<u>REPUBLIC OF KENYA</u>

<u>IN THE SUPREME COURT OF KENYA</u>

(Coram: Ibrahim, Ojwang, Wanjala, Ndungu & Lenaola SCJ)

PETITION NO. 11 OF 2015

KENYA WILDLIFE SERVICE ....APPELLANT

AND

RIFT VALLEY AGRICULTURAL
CONTRACTORS LIMITED..RESPONDENT

(Appeal from the Judgment of the Court of Appeal (Nambuye, M'Inoti and J. Mohamed, JJ.A) at Nairobi dated 10th October 2014 in Nakuru Civil Appeal No. 212 of 2013)

<u>JUDGEMENT</u>

A. INTRODUCTION

[1] The matter before this Court is a petition of appeal filed by the appellant on 30th July 2015 against the decision of the Court of Appeal delivered on 10th October, 2014.

[2] The appeal is anchored on grounds that the Court of Appeal erred:

(i) In wrongly finding that the Judge of the High Court was right in his analysis of the statutory duties of the appellant as set out in Section 3A (c) and (l) of the Wildlife Act.

(ii) In finding that the appellant was liable to compensate the respondents.

*(iii) In finding that the rules in **Ryland v. Fletcher** apply to the case before the Court.*

(iv) In failing to find that migration of wildlife is a natural phenomenon hence an act of God.

[3] The appellant therefore seeks the following reliefs:

(i) The appeal be allowed.

(ii) The decision of the Court of Appeal be set aside and be substituted with an order allowing the appeal and dismissing the respondent's case in the High Court.

(iii) Costs of the present appeal, the appeal in the Court of Appeal and the High Court case.

(iv) Any other relief that this Court might deem fit.

[4] Over and above the issues that the Court of Appeal flagged as constituting matters of general public importance, the appellant prays for the Court to determine whether under the Wildlife Act, the Government of Kenya was liable to compensate people for loss of crops caused by wildlife as well as whether the Maasai Mara Game Reserve is the property of the appellant or that of the Narok County Government.

B. BACKGROUND

[5] The appellant, the Kenya Wildlife Service, is a statutory body established under the Wildlife (Conservation and Management) Act, Cap 376 of the Laws of Kenya (Wildlife Act). Its statutory duties are laid down in Section 3A of the

Wildlife Act. The respondent is a company incorporated in Kenya under the Companies Act, Cap 486 of the Laws of Kenya. It engages in the business of leasing land in Rift Valley for purposes of planting and harvesting.

[6] It is alleged that between March and June 2000, wild animals from the Maasai Mara Game Reserve entered into one of the respondent's farm situated at Olkirianie Location, Ololunga Division, Narok District and damaged several crops valued at Kshs 64, 160, 130.00.

[7] The respondent filed a case at the High Court in Nakuru- ***Rift Valley Agricultural Contractors Limited v. Kenya Wildlife Service High Court Civil Case No. 256 of 2000***. It claimed that the appellant breached its statutory duties set out in Section 3A(c) and (l) of the Act. In the alternative, it argued that the appellant was negligent and thus liable under the rule laid down in ***Ryland v. Fletcher [1866] LR 1Ex 265*** (***Ryland v. Fletcher***).

[8] The appellant refuted the respondent's claim and argued that the Maasai Mara Game Reserve was the property of the Narok County Council (now the Narok County Government). It also contended that the respondent should have sued the Government of Kenya because wildlife is classified as a heritage of the people of Kenya, therefore the Government should be held liable to compensate any loss occasioned as a result of the wildlife. Finally, it argued that the migration of wildlife is an act of God therefore the rule in ***Ryland v. Fletcher*** was not applicable in the case.

[9] In a judgment delivered on 27th July 2011 *Ouko J,* found that the appellant was in breach of its statutory duty as provided under Section 3A(i) of the Wildlife

Act and that it was liable under the rule in ***Ryland v. Fletcher***. The Court awarded the respondent special damages in the sum of Kshs.31,500,000.

[10] The appellant was aggrieved by the decision of the High Court and filed ***Civil Appeal No. 212 of 2013*** at the Court of Appeal at Nakuru. It relied on the following grounds of appeal that the learned judge erred in law and in fact when he:

(i) *Wrongly analysed the statutory duties of the appellant under Section 3A of the Wildlife Act and finding that one of the statutory duties of the appellant is to ensure that the protection of the crops and domestic animals against destruction by wild animals.*

(ii) *Found that the common law rule in* ***Ryland v. Fletcher*** *is applicable to the case yet there is statute, which provides for the duties of the appellant.*

(iii) *Failed to evaluate evidence to show that the Maasai Mara Game Reserve is not a national reserve but a game reserve under the control of the then Narok County Council.*

(iv) *Failed to find that the migration of wildlife is an act of God.*

(v) *Failed to distinguish this case with the case of* ***Joseph Boro Ngera & Superduka Nakuru Limited v. Kenya Wildlife Service Civil Appeal No. 171 of 1997****.*

(vi) *Failed to find that the Wildlife Act provides that wildlife is a natural heritage belonging to the Government of Kenya therefore the Government is responsible for compensation in case of claims relating to injury or damage to property.*

(vii) *Found that the respondent had proved its claim specifically yet the record indicates that there was no evidence that the respondent had leased any of the land as alleged and that the respondent's alleged loss*

was purely based on estimates that could not be verified and could not specifically prove the loss.

[11] In a Judgment delivered on 10th October 2014, the Court of Appeal (*Nambuye, M'Inoti & J. Mohammed JJA*) agreed with the High Court decision that the appellant was under a statutory duty under Section 3A (i) of the Wildlife Act to protect the respondent's crops from damage and that even though there was no statutory remedy, the respondent could claim damages under the common law and thus dismissed the appeal with costs.

[12] Consequently, the appellant filed at the Court of Appeal, ***Civil Application No. SUP. 19 of 2014 (UR 13/2014)***, in which it implored the Appellate Court to certify that the matter was one of general public importance in order for it to appeal to the Supreme Court. On 3rd July 2015, the Court of Appeal (*Mwera, Mwilu & Otieno-Odek, JJA*) delivered a Ruling in which certification was granted.

[13] It is worth noting that on 17th July 2015, the respondent filed, at the Supreme Court, an application (***Rift Valley Agricultural Contractors Limited v. Kenya Wildlife Service S.C. Motion No. 13 of 2015***) to review the certification issued by the Court of Appeal. However, this Court (*Tunoi, Ibrahim, Ojwang, Wanjala & Njoki SCJJ*) in a ruling dated 20th April 2016, found that there was no reason to overturn the decision of the Court of Appeal that certified the matter as one of general public importance.

[14] In the meantime, the appellant had filed their petition of appeal dated 30th July 2015, against the decision of the Court of Appeal in *Civil Appeal No. 212 of 2013*.

C. SUBMISSIONS OF THE PARTIES

i. The appellant's submissions

[15] The appellant has presented submissions in line with the four issues the Court of Appeal laid down when certifying the matter as one of general public importance. On the first issue of whether Section 3A(i) of the Wildlife Act, as amended, imposes a liability on the part of the appellant, to compensate any person for loss or destruction to crops caused by wildlife, the appellant presented a historical chronology of the law relating to compensation in wildlife conservation and management in Kenya.

[16] The appellant cites the Wildlife (Conservation and Management) Act of 1976, which repealed the Wild Animals Protection Act of 1962. Section 62(1) of the 1976 Act provided for compensation in instances where wildlife caused damage or loss to crops and property or bodily injury or death to a person. The Wildlife (Conservation and Management) Amendment Act No. 16 of 1989 (Amendment Act) later amended the Wildlife (Conservation and Management) Act of 1976. The Amendment Act expressly provides for the functions of the Wildlife Service.

[17] The appellant further submits that Section 62(1) was amended and compensation in respect of damage to crops or property was repealed, therefore leaving compensation only in instances where wildlife caused bodily injury or death of a person. It is the appellant's case that a reading of the Act shows that the Government has always had the primary responsibility of paying compensation and that the appellant's role is only to manage and offer advice on issues related to wildlife. The appellant underscored that Section 118 of the

Wildlife (Conservation and Management) Act No. 46 of 2013 repealed the Wildlife Act Cap 376. It is submitted that Section 25(1) of the 2013 Act also leaves out compensation in instances where wildlife has caused damage to crops.

[18] As regards whether a breach of Section 3A (i) of the Wildlife Act of the Laws of Kenya attracts liability on the part of the Kenya Wildlife Service to compensate for loss or destruction of crops by wildlife, counsel submitted that the provisions of the various Acts shows that the Kenya Wildlife Service should not be held liable.

[19] On whether wildlife is the Government's property, the appellant submits that there is no legislation that provides that Kenya Wildlife Service owns wildlife. Instead, it is the appellant's case that under Section 3A of the Amendment Act, the Kenya Wildlife Service was established as an autonomous parastatal with the authority to conserve and manage wildlife in Kenya. The appellant reiterates that it is an organ of government and only performs its functions on behalf of the Government of Kenya.

[20] On the issue of whether the appellant had a common law obligation, under the rules set out in ***Donoghue v. Stevenson*** and ***Ryland v. Fletcher***, to compensate the respondents for the damage caused by the wildlife on the crops, the appellant argues that the respondent cannot rely on these cases. This is because migration of wildlife is an act of God which the appellant has no control over and in any event the migration has also been declared an eighth wonder of the world. In the same breadth, it is the appellant's case that ***Donoghue v. Stevenson*** is distinguishable from this case because this present case does not deal with product liability as was in the ***Donoghue v. Stevenson***. This is because wildlife is a natural resource, which the appellant did not create.

[21] The appellant also cited the case of ***Joseph Boro Ngera & Superduka Nakuru Ltd v. Kenya Wildlife Service Civil Appeal No. 171 of 1997 (E &L) 314*** (***Joseph Ngera***) where the appellants in that case attributed the loss of their wheat crops to the Kenya Wildlife Service because the birds from Lake Nakuru National Park destroyed the crops. It was argued that KWS breached its statutory duties set out in Section 3A(c) and (l) of the Wildlife Act. The Court of Appeal dismissed the suit and held that: (i) Parliament intended to impose an obligation on the respondent (KWS) to render services necessary to protect a limited class of persons, that is, the farming and ranching communities; and (ii) the Amendment Act removed compensation for damage or loss of crop by wildlife but the appellant had the option of pursuing a common law remedy.

[22] The appellant submits that the game reserve is the property of, and governed by the County Government of Narok and therefore urges this Court to find that if in fact the respondent has a cause of action, it ought to be directed to the Narok County Government.

ii. The respondent's submissions

[23] The respondent submits that under Section 3A(i) of the Wildlife Act, the appellant is under a statutory duty to formulate policies, but also to ensure that the protection of crops and other domestic animals against destruction by wildlife. It further argues that although the Wildlife Act does not provide for compensation in instances of breach of the Act, the respondent has a claim for damages under the common law. To support this argument, the respondent relies on Clark & Lindsell on Tort, 12th Edition at paragraph 1407, which states that:

> ***"If a statute creates a duty but imposes no remedy, civil or criminal for its breach, there is a presumption that the person who is injured thereby will have a right of action, for otherwise the statute would be put a pious aspiration."***

[24] The respondent contends that the people of Kenya have bestowed upon the appellant, public trust to manage wildlife on its behalf. Therefore, it argues that the people, through their elected representatives gave the appellant the duty to manage wildlife on their behalf. Therefore, when the obligation arises, the appellant cannot abdicate its role.

[25] The respondent also agrees with the Court of Appeal decision in ***Joseph Ngera*** in so far as it places an obligation on the respondent under Section 3A of the Wildlife Act.

[26] It is the respondent's case that the rules in ***Donoghue v. Stevenson*** and ***Ryland v. Fletcher*** apply in this case; therefore there is a common law obligation on the appellant to compensate any person for damage or destruction caused by the wildlife.

[27] As regards whether the migration of the wildlife was an act of God, the respondent submits that the question of whether it was an act of God is a question of fact. It contends that the movement of the wild animals was as a result of drought and migration, which could be foreseen and prevented by the appellant. The respondent urges this Court to first determine first whether the migration was foreseeable and whether the appellant should have taken a reasonable degree of care and diligence to make sure that the wildlife does not

destroy the crops on the respondent's land. The respondent submits that the appellant was aware of the migration and failed to take any reasonable steps to stop the wild animals from entering into the respondent's land and destroying its crops.

D. ISSUES FOR DETERMINATION

[28] The following issues crystallize for determination by this Court:

1. *Whether Section 3A(l) of the Wildlife (Conservation and Management) Act, Chapter 376 of the Laws of Kenya as amended, and any breach thereof of the said Section imposes a liability on the part of the appellant, the Kenya Wildlife Service, to compensate any person for loss or destruction to crops caused by wildlife?*
2. *Whether there is a common law obligation under the principle in **Donoghue v. Stevenson** and the rule in **Ryland v. Fletcher** on the part of Kenya Wildlife Service to compensate any person for damage or destruction caused by wildlife?*
3. *Whether damage caused by migrating wildlife is an act of God and the loss lies where it falls?*
4. *Whether the Government ought to be liable for destruction by wildlife?*

Whether the respondent is liable for contributory negligence?

5. ***ANALYSIS***

1. ***Whether Section 3A(l) of the Wildlife (Conservation and Management)Act, as amended, and any breach thereof of the said Section imposes a liability on the part of the appellant?***

[29] The Wildlife Act provides under Section 3A, stipulates that***:***

> ***"The functions of the Service shall be to—***
> ***…;***
> ***(c) manage National Parks and National Reserves;***
> ***…***
> ***(l) render services to the farming and ranching communities in Kenya necessary for the protection of agriculture and animal husbandry against destruction by wildlife."***

[30] This provision is unequivocal that the appellant, the Kenya Wildlife Service (KWS) has the obligation of rendering services to communities in Kenya, such as would be necessary for the protection of agriculture and animal farming against destruction by wildlife. It has been urged by the appellant that this provision has nothing to do with destruction of crops. The ordinary meaning the term 'agriculture' according to the Merriam-Webster Online dictionary is:

> ***"[T]he science, art, or practice of cultivating the soil, producing crops, and raising livestock and in varying degrees the preparation and marketing of the resulting products."***

[31] It cannot be gainsaid that the services to be rendered by the appellant pursuant to this provision are to ensure crops cultivated, as well as animals reared on land are protected from destruction by wildlife. Any other interpretation of this provision would be grossly narrow and simplistic.

[32] Having said that, this Court has to determine whether the duty to protect the crops and animals reared on the land is accompanied by a corresponding duty to compensate for destruction to crops, occasioned by wildlife.

[33] Paul Ward BL, in his paper, "Liability in negligence of statutory bodies for breach of statutory duty," presented on 14th December, 2013 alludes to the challenge that Courts have had to grapple with in trying to superimpose on a statutory duty a common law remedy. That notwithstanding, he elucidates that:

> ***"[I]t is clearly established in all common law jurisdictions that public bodies can be held liable in negligence for the negligent exercise of statutory duties and powers."***

[34] He cites the decision of the House of Lords in ***X (Minors) and Others v. Bedfordhire L.A,*** [1995] 3 ALL E.R. 353, in which the Court held that a breach of statutory duty could only be maintained upon an interpretation of the statute that intended to confer a common law right of action. He observes thus:

> ***"A simple claim of a breach of the statute could not be maintained on its own. As statutes rarely specifically confer a common law right of action on individuals, a common law right of action, however, could be inferred in the interpretation of the statute if the statute was intended to protect a particular class of person. A second claim of the negligent or careless performance of a statutory duty or power could be maintained provided the plaintiff could establish the first claim of breach of statutory duty."***

[35] In light of the foregoing, we are persuaded that though there is no obligation expressly imposed on the appellant under the Wildlife Act to compensate for

destruction of crops by wildlife, the statutory duty imposed under Section 3A(l) is actionable under common law.

[36] It would therefore be liable under the tort of negligence despite the lack of an express provision of statute to that effect. Under this tort four elements must be proven. The Global CCS Institute, University College London, in its publication *Legal liability and carbon capture and storage: a comparative perspective* (2014) describes those four elements in the following terms:

> ***"Four key elements predominate in establishing a negligence claim - a duty of care, a breach of that duty, causation, and damage. A defendant must owe a 'duty of care' to the person bringing the claim, in the sense that they fell within a class of interests which the law considers should be protected. ... There is a breach of that duty involving a failure to take reasonable care. Causation must be proved, and the type of damage alleged must be protected by the law.***

[37] Counsel for the respondent referred this Court to the essentials of a cause of action in event of a statutory breach, highlighted in Halsbury's Laws of England 3rd Ed. Vol. 36 para. 689 in the following words:

> ***"In order to succeed in an action for damages for breach of statutory duty the plaintiff must establish a breach of a statutory obligation, which on the proper construction of the statute was intended to be a ground of civil liability to a class of person of whom he is one; he must establish an***

injury or damage of a kind against which the statute was designed to give protection and must establish that the breach of statutory obligation caused, or materially contributed to, his injury or damage."

[38] In the present matter Section 3A without a doubt imposes a duty on the appellant to protect the crops from destruction by wildlife. In addition, the respondents have demonstrated to this Court that their crops were destroyed by migrating wildlife hence, the duty imposed by Section 3A is towards persons such as the respondent. They have also demonstrated that the loss they suffered was a direct result of the migration of wildlife.

[39] Counsel for the respondent also signaled to this Court the remarks of Clarke & Lindsell on Tort, 12th edition, para. 1407 which explicate that:

> ***"If a statute creates a duty but imposes no remedy, civil or criminal for its breach, there is a presumption that the person who is injured thereby will have a right of action, for otherwise the statute would be but a pious aspiration."***

[40] Counsel for the appellant urged that the game reserve in question was not under the management of the appellant but rather it was managed by Narok County Government hence they would be liable for destruction of crops by wildlife. A look at Article 62 of the Constitution brings to bear that national parks and game reserves are not among the land that vests in county governments. In the same vein, management of national parks and game reserves is not a function that has been devolved to the county government under the Fourth Schedule to the Constitution. We opine that this Court is not privy to the arrangement

between the appellant and the Narok County Government (which is not a party in this appeal) concerning the management of the game reserve in question.

[41] However, it behooves us to clarify that where a statutory obligation is imposed on a person, such obligation cannot be abdicated by that person even if it is expressly permissible under the Constitution or statute to do so. The express provisions imposing the obligation will trump any agreement, whether contractual or not, purporting to relinquish such obligation.

[42] The appellant's obligations under Section 3A(l) could not and were not abdicated in favour of, or transferred to Narok County Government. Without belaboring this point any further we find that breach of Section 3A (l) imposes a liability on the appellant to compensate for destruction of crops by wildlife.

2. ***Applicability of the principle in <u>Rylands v. Fletcher</u>***

[43] In the celebrated case of ***Rylands v. Fletcher,*** (1868) UKHL 1, the House of Lords upheld the decision of the trial Court as well as that of the Court of Appeal. In summary the facts of that case were that the Fletcher who owned land which was neighbouring Rylands' land engaged an independent contractor to construct a water reservoir on his land. Due to the negligence of the independent contractor when the reservoir was filled with water it flowed through some underground mine shafts, unknown to both the independent contractor as well as Fletcher, and flooded Rylands' mines causing damage. At trial *Blackburn J.* held:

> ***"We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes,***

must keep it in at his peril, and, if he does not do so, he is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient."

[44] The House of Lords augmented the trial Court's decision through the addition of the element of "non-natural use" and held that:

" … if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, - and if in consequence of their doing so, or in consequence of any imperfection in the mode 'of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for

the consequence of that, in my opinion, the Defendants would be liable …"

[45] In summary the elements of the principle in ***Rylands v. Fletcher*** are:

(i) the defendant must make a non-natural use of his land;
(ii) the defendant must bring something onto his land which is likely to do mischief if it escaped;
(iii) the thing in question must actually escape; and,
(iv) damage must be caused to the plaintiff's person or property as a result of the escape.

[46] The meaning ascribed to "non-natural use" was explained by Lord Moulton in ***Rickards v. Lothian,*** [1913] A.C. 263 (C.A.). He observed that:

> ***"It is not every use to which land is put that brings into play that principle. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."***

[47] The principle in ***Rylands v. Fletcher*** is based on an "escape" from land in occupation of the defendant. In ***Read v. Lyons,*** [1947] A.C. 156, it was held that the escape must be from land under the control of the defendant

[48] In ***Cambridge Water Co. v. Eastern Counties Leather PLC,*** 1 All E.R. 53 (H.L. 1994), Lord Goff, writing for a unanimous House of Lords,

indicated that reasonable foreseeability of harm was an essential element in cases similar to ***Rylands v. Fletcher.***

[49] It is our considered view that the principle in ***Rylands v. Fletcher*** is not applicable in the case before us; firstly, because the presence of the wildlife on the land is not a non-natural use of the land in question – even without delving into the question whether the appellant is the owner of the land. Secondly, the appellant did not bring the wild animals onto the land. Thirdly, the escape must be from land in occupation of and/or under the control of the appellant. The appellant is not in occupation of the land in question, neither was the land under its control. It is not in doubt that the land in question is owned and managed by the Narok County government.

[50] We hasten to add that there have been recent developments in the principle in ***Rylands v. Fletcher*** such as the inclusion of the element of foreseeability as indicated earlier. However, we shall not delve into that in this matter seeing that the principle is not applicable.

3. Applicability of the principle in <u>Donoghue v. Stevenson</u>

[51] Counsel for the respondent urged that the principle in ***Donoghue v. Stevenson,*** 1932 SC (HL) 31; [1931] UKHL 3; [1932] UKHL 100; [1932] AC 562 is applicable in this case, therefore there is a common law obligation on the appellant to compensate any person for damage or destruction caused by wildlife.

[52] In that landmark case, the facts were; Mrs. Donoghue found a decomposed snail in ginger beer which she had partly consumed. As a result, she suffered

severe shock. She claimed against the defendant who was the manufacturer of the ginger beer, for breach of duty. As per *Lord Atkin,* for determination by the court was the question:

> ***"[W]hether the manufacturer of an article of drink sold by him to a distributor in circumstances which prevent the distributor or the ultimate purchaser or consumer from discovering by inspection any defect is under any legal duty to the ultimate purchaser or consumer to take reasonable care that the article is free from defect likely to cause injury to health."***

[53] The House of Lords held, per *Lord Thankerton*, that it is incumbent upon the party claiming redress to show that there was some relation of duty between claimant and the respondent which requires the respondent to exercise due and reasonable care for the sake of the claimant, because a man cannot be charged with negligence if he has no obligation to exercise diligence.

[54] By a majority of three to two, the House of Lords held, *per Lord Thankerton,* that the contention of the appellant was sound and that she had relevantly averred a relationship of duty between the Respondent and herself, and that her averments of the respondent's neglect of that duty are relevant.

[55] Lord Atkin, while explaining on a person's liability for negligence and the persons who may claim redress, observed that:

> ***"[R]ules of law arise which limit the range of complaints and the extent of their remedy. The rule that you are to love your neighbour becomes in law you must not injure***

> ***your neighbour; and the lawyer's question "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."***

[56] The principle in ***Donoghue v. Stevenson*** is applicable in respect of where a person owes a duty of care to persons who are closely and directly affected by his act, so that he ought to reasonably foresee they will be affected. However, the principle, to the effect that a manufacturer owes a duty of care to the consumer of his goods is outrightly inapplicable in the present matter, since it has nothing to do with manufacture of goods.

4. ***Whether damage by wildlife is an 'act of God'?***

[57] Black's Law Dictionary defines 'act of God' as:

> ***"An overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado. The definition has been statutorily broadened to include all natural phenomena that are exceptional, inevitable, and irresistible, the effects of which could not be prevented or avoided by the exercise of due care or foresight."***

[58] Jill M. Fraley, in his article, *"Re-examining Acts of God", (2010) Pace Environmental Law Review, Vol. 27,* in relying on the definition by Congress in several statutes in the United States of America propounds that:

> ***"[A]n act of God is "an unanticipated grave natural disaster or other natural phenomenon of an exceptional, inevitable and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight." This definition includes multiple elements: (1) "natural" causation; (2) a lack of foreseeability; (3) that "nature" must be the exclusive or sole cause; and (4) the effects must not have been preventable by reasonable due care or foresight of the defendant. While the concept of acts of God cannot be reduced to simply the idea of "forces of nature," acts of God are understood to be a subset of these, thereby immediately raising the question of which acts are natural and which are human."***

[59] Fraley's views are sound, and we are persuaded that they replicate the legal position in our jurisdiction with regard to 'act of God': that there has to be an aspect of "natural" causation; the event or act should be one that could not have been foreseen; that "nature" must be the exclusive or sole cause; and, the effects could not have been avoided by reasonable due care or foresight on the part of the defendant.

[60] The element of foreseeability is commonly taken into consideration in determining whether an impugned act is an 'act of God.' Myanna Dellinger, in her

article "*An 'Act of God'? Rethinking Contractual Impracticability in an Era of Anthropogenic Climate Change," (2016) Hasting Law Journal, vol. 67* alludes to the element of foresight in the following terms:

> ***"'[T]he involvement of man in anticipating and averting the danger' was and, to some extent still is, critical. In other words, the alleged incident must be due to direct and exclusive natural causes so that the incident 'could not have been prevented by any amount of foresight and pains and care reasonably to be expected' from a party."***

[61] Dellinger, posits that the courts should limit the applications of 'act of God' to events that can truly be classified as extraordinary and unforeseen in view of today's readily available knowledge of weather patterns and climate change. We are convinced that, in like manner, the migration patterns of wild animals are predictable and adequate preparation must be made by relevant authorities to ensure that loss arising from migration is avoided.

[62] We agree with the proffered views, as we do with the Court of Appeal decision in this matter; that in determining whether the event in question was an 'act of God', significant consideration must be given to the question whether the event was reasonably foreseeable. The Appellate Court observed:

> ***"On the defence that the destruction of crops by wildlife was an act of God, Winfield and Jolowicz on Torts 18th Edn, 2010, para 15-17 states:***
>
> > ***'In law, then, the essence of an act of God is not so much a phenomenon which is sometimes attributed to a positive intervention of the***

> ***forces of nature, but a process of nature not due to the act of man and it is the negative side which deserves emphasis. The criterion is not whether or not the event could reasonably be anticipated, but whether or not human foresight and prudence could reasonably recognize the possibility of such an event.'***

[63] Despite the claims by the appellant that the movement of wild animals was due to drought and migration, the Appellate Court proceeded to find that 'act of God' was inapplicable in the present case. We agree with this finding, for the reason that migration of wildlife, especially within the land in question is an annual occurrence, hence foreseeable to any reasonable person. Similarly, we are of the opinion that occurrence of drought is reasonably foreseeable within the region in question. Therefore, the appellant's claim of 'act of God,' inevitably, fails.

5. ***Whether the Government ought to be liable for destruction by wildlife?***

[64] The appellant urges that the Government of Kenya being the owner of the wildlife would be the suitable party to bear liability for damage occasioned by wildlife, instead of KWS. The provisions of Section 3A are very clear as to who bears the obligation to protect agriculture and animal husbandry – it is KWS. The remarks of Thomas Shearman and Amasa A. Redfield, in their book, *A Treatise on the Law of Negligence,* (1869) Baker, Voorhis & Co. Publishers, New York, are very insightful on this. They intricately explain who the owner of an animal is in relation to the tort of negligence and observe, at page 227, that:

"The owner of an animal, within the meaning of the rule, is the person who has the control of it, or whose duty it is to have such control. Presumptively, of course, the lawful owner has this control, or duty of control; but if it appears that he has not in fact, he is not responsible for the animal."

[65] It follows, therefore, that though the Government would ideally be expected to have control of the wildlife, factually it was KWS which had the duty of control of the wildlife by dint of Section 3A of the Wildlife Act. Consequently, the liability for the damage occasioned falls on it.

6. A signal for Legislative intervention on Policy?

[66] A global comparison of laws and jurisprudence relating to animal and wildlife management normally provide that an entity charged with such a management task also collects the revenues generated from activities relating to the same. The rationale being that such revenue supports the costs of management and any related outcomes, including compensation for damage made by animals and wildlife. The architecture of the current law in Kenya – the Wildlife Conservation and Management Act No.47 of 2013, follows this rational principle – that the management of national parks lies with Kenya Wildlife Service which is also the revenue collector at these parks – *with the exception of the Maasai Mara National Park*. In the case of Maasai Mara, although the management of the park lies with Kenya Wildlife Services, the recipient of revenue collection belongs to the County of Narok. The Wildlife Act gives responsibility to Kenya Wildlife Service as the Park revenue collector to compensate for damage occasioned by wild animals. Indeed, this has been the

procedure in all other parks in Kenya. However, the instant case before the court is an interesting one, where Kenya Wildlife Service which does not collect revenue from the Maasai Mara but has been found liable for compensation by dint of the law. The county that receives this revenue is not liable. When therefore, the issue of compensation is raised, its application and resolution appears disjointed compared to the norm as practiced elsewhere in the country and indeed the world. We deem it fit to recommend that this is a dilemma that ought to be studied and possibly remedied by Parliament.

[67] Further we also make note that whereas compensation for damage occasioned by wildlife has been devolved to counties under section 18 of the Wildlife Conservation and Management Act: still compensation for loss to crops, livestock or other property from wildlife is subject to the rules made by the Cabinet secretary, which have not yet been enacted. Similarly, the Wildlife Conservation and Management (Compensation Scheme) Regulation 2015 which contemplate how to deal with claims for human death or injury and crop and property damage caused by wildlife, is yet to be implemented. There is therefore urgent need for parliament to pass into law the said regulations to make the compensation process provided for in the Act functional.

[68] We make further note that at present globally, the insurance sector is so advanced that there are insurance covers available for virtually any conceivable type of loss that may be suffered. Consequently, one would reasonably expect an owner of land adjoining a Game Reserve to take an insurance policy, to cover the crop against possible destruction by wildlife. By so doing, they avoid the contingency of hefty losses being suffered due to destruction of the crop by wildlife. Indeed, an owner of land that has close proximity to a National Park or

Game Reserve is expected to insure his crop, failing which a Court of law would have to apportion to him a degree of negligence. Consequently, based on the apportionment, the claimant only recovers part of the loss incurred as opposed to the full amount. In view of this, it is our recommendation that the Legislature ought to consider whether or not affected parties such as farmers, ought to take up mandatory insurance policies.

E. ORDERS

[69] Consequently, we make the following Orders:

(i) The Judgement of the Court of Appeal dated 10th October, 2014 is hereby upheld.

(ii) For the avoidance of doubt, the Judgement of the High Court delivered on 27th July, 2011 awarding the respondent Kshs.31,500,000 is hereby affirmed.

(iii) Each party will bear its own costs.

DATED and **DELIVERED** at **NAIROBI** this 27th **Day** of **April** 2018

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M. K. IBRAHIM	**J. B. OJWANG**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

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S. C. WANJALA	**S. N. NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

………………………………………………

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy

of the original

REGISTRAR

<u>SUPREME COURT OF KENYA</u>