IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWERA, MWILU & OTIEN0-ODEK, JJ.A)

CIVIL APPLICATION NO. SUP. 19 OF 2014 (UR 13/2014)

BETWEEN

KENYA WILDLIFE SERVICE ……...….....…….. APPLICANT

AND

RIFT VALLEY AGRICULTURAL

CONTRACTORS LIMITED ……....…….RESPONDENT

(An application for leave to appeal to the Supreme Court of Kenya from the Judgment of the Court of Appeal at Nairobi (Nambuye, M'Inoti & J. Mohammed JJ.A) dated 10th October 2014

in

Civil Appeal No. 212 of 2013)

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RULING OF THE COURT

1. By Notice of Motion dated 19th December 2014, the applicant seeks Certification and leave to appeal to the Supreme Court. The order sought is:

   (1) A Certificate that a matter of general public importance is involved in the intended appeal to the Supreme Court.

2. The undisputed facts relevant to this application are as follows: The applicant, ***Kenya Wildlife Service*** is a body corporate established under the **Wildlife (Conservation & Management) Act, Cap 376** of the Laws of Kenya (as amended by **Act 16 of 1989**). The respondent ***Rift Valley Agricultural Contractors Limited*** was at all material times the beneficial owner of land surrounding the Maasai Mara National Game Reserve. Between the months of March and May 2000, the respondent had planted 2000 hectares of wheat and 40 hectares of barley. Around the months of March and July 2000, while the respondent's crop was ripe, droves of wildlife including wildebeest, zebras and antelopes, among others, indiscriminately invaded the respondent's farm and totally destroyed the wheat and barley crops thereby resulting into loss and damage to the respondent. The respondent filed suit at the High Court against the applicant for breach of statutory duty and negligence and claimed special damages. The High Court in a judgment delivered by Ouko J. (as he then was) entered judgment for the respondent against the applicant in

the sum of Ksh. 31.5 million as special damages. The learned judge held that the applicant was in breach of its statutory duty as provided under ***section 3A (l)*** of the Wildlife (Conservation & Management) Act, Cap 376 of the Laws of Kenya. The learned trial judge further held that the applicant was liable under the Rule in **Rylands -v- Fletcher (1866) L.R. 1 Ex.265.**

3. ***Section 3A (l)*** of the Wildlife (Conservation & Management) Act, lists one of the applicant'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. ……
c. ……
d. ……

- *render services to the farming and ranching communities in Kenya necessary for the protection of agriculture and animal husbandry against destruction by wildlife.*

4. Aggrieved by the trial court's decision, the applicant filed an appeal before this Court and in the judgment dated 10th October 2014, this Court upheld the decision of the High Court thereby dismissing the appeal. In dismissing the appeal, this Court held that the applicant under ***section 3A (l)*** of the Wildlife Act had a statutory duty to protect the respondent's crops from damage which it failed to do; that the absence of provision or remedy for breach of that statutory duty was no bar to the respondent to claim damages under the common law; that the respondent pleaded and proved the special damages owed to it and the trial judge arrived at the correct finding that the respondent was entitled to payment of special damages of Ksh. 31.5 million.

5. The applicant is aggrieved by the judgment delivered by this Court on 10th October 2014 and hereby seeks a Certificate and leave to appeal to the Supreme Court on the ground that a matter of general public importance is involved in the intended appeal.

6. The grounds in support of Certification as stated on the face of the Motion and deposed in the supporting affidavit of Thomas Ogola are as follows:

> *"(a) Whether the statutory duties of the applicant as set out in Section 3A (l) of the Wildlife (Conservation & Management) Act encompass protection of crops and other domestic animals from destruction by wild animals.*

b. *Whether the applicant, Kenya Wildlife Service, can be held liable for acts of destruction caused by wild animals migration as per the Rule in* ***Rylands -v- Fletcher*** *(1866) LR 1 Ex. 265 and in particular:*

i. *Whether common law can be used to impose a duty on the applicant when statute is clear and unambiguous on what the responsibilities of the applicant are.*

ii. *Whether the applicant accumulated the migrating wild animals on its land.*

iii. *Whether the applicant could reasonably foresee that the wild animals, namely wildebeest, could escape and cause mischief to the respondent's crops.*

iv. *Whether the damage caused by wild animals to respondent's crop was remote.*

a. *Whether the Maasai Mara Game Reserve is a national reserve or game reserve controlled by the County Government of Narok (previously Narok County Council).*

b. *Whether wildlife is a natural heritage belonging to the Government of Kenya.*

c. *Whether it is the responsibility of the Government of Kenya to compensate for injury and loss caused by wildlife to a private person's property.*

d. *Whether damage to crops caused by wild animals, wildebeest during migration from the Serengeti National Park in Tanzania to the Maasai Mara Game Reserve in Kenya is an Act of God and incapable of being foreseen by the applicant."*

7. At the hearing of the application, learned counsel George Gitonga Murugara appeared for the applicant while learned counsel D.N. Kipkoech acted for the respondent. The learned counsel submitted a list of authorities in support of their submissions.

8. Counsel for the applicant reiterated the grounds in support of Certification urging that a point of law of general public importance has arisen in this matter and leave should be granted to enable the Supreme Court make a final determination of the point. It was submitted that the respondent's wheat and barley crops were destroyed by wildebeest migrating from Serengeti in Tanzania as they crossed into the Maasai Mara Game Reserve in Kenya; that the wildebeest were in their natural migration path and the damage done to the respondent's crops was a natural act and an Act of God beyond the control of the applicant. That both the High Court and Court of Appeal erred in law in making the applicant liable for damage caused by an Act of God.

9. Counsel for the applicant urged this Court to note that wildebeest migration from Serengeti to Maasai Mara is the 8th Wonder of the World and this migration takes place every year and damage to people's crops might take place again and again; that since the wildebeest migration occurs every year, the decision of this Court to uphold the trial court's judgment could easily open a flood gate of litigation and liability upon the applicant and it is this that makes the issue at hand to be a matter of general public importance which transcends the interest of the parties to this suit.

10. Counsel emphasized that the point of law to be determined by the Supreme Court involves interpretation of ***section 3A (l)*** of the Wildlife (Conservation & Management) Act; the question for determination is whether ***section 3A***

(l) of the Act allows for compensation for crops damaged or destroyed by wildlife; that the role of Kenya Wildlife Service is to advise the farming and ranching communities in Kenya as necessary for the protection of agriculture and animal husbandry against destruction by wildlife. That this role is advisory and should not impose liability on the part of Kenya Wildlife Service. That ***section 3A (l)*** does not provide for the applicant to compensate the respondent or any other person whose crop may be damaged or destroyed by wildlife. That the High Court and this Court erred in law in interpreting that ***section 3A (l)*** of the Act imposes an obligation on the applicant to compensate the respondent for loss and damage to crops caused by wild animals. That both the High Court and this Court erred in interpreting ***section 3A (l)*** to mean that the applicant is under a statutory duty to compensate the respondent or any other person for loss or damage caused by wildlife.

11. The applicant further submitted that wildlife in Kenya is a heritage of the people of Kenya and owned by the Government of Kenya and as such, it is the Government of Kenya and not the applicant that should incur any liability for loss or damage caused by wild animals. It was further contended that both the High Court and this Court erred in holding that the Rule in ***Rylands - v- Fletcher (supra)*** is applicable in this case; it was submitted that the applicant does not own the Maasai Mara Game Reserve and neither did it accumulate or gather any wildlife on any land. In concluding its submissions, the applicant stated that the intended appeal to the Supreme Court is to interpret whether ***section 3 A (l)*** of the Wildlife (Conservation & Management) Act imposes liability on the part of the applicant to compensate any person who suffers loss or damage caused by wildlife. Counsel urged us to grant leave and issue a Certificate to the Supreme Court.

12. Counsel for the respondent opposed the application urging that there is no matter of general public importance raised in this case. That ***section 3A (l)*** imposes a statutory obligation on the part of the applicant to render services to the farming and ranching communities in Kenya necessary for the

protection of agriculture and animal husbandry against destruction by wildlife; that both the High Court and this Court held the applicant was in breach of its statutory obligation under ***section 3A (l)***; that migration of the wildebeest and other wild animals is foreseeable and is not an Act of God; that the applicant failed in its duty to protect the respondent's crops from being damaged by wild animals; that the applicant having deviated and failed in its statutory duty is under obligation to provide a remedy; that it is settled law that no injury or damage can be suffered without a remedy; that there is no uncertainty in judicial precedent that would warrant this matter being certified to the Supreme Court; that no complex point of law has been identified to be canvassed before the Supreme Court; that the Rule in ***Rylands -v- Fletcher (supra)*** and ***Donoghue v Stevenson*** [1932] UKHL 100 is applicable in this case and it is not in dispute that it is the statutory duty of the applicant under ***section 3A (l)*** of the Act to advise farmers and ranchers to prevent damage or destruction by wildlife. Counsel for the respondent urged us to dismiss the application and decline Certification to the Supreme Court. In concluding his submission, counsel stated that whereas the instant application raises a matter of general public importance, the specific matter of general public importance is the public interest in expeditious disposal of litigation and not the grounds urged by the applicant; he submitted that litigation must come to an end and granting leave to appeal to the Supreme Court would only delay conclusion of litigation in this matter; counsel observed that the applicant is bent on flogging a dead horse which cannot be revived.

13. We have considered the application, the grounds in support thereof, and in opposition thereto and submissions by both counsel. An appeal from this Court to the Supreme Court arises in only two instances as set out in ***Article 163(4)*** of the ***Constitution***. The said Article provides:-

> **"163(4) Appeals shall lie from the Court of Appeal to the Supreme Court-**
>
> a. **As of right in any case involving the interpretation or application of this Constitution; and**
>
> b. **In any other case in which the Supreme Court or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)."**

14. The applicant premises its application under ***Article 163 (4) (b)*** of the Constitution that a matter of general public importance is involved. The issue before us is to determine whether indeed there is a matter of general public importance that is raised and disclosed. This Court in ***Hermanus Philipus Styen -vs- Giovanni Gnecchi-Ruscone - Civil Application No. Nai. Sup.4 of 2012*** observed:-

> **"…The requirement for certification by both the Court of Appeal and the Supreme Court is a genuine filtering process to ensure that only appeals with elements of general public importance reach the Supreme Court."**

15. What constitutes a matter of general public importance? The Supreme Court of Kenya in ***Hermanus Phillipus Steyn -vs- Giovanni Gnecchi-Ruscone - Application No. 4 of 2012*** held,

> **"….a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impact and consequences are substantial, broad based, transcending the litigation- interests of the parties, and bearing upon the public interest."**

The majority opinion in the aforementioned case set out the following as the governing principles in the determination of matter(s) of general public importance:-

> ***"i. For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal transcends the circumstances of the particular case, and has a significant bearing on the public interest;***

ii. Where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one,

the determination of which will have a significant bearing on the public interest;

iii. Such question or questions of law must have arisen in the court or courts below, and must have been the subject of judicial determination;

iv. Where the application for certification has been occasioned by a state of uncertainty in the law arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

v. Mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must fall within the terms of Article 163(4)(b) of the Constitution;

vi. The intending applicant has an obligation to identify and concisely set out the specific elements of

'general public importance' which he or she attributes to the matter for which certification is sought;

vii. Determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

(See also the Supreme Court's decision in ***Malcolm Bell -vs- Hon. Daniel Toroitich Arap Moi & another - Application No. 1 of 2013)***.

16. From the undisputed facts of this case, it is obvious that damage to the respondent's crops was occasioned by wild animals during the period of wildebeest migration from Serengeti to Maasai Mara Game Reserve. We take judicial notice that migration of wildlife from Serengeti to Maasai Mara Game Reserve is an annual event and the said wild animals may find their way into people's farms and destroy crops. This realization makes the point of law in issue in this case to be broad based transcending the circumstances of this particular case and has a significant bearing on public interest.

17. The other issue is whether the Certification sought raises a point of law that is substantial the determination of which will have a significant bearing on the public interest. The applicant submitted that the point of law to be urged in the intended appeal is interpretation of ***section 3A (l)*** of the Wildlife (Conservation & Management) Act, Cap 276 of the Laws of Kenya. The intended appeal is to enable the Supreme Court interpret and determine the question whether the function of Kenya Wildlife Service (KWS) to render services to the farming and ranching communities in Kenya necessary for the protection of agriculture and animal husbandry against destruction by wildlife imposes a duty on KWS to compensate farmers for destruction to crops caused by wildlife. It is our considered view that this question raises a substantial point of law with a significant bearing on public interest. Having taken judicial notice that wildlife migration from Serengeti to Maasai Mara is an annual event, we are convinced that there is a potential for damage to

crops by the migrating wildlife and this may recur over and over again and the Supreme Court's interpretation of ***section 3A (l)*** will give judicial direction and certainty as to whether the Section allows compensation for destruction caused by wildlife.

18. A ground in support of the instant application is the submission by the applicant that wildlife

migration from Serengeti to Maasai Mara is natural and any damage or destruction to crops is An Act of God. Further, that the Rule in ***Rylands -v- Fletcher (supra)*** is inapplicable in the present case. On our part, we are of the considered view that it is a matter of general public importance and public interest that the Supreme Court should consider and determine the issue whether damage caused by migrating wildlife is an Act of God and if the Rule in ***Rylands -v- Fletcher (supra)*** applies in National Game Reserves. This issue is of general public importance and transcends the litigation interest of the parties to this case.

19. Having examined and analyzed the Judgments of the High Court and this Court, we are satisfied that the issues and questions of law raised in the intended appeal to the Supreme Court were raised, canvassed and considered by the High Court and this Court and judicial determination was made. It is our view that as a matter of public interest, the Supreme Court should consider and make a determination on the point of law raised in the intended appeal.

20. We are of the view that the applicant has demonstrated that there are serious issues of law which transcend the circumstances of the case herein and/or have a bearing on the proper conduct of the administration of justice. We are inclined to issue a Certificate and leave to appeal to the Supreme Court. We phrase the following interrelated questions for consideration and determination by the Supreme Court:

a. Whether section 3A (l) of the Wildlife (Conservation & Management) Act as amended (Cap 376 of the Laws of Kenya) imposes a liability on the part of Kenya Wildlife Service to compensate any person for loss or destruction to crops caused by wildlife.

b. Whether breach of section 3A (l) of the Wildlife (Conservation & Management) Act, (Cap 376 of the Laws of Kenya) imposes a liability on the part of Kenya Wildlife Service to compensate any person for loss or destruction to crops caused by wildlife.

c. Whether there is a common law obligation under the principle in ***Donoghue v Stevenson*** [***1932] UKHL 100*** and the Rule in ***Rylands -v- Fletcher (1866) LR 1 Ex. 265*** on the part of Kenya Wildlife Service to compensate any person for damage or destruction caused by wildlife.

d. Whether damage caused by migrating wildlife is an Act of God and the loss lies where it falls.

21. The upshot of the foregoing is that we find that the Notice of Motion dated 19th December 2014 has merit and we hereby allow the application, grant leave and issue a Certificate to appeal to the Supreme Court. The questions and issues for determination by the Supreme Court are as enumerated above. Each party shall bear its costs in this application.

Dated and delivered at Nairobi this 3rd day of July, 2015.

J.W. MWERA

JUDGE OF APPEAL

P.M. MWILU

JUDGE OF APPEAL

J. OTIENO-ODEK

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR