Rift Valley Agricultural Contractors Limited v Kenya Wildlife Service (Motion 13 of 2015) [2016] KESC 8 (KLR) (20 April 2016) (Ruling)

Rift Valley Agricultural Contractors Limited v Kenya Wildlife Service [2016] eKLR

Neutral citation: [2016] KESC 8 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

MOTION 13 OF 2015

PK TUNOI, MK IBRAHIM, JB OJWANG, SC WANJALA & N NDUNGU, SCJJ

APRIL 20, 2016

BETWEEN

RIFT VALLEY AGRICULTURAL CONTRACTORS LIMITED ..... APPLICANT

AND

KENYA WILDLIFE SERVICE ..... RESPONDENT

(Being an application for review of certification by the Court of Appeal that a matter of general public importance is involved, pursuant to Article 163(4)(b) of {{>/akn/ke/act/2010/constitution the Constitution}} of Kenya, 2010 on the 3{{^rd}} of July, 2015 in Court of Appeal Civil Application No. SUP. 19 of 2014 (UR 13/2014)

RULING

Introduction

1 This is an Originating Motion dated and filed on 17th July, 2015, seeking a review of the certification granted by the Court of Appeal, that a matter of general public importance is involved in the intended appeal. The applicant seeks the determination of the following questions:

i. whether Section 3A i of the Wildlife Conservation & Management Act as amended imposes a liability on the part of Kenya Wildlife Service, to compensate any person for loss, or destruction to crops caused by wildlife;

ii. whether breach of Section 3A i of the Wildlife Conservation & Management Act as amended, imposes a liability on the part of Kenya Wildlife Service to compensate any person for loss, or destruction to crops, caused by wildlife;

iii. 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; and

iv. whether the damage caused by migrating wildlife is an act of God and the loss lies where it falls.PARAGRAPH 3.

2 The application is supported by an affidavit sworn on 17th July, 2015 by Benson T. Karanja, a Director of the applicant.

Background

Basic Facts.

3 This matter was originated by a suit filed by the applicant in the High Court against the respondent, HCCC. No. 256 of 2002. The applicant was claiming general, specific, and exemplary damages for loss occasioned to the farmers' crops by wild animals.

4 The applicant 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 applicant had planted 2000 hectares of wheat, and 40 hectares of barley. Around the months of March and July 2000, when the applicant's crop was ripe, droves of wildlife, including wildebeests, zebras and antelopes, invaded the farm, and destroyed the wheat and barley crops, resulting into loss and damage.

High Court Proceedings.

5 Having suffered such a loss, the applicant filed a suit at the High Court against the respondent, Kenya Wildlife Service, for breach of its statutory duty, and negligence, claiming special damages. The High Court Ouko, J , in a Judgement delivered on 27th July, 2011, found in favour of the applicant, as against the respondent. He held that the respondent was in breach of its statutory duty as provided under Section 3A i of the Wildlife Conservation & Management Act Cap. 376 Laws of Kenya , and that it was liable under the rule in Rylands v Fletcher 1866 L.R. 1 Ex. 265. He awarded the sum of Kshs. 31,500,000 million as special damages.

Court of Appeal Proceedings.

6 The respondent, who was aggrieved by the High Court decision, moved to the Court of Appeal. The Appellate Court agreed with the findings of the High Court, dismissing the appeal, and holding that the respondent, under Section 3A i of the Wildlife Act, has a statutory duty to protect the applicant's crops from damage, and that it had failed to do so. The Court held that it was immaterial that there was no specified remedy for such a breach of statutory duty, and that the applicant was still entitled to claim damages under the common law, and in this regard, the applicant had pleaded and proved the special damages owed to it, and in the circumstances, the trial Judge had arrived at the correct finding —that the applicant was entitled to special damages in the sum of Kshs. 31.5 million.

The Court of Appeal: The Question of Certification for Further Appeal

7 Being aggrieved, the respondent decided to move to this Court on a further appeal via Civil Application No. SUP. 19 of 2014 UR 13/2014 , and sought certification that its intended appeal involves matters of general public importance. Its application before the Court of Appeal rested on the following grounds:

A. whether the statutory duties of the Kenya Wildlife Service as set out in Section 3A 1 of the Wildlife Conservation & Management Act, encompass protection of crops, and domestic animals, from destruction by wild animals;

B. whether the Kenya wildlife Service can be held liable for acts of destruction caused by wild animals in the process of migration, on the basis of the Rule in Rylands v. Fletcher 1866 LR 1 Ex. 265 and in particular:

I. whether the common law can be relied upon to impose a duty on the applicant, where statute is clear and unambiguous, on what the responsibilities of the applicant are;

II. whether the applicant kept 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 a remote situation, in terms of causation;

C. whether the Maasai Mara Game Reserve is a National Park or Game Reserve controlled by the County Government of Narok previously Narok County Council ;

CD. whether wildlife is a natural heritage in the ownership of the Government of Kenya; and

E. whether it is the responsibility of the Government of Kenya to render compensation for injury and loss caused by wildlife to a private person's property.PARAGRAPH 9.

8 The Court of Appeal Mwera, Mwilu & Otieno-Odek, JJA , by a Ruling delivered on 3rd July, 2015, granted leave to the respondent herein to appeal to the Supreme Court, pronouncing itself as follows paragraphs *20*, *21* :

> "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 having 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 i of the Wildlife Conservation & Management Act as amended under 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 i 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 inDonoghue v. Stevenson [1932] UKHL 100 and the Rule inRylands 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.Whether the damage caused by migrating wildlife is an Act of God and the loss lies where it falls.
>
> 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."

9 It is this grant of leave by the Appellate Court, that is contested by the applicant, who now seeks a review of the grant of certification for ultimate appeal in the Supreme Court.

Application before the Supreme Court

10. The Originating Motion was filed in this Court under certificate of urgency on 17th July, 2015, coming up before Lady Justice Kalpana Rawal DCJ on 20th July, 2015. Such a certificate was not granted; the matter came up before the Deputy Registrar, and on 19th August, 2015 the parties recorded a consent, that the matter be determined solely on the basis of their written submissions, without an oral hearing. Subsequently, upon the matter being certified as having attained compliance by the Deputy Registrar, it came up before the learned Deputy Chief Justice who on 7th December, 2015, constituted the Bench herein to determine it.

Parties' Submissions.

Applicant

11 The applicant was represented by the firm of Gordon Ogola, Kipkoech & Co. Advocates, and its submissions dated 13th August 2015 were filed in this Court on 14th August, 2015 together with a list of authorities. Learned counsel submitted that the questions framed by the Court of Appeal for determination fall short of the criteria set out under Article 163 4 b of *the Constitution*.

12 Counsel submitted that the learned Judges of the Appellate Court did not have an occasion to consider the proceedings in the High Court; and that by Section 3 A i of the Wildlife Conservation & Management Act, the respondent is obligated to compensate the applicant, or any other person, for loss or damage caused by wildlife, as held by the High Court?

13 Citing the principles laid down by this Court in Hermanus Phillipus Steyn v. Giovani Gnecchi Ruscone [2013] eKL, the applicant submitted that no complex point of law arises in this matter, justifying an appeal, and the certification by the Appellate Court ought to be reversed. It was urged that, the fact that Kenya Wildlife Service is a party to this matter is not sufficient ground for this matter to be treated as being of general public importance.

14 The applicant submitted that this is an old matter from the High Court at Nakuru, of 2002, and its real issue of general public importance, is the call for expeditious disposal, in the terms of Article 159 2 b of the current Constitution. Counsel invoked the trite principles that litigation must come to an end, and that the winning litigant is entitled to justice for the wrongs suffered. It was urged that the Originating Motion of 17th July, 2015 be allowed, and the certification by the Appellate Court overturned.

Respondent

15 The respondent was represented by the firm of Hamiliton Harrison & Mathews, Advocates, and filed its submissions on 7th August, 2015. It also sought to rely on the affidavit of Thomas Ogola, its Legal Officer, sworn on 4th August, 2015 and filed on 5th August, 2015.

16 Learned counsel submitted that the nature of the four issues framed by the Court of Appeal does, indeed, transcend the private interest, as had been quite rightly perceived by the Appellate Court.

17 The respondent submitted that the principles governing matters for further appeal, as laid down in Hermanus, had duly guided the Court of Appeal, leading to the framing of the four matters of general public importance, for consideration by this Court. Counsel urged that the applicant had not

demonstrated to this Court that the said matters do not meet the threshold for "matter of general public importance".

Analysis And Determination

18 We recall that on 19th August, 2015, when this matter was mentioned before the Deputy Registrar, learned counsel for both parties were present: Mr. Kipkoech for the applicant; and Mr. Mungara for the respondent. The proceedings on that occasion run in part as follows:

> " Mr. Mungara
>
> This is an appeal for de-certification from the Orders of the Appellate Court; and I request that the matter be placed before the Supreme Court for a Ruling date.
>
> "Mr. Kipkoech
>
> Confirms the position.
>
> Parties to rely on written, filed submissions and then await a Ruling date.
>
> "Court Order
>
> Matter to be placed before Supreme Court Judges and Ruling to be communicated."

19 Hence it was the consent of the parties, that oral submissions be dispensed with, and the matter be determined on the basis of the written submissions filed by the parties.

20. From the Originating Motion and the supporting affidavit thereto; the replying affidavit by the respondent; and the written submissions by both parties: the single issue before this Court for determination is, whether a basis has been laid for it to overturn the certification by the Court of Appeal, and to revoke the leave granted to the respondent to file an ultimate appeal before this Court.

21 Both parties filed synoptic submissions in this matter, after expressly waiving their right s to oral hearing. The applicant's main contention is that the Appellate Court's certification was based on a compromised view of relevant issues, the Court of Appeal not having clearly observed the facts from the High Court, or the Appellate Court's record.

22 To the contrary, the respondent urged that the Appellate Court did, indeed, consider he relevant records, quite apart from adverting to pertinent guiding precedents, such as: Hermanus; and Malcom Bell—arriving at the conclusion that the four framed issues, indeed, met the threshold for grant of leave to appeal to the Supreme Court.

23 It is worth noting that, although brought under Article 163 4 b of *the Constitution*, this is an application that seeks to review a grant of certification by the Court of Appeal. As such it falls well within the provisions of Article 163 5 of *the Constitution*, which is the right article to be cited. Article 163 5 provides:

> " A certification by the Court of Appeal under clause 4 b may be reviewed by the Supreme Court, and either affirmed, varied or overturned".

24 However, as this Court has previously held in Hermanus, Article 163 4 b is to be read conjunctively with Article 163 5 . On that basis, it properly devolves to this Court to consider the Appellate Court Ruling that granted certification.

25 It is a general principle of evidence, now codified [see Section 107 of the *Evidence Act* Cap. 80, Laws of Kenya], that he who alleges, has the burden of proof. Hence the onus rests on the applicant, in this

application, to set out the shortcomings in the Appellate Court's decision, so this Court may examine them for any fault of the kind alleged.

26 Both parties are in agreement on the factual background to the case, from the High Court hearing, to the Court of Appeal's finding on the primary cause. It is the findings of the Court of Appeal on certification, that is now before us for review. In seeking certification before the Court of Appeal, the respondent set out the issues as follows:

> " a whether the statutory duties of the applicant Kenya Wildlife Service as set out in Section 3A 1 of the Wildlife Conservation & Management Act encompass protection of crops and 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- animal 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 held 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 Rift Valley Agricultural Contractors Ltd crops;
>
> iv. whether the damage caused by wild animals to respondent's crop was remote;
>
> C. whether the Maasai Mara Game Reserve is a National Reserve or Game Reserve controlled by the County Government of Narok previously Narok County Council.
>
> d. whether wildlife is a natural heritage belonging to the Government of Kenya;
>
> e. 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."

27 The Court of Appeal did evaluate the foregoing issues on the basis of the principles in Hermanus, firstly by considering what constitutes a matter of general public importance, as follows paragraph *15* :

> " What constitutes a matter of general importance? The Supreme Court of Kenya in Hermanus Phillipus Steyn v. 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'."

28 The appellate Court then proceeded to recount the governing principles in the determination of matter s of general public importance, as stated in the decision of this Court in Hermanus, while taking note of the Malcom Bell case, in which the Court consolidated the principles founded in both the majority and the minority opinions in Hermanus. In this context, which bears cogency in all respect, in our

view, the Court of Appeal proceeded to evaluate the case before it, making specific findings as follows paragraph 16 :

> " From the undisputed facts in 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."

29 The Serengeti Wildebeest migration is a phenomenal occurrence that happens annually. The wildlife movement is large-scale, as animals march over the borders of Kenya and Tanzania. The occurrence is swift, as the animals traverse the land in strength and haste, to escape the imminent danger of crocodiles waiting to prey on them, in the waters of the Mara River. So spectacular is this process of migration: judicial notice is to be taken that it has been widely perceived as an eighth wonder of the world. With such a large-scale wildlife motion annually, major environmental and related impacts are unavoidable, and we would perceive no fault, with respect, in the view of such a phenomenon as was taken by the Appellate Court.

30. The migration will recur over and over again; and the burden of its impacts will fall on all farmers in the affected areas. So it is to be expected that over the years, so many other suits may be lodged before the Courts, with parties seeking a resolution to conflicts occasioned by the periodic wildlife migration. Evidently, the annual migration of wildlife should be perceived as a matter of general public importance.

31 The learned Appellate Court Judges did make the following apposite remarks paras 17,18 :

> " 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 the interpretation of Section 3A i of the Wildlife Conservation & Management Act Cap. 276, Laws of Kenya . The intended appeal is to enable the Supreme Court to 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 upon 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 i will give judicial direction and certainty as to whether the Section allows compensation for destruction caused by wildlife.
>
> "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 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."

32 The applicant in its submissions on record, has disclosed no fault in the Appellate Court's perception on this question. This Court for its part, and with respect, holds the Appellate Court's view to exemplify the best course of reasoning.

33 We found limited merit in the main thrust of the applicant's case: that the Appellate Court had not duly considered the Judgments of the High Court and the Court of Appeal on the substantive suit. To the contrary, the Ruling of the Court of Appeal is emphatic on the terms of the substantive decision. There had indeed been a proper evaluation of the reasoning of the High Court and the Appellate Court. Let us recall, for instance, that the Appellate Court in granting the certificate for further appeal, thus pronounced itself paragraph 19 :

> " Having examined and analyzed the Judgements 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 in a matter of public interest, the Supreme Court should consider and make a determination on the point of law raised in the intended appeal."

34 Clearly therefore, the applicant has failed to show that the Court of Appeal erred in certifying the matter as one of general public importance, and in granting leave to appeal to this Court. This is a matter that draws considerable public interest. KWS was found liable by both superior Courts. If in the event, KWS pays every year for the damage caused by wildebeest migration, it will follow that the periodic disbursements by this State Corporation will be an accountable element in public funds. The expenditure of public funds is a matter of public interest and, if it is to be an annual obligation, this calls for clear budgetary arrangements, in line with *the Constitution*; that is to say, a matter of public importance.

35 It is thus necessary to make a determination as regards the responsibility of Government, if at all, to recompense private persons for damages occasioned by wild animals in the National and/or Game Reserves. Besides, a significant issue was raised by KWS, when it questioned the status of the Maasai Mara as a 'Game Reserve' or a 'National Reserve'. The determination of this question has vital public implications. If a finding is made that it is a National Park, then the KWS position is that it may be liable to pay compensation, as National Parks fall within the management of national government. However, KWS contends that if it is a 'Game Reserve', which it believes to be the case, then it falls under the management of the devolved Narok County Government, by virtue of the new Constitution, and so KWS has no responsibility for damage caused by wildlife.

36 This Court has held that with the dawn of the current Constitution, certain transitional matters may fall within the category of "matters of general public importance". In the case of Town Council of Awendo v. Nelson Oduor Onyango & 13 Others, Misc. Application No. 49 of 2014, the Court thus pronounced itself, in relation to the certification of matters for ultimate appeal paragraph *35* :

> " From the content of paragraphs 32 and 34, it emerges that while this Court did, in the Hermanus Phillipus Steyn and Malcolm Bell cases, set out an elaborate set of criteria for ascertaining 'matters of general public importance' for the purpose of engaging the Court's jurisdiction, a further criterion has arisen. It may be thus stated. Issues of controversy that emerge from transitional political-economic-social-cum-legal factors, with impacts on

current rights and entitlements of suitors, or on public access to common utilities and services, will merit a place in the category of 'matters of general public importance'."

37 The determination of whether the Maasai Mara is a 'National Park' under the management of the national government, or a 'Game Park' under the Narok County Government, is in our view, such a transitional political-economic-social-cum-legal issue.

38 Consequently, this Court finds no cause to disturb the findings of the Court of Appeal as it made the grant of certification. We are, besides, in agreement with the Appellate Court as regards the issues for determination in the intended appeal, namely:

A. whether Section 3A i of the Wildlife Conservation & Management Act as amended 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 i of the Wildlife Conservation & Management Act Cap 376, Laws of Kenya attracts the 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 the damage caused by migrating wildlife is an act of God, and the loss lies where it falls.

Conclusion And Orders

39 The succinct profile of relevant issues herein, as it emerges from the submissions and analysis, leads us inevitably to the following Orders:

The Originating Motion dated 17th July, 2015 is hereby disallowed.The applicant shall bear the costs of the respondent.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2016.

P. K. TUNOI M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

J. B. OJWANG S. C. WANJALA

JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT

S. N. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registar

Supreme Court