

REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA  
ELCEPA NO. E007 OF 2025

*[FORMERLY NAIROBI ELCEPA NO. E004 OF 2025]*

FOSSILS SUPPLIES LIMITED .....  
APPELLANT

VERSUS

HAKI KENYA ORGANIZATION CBO ..... 1<sup>ST</sup>  
RESPONDENT

MICHAEL BARAZA NATO ..... 2<sup>ND</sup>  
RESPONDENT

KIBWANA MWIJUMA KIBWANA ..... 3<sup>RD</sup>  
RESPONDENT

NASIB FOSTER FASTINO ..... 4<sup>TH</sup>  
RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....  
.....5<sup>TH</sup>  
RESPONDENT

*[Being an appeal from the ruling of the National Environment  
Tribunal at Nairobi delivered on 1<sup>st</sup> July 2025 in Tribunal Appeal No.  
003 of 2025]*

JUDGEMENT

1. The appellant filed this appeal through the memorandum of appeal dated 9<sup>th</sup> July 2025 raising the following eight (8) grounds that:

- a) *“The learned members of the Tribunal erred in law and in fact in dismissing the notice of preliminary objection by the 5<sup>th</sup> respondent dated 24<sup>th</sup> March 2025, an application that was unopposed. That the 1<sup>st</sup> to 4<sup>th</sup> respondents neither filed a response nor written submissions in opposition to the said preliminary objection, it is unclear the circumstances under which the Tribunal unilaterally dismissed it.*
- b) *The learned members of the Tribunal erred in law and fact by descending into the arena of litigants, defending the said preliminary objection and the Tribunal thereafter awarding itself favourable orders, through the impugned ruling.*
- c) *The learned members of the Tribunal erred in law and fact by delivering and issuing to the parties an unsigned ruling.*
- d) *The learned members of the Tribunal erred in law and fact by delivering a per incurum ruling.*
- e) *The learned members of the Tribunal erred in law and fact in delivering a ruling that flouted the principle of stare decisis and inextricably deviated from the previous*

*consistent precedents of the superior courts and the Tribunal itself on the subject matter of this appeal.*

*f) The learned members of the Tribunal erred in law and fact in finding that “issues of fact” had been raised in the said preliminary objection. A determination of the question of the date an appeal was filed vis-à-vis the requisite filing timeline and applicable section are not issues of fact, they are questions of law.*

*g) The learned members of the Tribunal erred in law and fact by grossly misdirecting themselves on the import, meaning and application of section 129 of the Environment Management and Co-ordination Act, contrary to previous precedents of the superior courts and the Tribunal.*

*h) The learned members of the Tribunal erred in law and fact in failing to consider and give consideration to the pleadings and submissions of the appellant and 5<sup>th</sup> respondent in respect to th preliminary objection.”*

The appellant therefore seeks for orders that:

*a) “The ruling of the Tribunal be and is hereby set aside.*

*b) The 1<sup>st</sup> to 4<sup>th</sup> respondents' case before the Tribunal be and is hereby dismissed for being outside the mandatorily prescribed timelines.*

*c) The costs of this appeal and the costs in the Tribunal be awarded to the appellant.*

*d) Interest on costs of this appeal and the costs in the Tribunal."*

2. The appellant filed the Record of Appeal, and Supplementary Record of Appeal, dated 19<sup>th</sup> September 2025 and 24<sup>th</sup> September 2025 respectively. The court then admitted the appeal on 16<sup>th</sup> October 2025 for hearing through written submissions. The learned counsel for the appellant filed their submissions dated 28<sup>th</sup> October 2025, while that for the 1<sup>st</sup> to 4<sup>th</sup> respondents and 5<sup>th</sup> respondent filed theirs, both dated the 18<sup>th</sup> November 2025, which the court has considered.

3. From the grounds on the memorandum of appeal and submissions filed, the following issues arises for the court's determinations:

*a) Whether the learned Tribunal members erred in law and fact in finding that the ground on the preliminary objection filed by the 5<sup>th</sup> respondent raises factual issues*

*and would require evidence to be tendered before determination.*

*b) Whether the learned Tribunal members ruling is in conflict with the law and superior court decisions.*

*c) Whether the learned Tribunal members erred in fact and law in failing to uphold the preliminary objection that was unopposed.*

*d) Whether the prayers sought should be granted.*

4. The court has carefully considered the grounds on the memorandum of appeal, the record of appeal, supplementary record of appeal, submissions by the learned counsel, superior court decisions cited thereon, and come to the following determinations:

a. It is appropriate to start by the court reminding itself that its jurisdiction in appeals, involves the task of reappraising, reassessing and re-analysing the evidence/arguments presented by the parties that is on the record, and to come to its own determinations/findings. This process will establish whether the decision of the learned members of the Tribunal/trial court should stand,

and give reasons if found that it should not. In doing the foregoing, the court should take into account the fact that it had no opportunity of hearing or seeing the parties as they testified, and or the counsel as they made their submissions and make an allowance in that respect. See the decisions in the case of Abok James Odera T/A A. J., Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, Selle & Another versus Associated Motor Boat Co. Limited & others (1968) EA 123, Ephantus Mwangi & Anor versus Duncan Mwangi Wambugu 1982 - 88 ICAR 278, Uganda Breweries Ltd versus Uganda Railways Corporation (2002) 2 EA 634 and John Malembi versus Truphosa Cheredi Muderubeu & 2 others (2019) eKLR.

b. In this appeal, it has not been disputed that the 5<sup>th</sup> respondent, which was the 1<sup>st</sup> respondent before the Tribunal, filed the notice of preliminary objection dated 24<sup>th</sup> March 2025, that raised the following grounds:

1. *“The Honourable Tribunal lacks the requisite jurisdiction to hear and determine the present*

*appeal pursuant to section 129(1) of the Environment Management and Coordination Act, Cap 387 Laws of Kenya for failing to comply with the mandatory 60 day timeline for filing such an appeal.*

2. *The appeal is thus bad in law, defective, an abuse of the Tribunal's process and ought to be struck out with costs to the 1<sup>st</sup> respondent."*

The above two grounds are actually raising the same issue for determination, which is whether the Tribunal was with jurisdiction to hear and determine the appeal before it for failure to comply with the 60 days, timeline.

c. The record confirms that the 5<sup>th</sup> respondent and the appellant, who are the 2<sup>nd</sup> respondent in the appeal before the Tribunal, filed their submissions in support of the preliminary objection dated the 28<sup>th</sup> March 2025 and 19<sup>th</sup> May 2025 respectively. In its ruling that is on the Record of Appeal, the Tribunal phrased the issue for determination on the said preliminary objection as *"Whether the instant appeal is time-barred,"* which in my view correctly summarized the ground raised

thereon. The ruling further shows the Tribunal members were alive to the two distinct ways of moving the Tribunal under *Section 129(1) & (2)* of Environment Management and Coordination Act, EMCA, that is set out at paragraph 11 thereof. There is nothing to show or suggest the Tribunal members were unaware of the import of the said provision and or its previous decisions and or those of the superior courts on the same in their analysis. I therefore find no basis to fault their declared position on that legal position as clearly captured at paragraphs 13 to 17 of the ruling. This is especially so as a classical ground of preliminary objection should be a pure point of law, whose determination does not require consideration of any evidence.

d. In the view of the learned Tribunal members, that is discernible at paragraphs 17 to 23 of the ruling, the question on whether the appeal before them is time barred would inevitably require a determination of whether the appeal before them is pursuant to *section 129(1) or 129(2)* of EMCA, and that has to wait until the hearing of the main appeal. The appellant did not

include a copy of the appeal filed before the National Environment Tribunal, NET, in both the Record of Appeal and the Supplementary Record of Appeal, and this court is unable to make a finding on whether the learned Tribunal members finding on the nature of the appeal before can be faulted or not.

e. The appellant and respondents will still have the opportunity to tender evidence and submissions on whether the respondents' appeal falls under section 129(1) or 129(2) of EMCA, during the hearing of the pending appeal, and the learned Tribunal members will definitely render their determinations. Thereafter, any aggrieved party(ies) will have recourse to a second appeal to this court in accordance with the law.

f. Having made a finding that the learned members of the Tribunal did not err or misdirect themselves in finding that the ground raised on the preliminary objection would require evidence to be considered before it can be determined, and noting that this is an appeal on a ruling at the interlocutory stage, this court should guard itself not to appear like it is making any final

determinations on questions of fact and or law that relates to the main appeal pending before the Tribunal. In case after the merit hearing of the said appeal, the Tribunal finds it was one pursuant to *Section 129(1)* of EMCA, then the appellant and 5<sup>th</sup> respondent will ultimately be vindicated, and the 1<sup>st</sup> to 4<sup>th</sup> respondents will be the losers, and vice versa. Whatever the case may be, parties will have been accorded an opportunity to be ventilate their issues in accordance with the right to be heard that is both constitutional and statutory, and the administration of justice will be the winner/victor.

g. All parties and counsel must know that it is not every prayer in every suit, petition, or application that is unopposed that is granted by the tribunal/court. The tribunal/court has the obligation to satisfy itself that the applicant has among others, complied with the requirements under *sections 107 to 109* of the Evidence Act chapter 80 of Laws of Kenya of tendering proof before rendering its decision one way or the other. It does not therefore mean that when the tribunal/court, like in this matter, declined to uphold the preliminary

objection in respect of which no replies had been filed, it had joined the litigation arena and or was defending the preliminary objection or that the orders it made were those favourable to itself. Parties and counsel should remain courteous throughout the litigation process, not just between themselves, but also towards the tribunal/court, for the furtherance of the administration of justice.

h. The upshot of the foregoing is that the appeal is without merit, and the court is of the view that costs in this appeal abide the outcome of the appeal pending before the National Environment Tribunal.

5. Flowing from the foregoing conclusions, the court finds the appellant has failed to prove their appeal to the standard required by the law. The court therefore orders as follows:

*a) The appeal is dismissed in its entirety.*

*b) The costs to abide the outcome of the appeal pending before the National Environment Tribunal.*

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 17TH DAY OF DECEMBER 2025.

S. M. Kibunja, J.  
ELC MOMBASA.

IN THE PRESENCE OF:

APPELLANT : Mr. Kithinji

RESPONDENTS : M/s Muyai for 5<sup>th</sup> Respondent

KALEKYE-COURT ASSISTANT.

S. M. Kibunja, J.  
ELC MOMBASA.

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