

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**  
**ELCA NO. E071 OF 2024**

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<b>BENSON MBUGUA KIMANI</b>	-	<b>APPELLANT</b>
<b>VS</b>		
<b>CAROLINE WARUGONGO</b>	-	<b>1<sup>ST</sup> RESPONDENT</b>
<b>PETER MWANGI</b>	-	<b>2<sup>ND</sup></b>
<b>RESPONDENT</b>		

**RULING**

**(In respect of the Respondents' Preliminary objection dated the 20/1/25)**

1. What is before the court is the Respondents' preliminary objection dated 20/1/25 expressed in the following terms;
  - a. The Respondents raise a preliminary objection on a point of law in this matter in line with the statutory provisions of rules 77, 79, and 84 of the Court of Appeal Rules.
  - b. The Appellant did not file any notice of appeal to the subordinate court nor the Environment and Land Court as prescribed under Rule 77 of the Court of Appeal Rules.
  - c. The Appellant failed to serve the respondents with the notice of appeal as per Rule 79 of the Court of Appeal Rules.
  - d. The Appellant filed a memorandum of appeal dated 24/5/2024 over the Ruling given on 25/4/24 before the BPRT tribunal by Hon Ndegwa Wahome and failed to attach a record of appeal as directed under Rule 84 of the Court of Appeal Rules.
  - e. The Appellant has summarily failed to adhere to the rules laid down under the law for instituting an appeal.
  - f. The memorandum of appeal is therefore bad in law, defective, and an abuse of the court process and should be struck out according to Rule 86 of the Court of Appeal Rules.

2. Upon service of the Preliminary objection, the Appellant filed a reply to the same stating that the objection is a waste of the court's time and that the same is predicated on the wrong premise.
3. He stated that he duly filed a notice of appeal and the record of appeal dated 24/5/25, although late due to problems he encountered with the online CTS system, where he experienced difficulties uploading it. He urged the court to dismiss the objection to pave way for the hearing of the appeal.
4. On 6/5/25, parties elected to canvass the objection by way of written submissions. I have read and considered the submissions filed by the objectors on 30/7/25. The Appellant failed to comply with the court's directions regarding the filing of written submissions.
5. Counsel for the objector submitted and referred the court to the provisions of Rule 13 of the High Court Practice Directions, Court of Appeal Rules 77 (1) and (2) and 79 and faulted the Appellant in failing to comply with the said Rules. The Appellant was further faulted for failing to file both the notice of appeal and the memorandum of appeal together, arguing that the Appellant's position that he filed only the notice of appeal was at best misleading.
6. It was further submitted that the notice of appeal was never served upon the Respondent and that the Appellant's attempt to annex the said notice through a replying affidavit dated 1/6/25 is an afterthought and untenable in procedural law. It was further submitted that the memorandum of appeal was filed outside the statutory period of 14 days allowed in law and that the Appellant is in breach of the provisions of Rule 84 of the Court of Appeal Rules.
7. The court was urged to uphold the preliminary objection in any event on its merits.
8. The key issues for determination are whether the objection is a pure point of law, and secondly, whether it is merited.

9. The test in determining a preliminary objection was set out in the case of **Mukisa Biscuits Manufacturing Company Ltd -Vs- West End Distributors Ltd [1969] EA 696** where the court held that:

“ . .... A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.

Further that:

“It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of discretion.

10. The effect of the case law cited above, is that, for one to succeed in putting up a Preliminary Objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing off the suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.
11. The court must proceed from the premise that an objection must be raised on a pure point of law, the effect of which, if successful, would dispose of the entire suit without allowing parties to go through the trial process. Arguably, the rationale of a preliminary objection is to interject the trial process. Given the draconian ramifications of preliminary objections, the Respondent must be seen to have proceeded in breach of a mandatory legal provision.
12. In this case, the objectors state that the Appellant failed to file the notice of appeal within 14 days in accordance with the provisions of Rules 77, 79, and 84 of the Court of Appeal Rules. Secondly, the Appellant filed a memorandum of appeal dated 24/5/24 against the tribunal's ruling in

BPRT No E37 of 2024, but failed to attach the record of appeal as required under Rule 84 of the Court of Appeal Rules. Consequently, the said appeal is now bad in law, defective, and an abuse of the court's process, and is subject to dismissal.

13. To the extent that the objection questions the provisions of procedural law regarding the filing of appeals, the court finds that the same is a pure point of law.

14. The next question is whether the objection is merited.

15. Appeals are creatures of law. Appeals to this court from the subordinate Courts are governed by the provisions of Section 79G of the Civil Procedure Act. It states as follows;

“79G. Time for filing appeals from subordinate Courts

Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time. [ emphasis is mine].

16. Similar provisions are found under Section 16A of the Environment & Land Court [ELC] which state as follows;

“All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the Environment and Land Court Act (Cap. 8D), provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for

the preparation and delivery to the appellant of a copy of the decree or order.

An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.”

17. Courts in this country are structured hierarchically. All tribunals, except where stated otherwise in the law, are subordinate to the High Court and courts of Equal status. Their appeals therefore lie to those superior courts.

18. Section 15 of the **Landlord and Tenant (Shops, Hotels and Catering Establishments)** ,Cap 301 provides as follows;

“ Any party to a reference aggrieved by any determination or order of a Tribunal made therein may, within **thirty days** after the date of such determination or order, appeal to the **Environment and Land Court:**

Provided that the Environment and Land Court may, where it is satisfied that there is sufficient reason for so doing, extend the said period of thirty days upon such conditions, if any, as it may think fit.

19. Undoubtedly, the provision above provides that a party who is aggrieved by the decision of the tribunal may file an appeal within 30 days of the date of the decision being appealed against. It is also clear from the said provisions that appeals from the tribunal lie to the Environment and Land Court, not to the Court of Appeal.

20. To the extent that the objector has quoted the provisions of the Court of Appeal, the objection must fail. It is also trite that appeals from subordinate courts, including tribunals, do not require an Appellant to file a notice of appeal. It suffices to file a memorandum of appeal within 30 days from the date of the decision that is being appealed against. Order 42 Rule 1 of the Civil Procedure Rules provides as follows;

“(1) Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.”

**21. Final orders for disposal**

a. In the end, the objector premised the objection on wrong and misplaced provisions of the law, and for that reason, the same is unmerited. It is dismissed.

b. I order each party to meet their own costs.

22. Orders accordingly

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF  
DECEMBER 2025 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered Online in the presence of:**

1. The Appellant is present in person
2. Ms Mwangi HB for Ms Kali for the Respondents
3. CA - Ms Yvette Njoroge