGMENT DEBTOR

STANDARD CHARTERED BANK OF
KENYA.....
.....GARNISHEE

CHARLES OMONDI ASUNGA &
ROSE ACHIENG ASUNGA.....EXPARTE
APPLICANTS

RULING

1. The Exparte Applicants filed an application dated 3rd February 2026 seeking for the following reliefs:

- i) Spent.
- ii) An order of a Garnishee Order Nisi against Standard Chartered Bank (Garnishee) in respect of account No. 01044330337411 held to the credit of the Respondent/Judgment Debtor in satisfaction of the decretal sum of Kshs5,000,000/=.
- iii) Upon the hearing of the application inter-partes, the court do issue a Garnishee Order Absolute against Standard Chartered Bank, the Garnishee herein in respect of account number 01044330337411 directing the Garnishee to pay the decree holder all monies held to the credit of the Respondent/Judgement debtor in satisfaction of the decretal sum of Kshs 5,000,000/=
- iv) Costs of the application be borne by the Respondent/Judgment Debtor.

2. The said application is supported by the grounds set out thereunder and by the affidavit of Charles Omondi Osunga sworn on even date. The Applicants' gravamen is inter alia; that this court has entered judgement in favour of the

Applicants on 29/1/2026 as against the Judgment debtor for the sum of Kshs5,000,000/=; that the decretal sum remains wholly unpaid and outstanding to date by the Judgment Debtor, that the judgment debtor maintains and operates an account with the Garnishee which contains sufficient funds to satisfy the decree; that the Applicants are apprehensive that the judgment debtor may withdraw or transfer or dissipate the funds thereby defeating the realization of the decree.

3. The Respondent filed grounds of opposition dated 26/2/2025 wherein it raised grounds inter alia; that the Respondent is a government agent generally mandated to the duty of conservation and management of wildlife on behalf of the public; that the 1st Respondent receives funds as may be approved and allocated to it by the National Assembly in its budget process; that as per Section 21 of the Government Proceedings Act, when it comes to execution against the Government it is trite law that a certificate of order against the Government must be issued; that the exparte Applicants failed to fulfil the requirement of this section in executing the orders of this court; that Section 32(1) of the said Act provides that where there is any expenditure to be incurred by or on behalf of the Government, such expenditure shall be defrayed out of monies provided by Parliament; that the Respondent's garnished bank account No. 01044330337411 is not an account dedicated to the monies provided by Parliament and that the action to garnish the account will adversely interfere with the public mandate of the

Respondent; that the judgment issued herein was in respect to a judicial review application seeking an order for mandamus to compel Respondent to pay for compensation over loss of life and does not constitute a debt payable for any monetary expenditure made by the Applicant; that under Order 23 Rule 4 of the Civil Procedure Rules, execution against the Garnishee is for a debt due or claimed to be due from the judgment debtor to a decree holder; that the Respondent contends that the judgment issued herein was not for a debt due but an order by way of mandamus to compel the Respondent to compensate for loss of life; that Order 23 Rule 3 of the Civil Procedure Rules provides that the effect of Garnishee Order is in respect of service of an order that debt due to the judgment debtor under a decree shall be attached; that the Respondent maintains that it does not owe any monies in form of debt capable of being executed by way of Garnishee proceedings; that the Garnishee proceedings is not a proper and standard mode of execution for the judgment in this case; that the application dated 3rd February 2026 ought to be dismissed.

4. The Respondent/Judgment debtor filed an application dated 4th February 2026 seeking for an order that the default ruling dated 28/1/2026 be set aside and that the Respondent be allowed to file responses out of time in the interest of justice and fairness. The said application is supported by grounds set out thereunder and by the affidavit of Derrick Karinga sworn on even date. The Respondent's gravamen is inter alia; that the Respondent is a government agency running a

single registry which serves the entire Republic with mounting human wildlife cases hence delay in cascading pleadings to the regional offices; that the County Warden in-charge of Siaya County and the custodian of records relating to human wildlife incidences was on leave resulting in delay in obtaining documents; that technical hitches hampered filing of responses as mapping had not been done by the 28/1/2026 when the ruling was made; that responses have since been filed together with submissions for expedience; that it is in the interest of justice and fairness for the Respondent to be heard before determination; that it will be highly prejudicial for the Respondent if the orders sought are not granted as the Respondent is a public entity relying on tax payer sweat which must be accounted for and utilized with due prudence and includes securing assets provided for use in responding to human wild life conflict.

5. The Applicants filed a replying affidavit dated 10/2/2026 wherein they averred inter alia; the Respondent was duly and properly served in the substantive application together with the mention and hearing notice as evidenced by the affidavit of service on record; that the period of service was quite sufficient to enable the Respondent enter an appearance and/or file a response within a timeline provided by law; that despite proper service, the Respondent failed, neglected and or refused to enter appearance or file any form of response; that upon lapse of statutory timelines the Applicants moved the court in accordance with the law and

that the default ruling was regularly and properly entered; that the default ruling was therefore not irregular, unlawful, or prematurely obtained but it was the natural legal consequences of the Respondent's inaction; that the explanation for delay given by the Respondent is untenable both factually and legally; that the entry of an appearance merely signifies an intention to participate in proceedings and reserves a party's right to be heard; that no explanation has been offered as to why the Respondent failed to take this basic procedural step immediately upon service; that the Respondent is a large public institution with multiple offices, technical staff, legal officers and administrative personnel; that it is inconceivable that the absence of a single officer on leave would render the entire institution incapable of entering appearance within the prescribed period; that administrative inefficiencies, internal bureaucracy or staffing arrangements cannot override statutory timelines or excuse non-compliance with court process; that public institutions are expected to have systems in place to ensure continuity of operations particularly in legal matters where statutory timelines are strict; that the annexure relied upon by the Respondent over its claim of delay in mapping by the CTS was only made on 29/1/2026 at 02:01:07, and that by that time the court had long issued judgment in default and updated the same on the system; that the evidence presented does not demonstrate diligence but rather evidence of prolonged inaction; that the delay was self-induced and arose from the Respondent's own lack of

urgency and internal inefficiency; that there is no evidence of any system failure, technical impossibility or external impediment preventing compliance with court timelines; that the Respondent should not benefit from its own indolence; that the matter concerns breach of statutory duty giving rise to strict statutory liability and that the governing statute and applicable regulations expressly provide compensation payable and mandate settlement of approved claims within 60 days; that the statutory obligations to compensate is not discretionary but it is mandatory; that the Respondent has failed to settle the approved claims within the prescribed 60 days and still remains and continues to be in breach of its statutory duty; that the Applicant's entitlement arises directly from statute and not from any discretionary or speculative claim; that the Respondent has not annexed any draft response demonstrating the existence of a plausible or triable defence; that no material has been presented to controvert the Applicant's statutory entitlement; that the application to set aside is not grounded on the existence of a meritorious defence but merely on administrative delay; that it is the court's discretion to set aside default judgment but the same is meant to prevent injustice arising from excusable mistake but not to aid a party who has deliberately or negligently obstructed the cause of justice; that in the absence of a demonstrated triable issue, the exercise of discretion in favour of the Respondent will serve no useful purpose other than prolong the delay; that the default ruling was regularly and properly entered and that no

sufficient cause has been demonstrated to warrant setting it aside and that no arguable defence has been disclosed; that the application dated 4/2/2026 lacks merit and ought to be dismissed with costs.

6. Parties agreed to canvass the two applications simultaneously by way of written submissions.
7. The Respondents submissions are dated 26/2/2026. It raised three issues for determination inter alia; whether the 1st Respondent is a government agent, subject to the provision of the government proceedings Act; whether the account sought to be garnished by the Exparte Applicant is an account holding funds defrayed for the purpose of payment of compensation and whether such an account can be garnished and whether the Applicant can execute mandamus orders through Garnishee.
8. As regards the first issue, it was submitted that the Respondent was established by an Act of Parliament, the Wildlife Conservation and Management Act (Cap 376) No. 16 of 1989, with the overall mandate to conserve and manage wildlife in Kenya, now repealed to the Wildlife Conservation and Management Act, 2013 hereinafter referred to as WCMA.
9. Section 6 (1) of the WCMA provides that:
“(1) there is established a uniformed and disciplined Service to be known as the Kenya Wildlife Service.
Section 7 of the WMCA provides for the functions of the 1st Respondent which generally revolve around Wildlife

Conservation, a public function, and that the said functions are overseen by the Ministry of Tourism and Wildlife. In order for the Service to perform, great reliance is placed on the ministry and the government especially in matters to do with compensation for claims resulting from Human - Wildlife Conflicts. The service is dependent on the government for funding in order to undertake their public function of wildlife conservation.

10. Reliance was placed in the case of Five Star Agencies Limited v National Land Commission; Kenya National Highways Authority (Intended Respondent); National Bank of Kenya (Garnishee) (Civil Case 445 of 2014) [2023] KEELC 16631 (KLR) (28 March 2023) (Ruling), where O. A. Angote J, while determining whether the National Land Commission was a government for purposes of Section 21(4) of the Government Proceedings Act cited the following:

“97. The High Court in the case of Association of Retirement Benefits Scheme v Attorney General & 3 others [2017]eKLR cited with approval the Indian Supreme Court case of Shetty v Airport Authority of India & others (1979) 1 S.C.R 1042 in which the test for determining whether an entity was a Government body or not, was stated as follows:-

“(a) Consider whether any share capital of the corporation is held by the Government

and if so that would indicate that the corporation is an instrumentality or agency of Government.

- (b) Where the financial assistance of the State is so much as to meet almost the entire expenditure of the Corporation, that fact would afford some indication of the corporation being impregnated with Governmental character;**
- (c) It may also be relevant to consider whether the corporation enjoys monopoly status conferred by the State.**
- (d) Whether the body has deep and pervasive State control,**
- (e) Whether the functions of the corporation are of public importance and closely related to Governmental functions then that would be a relevant factor in classifying the corporation as an instrumentality or agency of Government and,**
- (f) If a Department of a Government is transferred to a corporation then it becomes an instrumentality or agency of the Government.”**

11. It was submitted that it is evident from the WCMA governing the 1st Respondent that the involvement of the

government through the Ministry of Tourism and Wildlife is quite extensive especially as elucidated in Section 14 - (Sources of funds of the Service); Section 7(e) - (Collecting of revenue levies and charges due to the government from wildlife...); Section 24 - (The Wildlife Compensation Scheme) and Section 25(1), (2), (3) (Compensation). Therefore, and considering the test in the “Five Star” Case, it is certain that the 1st Respondent is subject to Section 21 of the Government Proceedings Act in relation to execution herein.

12. It was submitted that while delivering its judgement on 4th June 2025, leading to the now subject execution proceedings, this Honourable Court, while citing various authorities, duly acknowledged that it is the Ministry of Tourism and Wildlife which pays compensation claims on behalf of the 1st Respondent. The court at paragraph 21 of its judgement stated that:

“....for me, the Court of Appeal found that when it comes to the issue of compensation, KWS and the Cabinet Secretary play the same role. They are conjoined and will not be separated, so that a claim against the KWS.”

13. It was contended that flowing from the foregoing, to bifurcate or to separate the 1st Respondent and the Ministry at this point would be self-defeating and would cause much more confusion in relation to execution of judgments resulting from claims of Human - Wildlife Conflict. Counsel

urged this court to make a finding that for purposes of execution, with specificity in matters revolving around compensation due to Human - Wildlife Conflicts, then the 1st Respondent is a government agency shielded under the ambit of section 21 of the Government Proceedings Act.

14. As regards the second issue, it was submitted that having established that the 1st Respondent is subject to the Government Proceedings Act, section 32(1) of the Government Proceedings Act provides that:

“(1) any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of moneys provided by Parliament.”

15. That Section 7 of the WMCA provides for the functions of the 1st Respondent which generally revolve around Wildlife Conservation. Further section 14 of the WCMA provides for the sources of funds of the Service which includes:

“(a) such moneys as may be approved and allocated to the service by the National Assembly as part of the budget process;

(b) money or proceeds from investments as may vest in the Service from the performance of its duties...”

16. Again, it was pointed out that Section 16 of the WCMA provides for the annual estimates which include the revenue and expenditure of the Service. These annual estimates shall

be prepared at least three months before the commencement of the financial year. It was contended that the Annual Estimates referred to herein do not make any provision for moneys for compensation resulting from Human - Wildlife conflicts as this is a preserve of the Ministry of Tourism and Wildlife.

17. It was also contended that Section 24 of the WCMA on the other hand clearly provides that there shall be a scheme established by the government for the purposes of compensation for claims resulting from Human - Wildlife conflict. It provides that:

“(1) The Government shall establish a Wildlife Compensation Scheme that shall consist of—

- (a) monies specifically allocated for this purpose through the budget process;**
- (b) an insurance scheme to be established by the Cabinet Secretary responsible for matters relating to finance; and**
- (c) monies from any other source approved by the Cabinet Secretary for the time being responsible for matters relating to finance; and**

(2) The Wildlife Compensation Scheme shall be used for financing compensation claims for human death or injury or crop and property damage caused by wildlife.”

18. It was therefore submitted that Section 32(1) of the Government Proceedings Act as read together with Section 24 of the WCMA provide that any such money sought by the Applicant can only be recovered from the Wildlife Compensation Fund and such funds must be as a result of an allocation for the specific purpose by the National Assembly. It was contended that the account sought to be garnished by the Applicant is a general operations account of the 1st Respondent and if the garnishee is allowed, the 1st Respondent's public function will be crippled.
19. It was also submitted that the 1st Respondent has demonstrated before this Honourable court that the law provides that the issues of payment of compensation claims is the preserve of the government through the Ministry of Tourism and Wildlife. It therefore follows that the Applicant cannot and should not be allowed to garnish the 1st Respondent's Bank Account. This will not only interfere with the 1st Respondent's functions in general but will also affect the functioning of the 1st Respondent which will sequentially affect the vision and mission of the 1st Respondent and eventually the public good sought to be achieved.
20. As regards the third issue, it was submitted that the Applicants had invoked Section 106 (2)(c) of the WCMA, among other provisions of the law, while approaching this Honourable Court for an order of mandamus. The section provides that:

“(2) Any person who has reason to believe that the provisions of this Act have been, are being, or are about to be violated, may petition the High Court for-

(c) the writ of mandamus against an officer or a person who has failed to perform a duty imposed by or under this Act; or any remedy at law or equity for preventing or enforcing the provisions of this Act.”

21. It was therefore contended that it is trite law that an order of mandamus cannot be executed through garnishee as it is an order as against an officer or a person who despite being responsible for performing a certain duty, has failed or refused to perform such duty. On the other hand, Garnishee can only apply in civil suits as provided for in Order 23 of the Civil Procedure Rules, 2010.

Reliance was placed in the case of **Republic V Town Clerk, Kisumu Municipality Ex-Parte East African Engineering Consultants [2007] eKLR**, where the learned Judge held that:

“(1) No such relief as garnishee proceedings is stipulated in the Act donating the jurisdiction i.e. the Law Reform Act.

(2) The orders are issuing in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The State so to

speak by the very act of issuing the orders frowns upon its own officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings.

22. It was finally submitted that Section 106(2)(c) of WCMA provides the manner as to how orders of mandamus should be executed which is; compelling an officer or a person who has failed to perform a duty imposed by or under the WCMA to perform such act and that where such an officer fails to perform such duties, the Applicant can only enforce such an action through contempt of court proceedings and not garnishee. Learned counsel therefore urged the Court to dismiss the Applicants' application dated 3/2/2026 with costs.

23. The Applicants' submissions are dated 3rd March 2026. It was submitted that the Applicants' compensation claim was approved as confirmed in the replying affidavit of the Respondent sworn on 28th January 2026 (filed after Judgment) wherein the Respondent expressly confirms that the County Wildlife Conservation Committee sat on 17th July 2025 and made a recommendation for compensation in accordance with the applicable statute and hence there is therefore no dispute between the parties that the claim was

considered, that compensation was recommended, and that no further statutory process remained pending and further the only outstanding step was payment of the recommended sum.

24. It was also submitted that despite the recommendation having been made as early as 17th July 2025, the Respondent failed, neglected and/or refused to effect payment, without offering any lawful or reasonable explanation for the delay. Faced with inordinate delay and in the absence of any pending statutory process, the Applicants moved this Honourable Court by way of Chamber Summons dated 26 November 2025 seeking leave to commence Judicial Review proceedings which leave was duly granted. The Applicants thereafter filed the substantive Notice of Motion and served the same upon the Respondent as per the affidavit of service dated 27th November 2025.

25. Learned counsel submitted that the issues for determination are whether the Respondent has made out a proper basis for setting aside the Judgment and Orders of Mandamus and whether the Applicants are entitled to enforce the Judgment through garnishee proceedings against the Respondent.

26. As regards the first issue, the Court of Appeal faced with the issue on whether a trial Court had the discretion to set aside a default judgment or not had the following to say in James

Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR)

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other.”

27. The same Court went ahead to state the following about irregular judgments-

“In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

Flowing from the foregoing principles, the nature of the impugned judgment determines the threshold an applicant must meet in seeking to have it set aside.

28. It was submitted that where the judgment is alleged to be irregular, the applicant need only demonstrate that there was no service or that service was improper. Once the Court is satisfied that summons were not duly served in accordance with the law, the judgment is liable to be set aside *ex debito justitiae*, without the necessity of demonstrating triable issues or explaining delay, since the fundamental right to be heard would have been violated. However, where the judgment is regular, the applicant must *first* demonstrate that he was duly served with summons but failed to enter appearance or file a defence for a plausible, excusable, and satisfactory reason. The Court will interrogate whether the explanation tendered is credible and not merely a tactic to obstruct or delay the course of justice. Secondly, the applicant must show that the application to set aside was brought without unreasonable or inordinate delay since promptitude is a material consideration, as equity aids the vigilant and not the indolent.

29. Further, the applicant must place before the Court a draft defence or otherwise to demonstrate that the intended defence raises bona fide triable issues worthy of consideration at trial. The Court does not examine the merits

in detail, but it must be satisfied that the defence is not a sham and discloses arguable questions fit for adjudication. Further, the Court will consider the respective prejudice likely to be suffered by each party and whether such prejudice can adequately be compensated by an award of costs. Ultimately, the Court must be persuaded that, in the totality of the circumstances, it is in the interests of justice to exercise its unfettered discretion in favour of the applicant.

30. Learned counsel submitted that applying the foregoing principles to the present matter, it is evident that the impugned Judgment was regularly entered. That the Respondent was duly and properly served at every procedural stage, service of the Chamber Summons for leave, the substantive Notice of Motion, the mention notices, and the hearing notice are all evidenced by duly sworn affidavits of service on record. The Respondent does not deny service. Its complaint is not want of notice, but rather internal administrative inefficiencies and alleged technical challenges in “mapping” the file. It was contended that the same cannot convert a regular judgment into an irregular one. That the foundational requirement of service having been satisfied, the Judgment cannot be impugned on the basis of irregularity.

31. It was further submitted that the Respondent has equally failed to meet the threshold applicable to setting aside a regular judgment. No plausible or excusable reason has

been advanced for the failure to enter appearance or file a response despite ample time and multiple instances of service. The explanation of centralized registries, an officer being on leave, and belated technical mapping, particularly where the mapping request was initiated after Judgment had already been delivered, does not constitute a satisfactory or bona fide explanation. Further, there was no prompt attempt to seek enlargement of time or to attend Court to explain any difficulty. The delay was neither candidly explained nor excusable.

32. It was further contended that the Respondent has not demonstrated the existence of any arguable or triable defence. It does not dispute that the statutory committee sat, considered the claim, and recommended payment. It does not dispute that no further statutory process remained pending. Its defence is anchored purely on administrative delay, which is precisely the mischief that the remedy of Mandamus addresses. That in the absence of a substantive defence and given the prejudice to the Applicants, who have waited since July 2025 for payment of a lawfully recommended compensation, there is no basis upon which this Honourable Court can exercise its discretion in favour of the Respondent. That the application to set aside is therefore devoid of merit.

33. It was also submitted that under Article 47 of the Constitution of Kenya, the right to fair administrative action

is guaranteed. This provision requires that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and that a delay in the payment of the compensation when the same was already recommended and approved does not meet the constitutional threshold of expediency and efficiency contemplated under the constitutional framework. That once the statutory committee discharged its mandate and made a recommendation for compensation, the Respondent was under a corresponding public duty to act promptly and effect payment. Unexplained administrative inertia, internal bureaucratic processes, or logistical challenges cannot override a clear constitutional command.

34. It was further contended that the Respondent's conduct, viewed against the backdrop of Article 47, amounts to unreasonable and procedurally unfair administrative action. The Applicants had complied with all statutory requirements, and there remained no discretionary or investigative step pending. The delay therefore ceased to be procedural and became unlawfully withholding a benefit already determined under statute.

35. It was therefore submitted that the grant of Judicial Review Orders of Mandamus was not only proper but constitutionally justified. That the Respondent's failure to act expeditiously triggered this Court's supervisory jurisdiction, and there exists no legal basis for setting aside a Judgment

that vindicated the Applicants' constitutional right to fair administrative action.

36. As regards the second application, the Applicants filed an application before this Honourable Court on 3rd February 2026, seeking garnishee orders against Standard Chartered Bank Kenya Limited (the "Garnishee Bank") to satisfy the Judgment debt. That the Respondent has not filed any formal response to this Application but instead, it has attempted to oppose the Application through detailed submissions, citing the decision of the High Court of Kenya at Kwale in **Republic v Kenya Wildlife Service & 2 others; Mashudi & another (Suing as legal representatives of the Estate of Umazi Nguzo) (Ex parte Applicant); Kenya Commercial Bank (KCB) Group Limited (Garnishee) [2025] KEHC 19352 (KLR)**.

37. It was submitted that before addressing that decision, it is necessary to note the clear requirements under the Civil Procedure Rules. Order 51 Rule 14(1) which provides that any Respondent wishing to oppose an Application must file one or a combination of three documents and in which submissions are not part of it. The provision dictates as follows-

“Any respondent who wishes to oppose any application may file any one or a combination of the following documents –

a. a notice preliminary objection: and/or;

- b. replying affidavit; and/or**
- c. a statement of grounds of opposition.”**

38. It was submitted that it is well established that submissions alone cannot substitute for a formal affidavit or other evidential pleading. The Court of Appeal in **Moi v Muriithi & another [2014] KECA 642 (KLR)** had the occasion to say as follows-

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented. In any event all the 1st respondent would claim and prove as loss could only relate to the shares in the companies and not the properties of the companies. And even that he did not do.

39. It was submitted that in the present case, the Respondent's reliance solely on submissions, without filing a replying affidavit or other grounds of opposition as required by the Civil Procedure Rules, is procedurally improper. That the submissions cannot create or prove facts that have not been properly placed before the Court and hence the Respondent has failed to formally oppose the Application, leaving the Applicants' garnishee Application unopposed in law.

40. It was therefore submitted that before this Honourable Court turns to consider the substantive issues arising from the garnishee application, it is clear that the Respondent's attempt to rely on submissions alone cannot be entertained as a valid opposition. The Court must proceed to determine the Application based on the law and the evidence (or lack thereof) formally before it.

41. As regards the claim by the Respondent that it is a government entity, it was submitted that the Respondent has relied on the decision in **Republic v Kenya Wildlife Service & 2 others; Mashudi & another (Suing as legal representatives of the Estate of Umazi Nguzo) (Ex parte Applicant); Kenya Commercial Bank (KCB) Group Limited (Garnishee) [2025] KEHC 19352 (KLR)** to argue that it is insulated from garnishee proceedings on account of being "Government" within the meaning of the Government Proceedings Act. With respect, that reliance is

misplaced and this Honourable Court ought not to adopt that reasoning.

42. In that decision, the High Court at Kwale held that although the Kenya Wildlife Service (KWS) is a state corporation capable of suing and being sued, its role in compensating victims of human-wildlife conflict brought it within the purview of the Government Proceedings Act. Guided by **Five Star Agencies Limited & another v National Land Commission & 2 others**, the Court concluded that garnishee proceedings under Order 23 of the Civil Procedure Rules were unavailable and that enforcement could only proceed through the elaborate procedure under section 21 of the Government Proceedings Act.

43. It was submitted that with tremendous respect, the reasoning in the above case is neither binding nor persuasive in the present matter for the following reasons-

- i)* a High Court decision does not bind a court of concurrent jurisdiction. While persuasive, it does not fetter this Court's interpretive duty. This Honourable Court is fully entitled, indeed obligated, to independently examine the statutory framework and reach its own conclusion.
- ii)* Kenya Wild life Service is not "the Government." It is a distinct statutory corporation established under section 6 of the Wildlife Conservation and

Management Act as a body corporate with perpetual succession and a common seal, expressly empowered to sue and be sued in its own name, to own property, and to undertake corporate acts. That statutory architecture is deliberate. Parliament created KWS as a separate juridical entity precisely to enable it to operate with legal autonomy. A body corporate with independent legal personality cannot, for convenience in execution proceedings, collapse into “Government” when it suits it.

- iii)* This Honourable Court has previously affirmed that position in **Nyawara & Another (Suing as the Administrators & Legal Representatives of the Estate of John Clinton) v Kenya Wildlife Service; KCB Bank Kenya Limited (Garnishee) [2025] KEHC 13746 (KLR)** and in **Olwayo v Kenya Wildlife Service; KCB Bank Ltd (Garnishee) [2025] KEHC 16871 (KLR)**, holding that KWS, as a parastatal with corporate personality, is amenable to ordinary execution processes. There is no legal basis to depart from that sound and consistent reasoning.
- iv)* The decision in **Five Star Agencies Ltd & another v National Land Commission & 2 others [2024] KECA 439 (KLR)**, is

distinguishable. The Court of Appeal there was concerned with the status of the National Land Commission as a constitutional commission, a State organ under Article 260 of the Constitution, infused with direct governmental character. The ratio was tied to the constitutional identity of the NLC as part of Government itself. KWS, by contrast, is a statutory corporation, not a constitutional State organ. It operates bank accounts in its own name, enters contracts in its own name, litigates in its own name, and bears liabilities in its own name. The legal and constitutional character of the two entities is fundamentally different.

44. It was also submitted that pursuant to the provisions of the Government Proceedings Act, Cap 40 Laws of Kenya, the Respondent cannot for the first time at the stage of execution purport to enjoy the status and protection accorded to Government entities. Where a party intends to rely on Government immunity or the special execution regime applicable to Government, such position must be disclosed and asserted from the commencement of the proceedings through the participation of the Honourable Attorney-General as required under Section 12 of the Act. It was further submitted that Kenyan courts have consistently held that a State organ or public entity cannot litigate as an ordinary private body and thereafter, at the stage of execution, purport to invoke Government status so

as to defeat the enforcement of a lawful judgment. The law requires that where a party seeks to benefit from the special protection accorded to Government or State entities against ordinary execution, such status must be asserted and properly constituted from the inception of the proceedings through the participation of the Honourable Attorney-General. Consequently, a party that elects to defend proceedings in its own name without involving the Attorney-General cannot later claim immunity from execution on the basis of Government protection and cannot approbate and reprobate by enjoying the benefits of private litigation while simultaneously seeking the shield of Government execution immunity.

45. It was also submitted that to extend the protection afforded to the core machinery of Government to every statutory corporation merely because it performs a public function would dangerously enlarge the scope of immunity beyond what Parliament intended. Many state corporations perform public functions; that alone does not transform them into "Government" for purposes of execution under the Government Proceedings Act.

46. It was finally submitted that the Applicant in the Respondent in its application dated 4 February 2026 has failed to show good and sufficient cause on why the Judgment should be set aside, and that application should be dismissed with costs to the Applicants. Further, the

Application seeking Garnishee Orders by the Applicants herein dated 3/2/2026 is both meritorious and unopposed and that the same should be allowed as prayed.

47. I have considered the two rival applications as well as the submissions tendered. I will start with the Respondent's application dated 4/2/2026 then followed by the Applicant's application dated 3/2/2026.

48. As regards the application dated 4/2/2026 by the Respondent/Judgment Debtor, the same relates purely to a request to set aside a judgment/ruling/order. The said remedy is always available to parties when they can approach the court and seek to be allowed to come on board despite being late. In the present circumstances, the Respondent has indicated to the court that it was not able to file a response to the Applicant's application seeking for entry of judgment against the Respondent for a sum of Kshs5,000,000/= flowing from the grant by this court of an order of mandamus to the Applicant. The Respondent has given reasons why it was not able to respond to the Applicant's application dated 27/11/2025 in good time. The Respondent therefore seeks to be allowed to participate in the proceedings by having the court's ruling dated 28/1/2026 set aside. The principles guiding the courts in setting aside judgments/rulings/orders have been laid down vide several decided cases. The bottom line is that the courts are entitled to exercise discretion in favour of a deserving litigant. The court while discharging that duty is required to exercise the discretion judiciously. An Applicant seeking for such an order

is required to render an explanation for the delay. The Court of Appeal faced with the issue on whether a trial Court had the discretion to set aside a default judgment or not had the following to say in **James Kanyiita Nderitu & another v Marios Philotas Ghikas & another** [2016] KECA 470 (KLR)

“From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective

prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment, among other.”

49. The same Court went ahead to state the following about irregular judgments-

“In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be

heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system.”

Flowing from the foregoing principles, the nature of the impugned judgment determines the threshold an applicant must meet in seeking to have it set aside.

50. Learned counsel for the Applicant has contended that the ruling in issue was a regular one and ought not to be interfered with unless the Respondent convinced the court that it was not served with the pleadings. It is trite that where the judgment is alleged to be irregular, the Applicant need only demonstrate that there was no service or that service was improper. Once the Court is satisfied that summons were not duly served in accordance with the law, the judgment is liable to be set aside *ex debito justitiae*, without the necessity of demonstrating triable issues or explaining delay, since the fundamental right to be heard would have been violated. However, where the judgment is regular, the applicant must *first* demonstrate that he was duly served with summons but failed to enter appearance or file a defence for a plausible, excusable, and satisfactory reason. The Court will interrogate whether the explanation tendered is credible and not merely a tactic to obstruct or delay the course of justice. Secondly, the applicant must show that the application to set aside was brought without unreasonable or inordinate delay since promptitude is a

material consideration, as equity aids the vigilant and not the indolent.

51. Further, the Applicant must place before the Court a draft defence or otherwise to demonstrate that the intended defence raises bona fide triable issues worthy of consideration at trial. The Court does not examine the merits in detail, but it must be satisfied that the defence is not a sham and discloses arguable questions fit for adjudication. Further, the Court will consider the respective prejudice likely to be suffered by each party and whether such prejudice can adequately be compensated by an award of costs. Ultimately, the Court must be persuaded that, in the totality of the circumstances, it is in the interests of justice to exercise its unfettered discretion in favour of the applicant.

Learned counsel for the Applicant has urged the court to dismiss the application dated 4/2/2026 on the ground that the Respondent has not availed a copy of a draft defence for the court's perusal so as to determine whether the same raises triable issues. Learned counsel further accused the Respondent for seeking to rely on submissions to act as a response to the Applicant's application dated 27/11/2025. However, upon perusal of the record, there is evidence that the Respondent did file a response to the Application as well as grounds of opposition to the Applicant's latest application (Garnishee) dated 3/2/2026. That being the position, this court must take note of the fact that the Respondent is desirous of contesting the matter. Indeed, under Article 48

of the Constitution, every party is entitled to access justice. The Applicant should not deny the Respondent a right to defend the suit. I find that no prejudice will be visited upon the Applicant if the Respondent's application is allowed and that the Applicant can be cushioned by an award of costs. It is also noted that the explanation rendered by the Respondent is plausible and is accepted by the court on the basis that every party ought to be given their day in court to ventilate their issues. In **Patel Vs. E.A Cargo Handling Services Ltd (1974) EA 75** it was held as follows:

***“There are no limits or restrictions on the judge’s discretion to set aside or vary an exparte judgment except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court will not impose conditions on itself to fetter the wide discretion given it by the rules.*”**

Also, in **Shah v. Mbogo & Another [1967] EA 116** it was held as follows:

“This discretion to set aside an exparte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is to designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

From the foregoing authorities, it is clear that courts have the discretion to set aside such orders to serve the ends of justice if the applicant shows good cause, such as improper service or a valid reason for non-appearance. Looking at the circumstances of the case and the explanation of the Respondent as juxtaposed with the pleadings presented, I am persuaded that the Respondent is genuine in its endeavour to be given an opportunity to defend the suit. In any case, the ruling in question was delivered on 28/1/2026 while the application was filed about a week thereafter. I find there was no inordinate delay on the part of the Respondent.

52. Having established that the Respondent's application dated 4th February 2026 has merit, I find that a determination of the Applicant's application (Garnishee) dated 3rd February 2026 would be premature at this stage on the ground that the parties herein must be given the latitude to canvass the Applicant's application dated 27/11/2025 after which they will revisit the one dated 3/2/2026 depending on the outcome of the application dated 27/11/2025. It is noted that the parties herein went out of their way to canvass the applications without restraint and hence the need to direct them to hold their horses until the opportune time.

53. In the result, the following orders are hereby issued:

- i) The Respondent's application dated 4/2/2026 is allowed as prayed with costs to the Applicant

and that the Respondent's replying affidavit dated 28/1/2026 is hereby deemed as duly filed.

- ii) The Applicant's application dated 3/2/2026 shall await the determination of the Applicant's application dated 27/11/2025.

Orders accordingly.

Dated and signed at Siaya this 13th day of March 2026.

D. KEMEI

JUDGE

In the presence of :

Ouko.....for Applicants.

N/A M/s Walubengo.....for Respondent.

Omondi for Jael Onyango.....for Garnishee.

Maurine.....Court Assistant.