

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ELCEPA NO. E002 OF 2025

SAMUEL ROTICH.....
APPELLANT

VERSUS

THE DIRECTOR GENERAL

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY...1ST
RESPONDENT

AMERICAN TOWER CORPORATION.....2ND
RESPONDENT

RULING

Introduction.

1. This ruling is in respect to the 2nd Respondent/Applicant's Notice of Motion application dated 15th January, 2026. The application is expressed to be brought under **Article 159(2)** of the Constitution and **Order 51 Rule 15 & Order 40 Rule 7** of the Civil Procedure Rules.

2. The application seeks the following prayers;

a. *Spent*

b. *Spent*

c. Spent

d. Pending the hearing and determination of this appeal, the status quo orders granted ex parte by this Court on 5th January, 2026 be discharged or, alternatively, set aside ex debito justitiae.

e. The costs of this application be provided for.

- 3.** The application is based on the grounds on its face and the supporting affidavit of **Lee Gachari** the 2nd Respondent/Applicant's Legal Manager. It is sworn on 15th January, 2026.

Factual Background.

- 4.** The Appellant/Respondent filed a Memorandum of Appeal dated 23rd December, 2023 against the decision of **Hon. Winnie Tsuma** in National Environment Tribunal (NET) Appeal No. E005 of 2025 on 25th November, 2025.

- 5.** The grounds of appeal are as follows;

a. That the Tribunal fundamentally erred in law by declining jurisdiction notwithstanding that Sections 129(2) and (3)(b) of the Environmental Management and Co-ordination Act (hereinafter referred to as 'EMCA'), read together with Rules 2, 3 and 4 of the National Environment Tribunal Procedure Rules, expressly confer jurisdiction upon it due to the 1st Respondent's failure/refusal to make a decision within a reasonable time, as occurred here following the Appellant's formal pre-action protocol letter dated 27th February, 2025, which remains unanswered to date;

b. That the Tribunal confined itself to Section 129(1) of EMCA and completely ignored Sections 129(2) and (3)(b), which provide an independent and self-executing appellate jurisdiction where the National Environment Management Authority/1st Respondent (hereinafter referred to as 'NEMA') knowingly fails, refuses, or neglects to act in the face of manifest EMCA violations and live

environmental threats requiring urgent deep EMCA introspection and sweeping orders including environmental restoration;

c. That the Tribunal was expressly aware that the Appellant issued the formal pre-action protocol letter dated 27th February 2025 to NEMA; and NEMA refused to communicate any decision to date despite construction by the 2nd Respondent continuing unabatedly in contravention of EMCA and Article 42 of the Constitution, and continues to date to pose an imminent and serious environmental risk;

d. That these undisputed facts squarely triggered Section 129(2) and (3)(b) of EMCA yet the Tribunal erroneously treated the 1st Respondent's regulatory inaction in the face of ongoing manifest EMCA violations and serious environmental threats posed by the 2nd Respondent's actions as a bar to jurisdiction rather than the very basis of invoking jurisdiction;

e. That by declining jurisdiction on the ground of “inaction” by the 1st Respondent in the face of the 2nd Respondent’s ongoing manifest EMCA violations, the Tribunal;

a. Erroneously defeated the statutory purpose of Sections 129(2) and (3)(b) of EMCA;

b. Erroneously shielded administrative silence from scrutiny in the face of ongoing violations of EMCA by the 2nd Respondent;

c. Illegally/unlawfully sanctioned infringement of the Appellant’s right to access environmental information under Section 3A EMCA; (sic)

d. Denied the Appellant access to environmental justice in contravention of Articles 2(4), 42, 69 and 70 of the Constitution EMCA; and

e. Condemned the vigilance and diligent efforts of the Appellant in enforcing his constitutional and statutory recognized environmental rights without fair hearing in violation of the non derogable right to fair trial under Article 25 (c) of the Constitution and in violation of the doctrine of exhaustion of statutory remedies.

f. The Tribunal thus improperly/sneakily relied on Republic vs National Environmental Tribunal & 2 Others ex parte Athi Water Services Board [2015]eKLR to justify its skewed reasoning in dismissing the Appellants Appeal on account of NEMA's inactions towards the 2nd Respondent which reasoning was rendered bad law two (2) years ago on account of a binding Supreme Court decision in Nicholus vs

**Attorney General & 7 Others [2023]
KESC 113 (KLR).**

g. That the Tribunal fundamentally erred in law by misinterpreting and misapplying the provisions of the Environmental Management and Coordination Act (EMCA), contrary to established principles of statutory interpretation consistently upheld by superior Kenyan Courts under EMCA;

h. That specifically;

a. The Tribunal improperly relied on Republic v National Environmental Tribunal & 2 others ex parte Athi Water Services Board 2015 eKLR to justify its skewed reasoning in dismissing the Appellants Appeal on account of NEMA's inactions towards the 2nd Respondent which reasoning was rendered bad law two (2) years ago on account of a binding

**Supreme Court decision in
Nicholus v Aftorne General
& 7 others 2023 KESC 113
KLR;**

**b. The Tribunal thus
disregarded the plain and
ordinary meaning of
Sections 129(2) and (3)(b)
of EMCA, which expressly
and independently confer
jurisdiction where the
Authority fails, refuses or
neglects to act, thereby
impermissibly importing
extraneous procedural
hurdies not contemplated
by the EMCA statute;**

**c. The Tribunal failed to
apply the golden rule to
avoid absurdity, the
mischief rule to remedy
administrative silence in
the face of ongoing
environmental harm, and
the purposive approach to
advance EMCA's overriding**

protective and remedial objectives;

d. The Tribunal neglected its constitutional duty to interpret EMCA in harmony with Articles 42, 69 and 70 of the Constitution, thereby undermining the specialised environmental justice framework and the Appellant's fundamental right to a clean and healthy environment;

e. Contrary to settled authority that remedial environmental legislation must be construed liberally in favour of protection, the Tribunal impermissibly imported extraneous procedural hurdles not contemplated by statute over a defined and substantive environmental appeal process under EMCA;

f. The Tribunal thus negated and frustrated Parliament's intent that established NET as a specialized tribunal and defined its procedures and processes under EMCA which enables swift intervention against threats and/or violations of the environment such as the ones being committed by the 2nd Respondent in the full knowledge/complicity of the 1st Respondent.

g. The Tribunal interpreted Section 129(1) in isolation, failing to harmoniously construe it with Sections 129(2) and (3)(b) of EMCA and the National Environment Tribunal Procedure Rules, thereby distorting the legislative scheme that provides self-

executing applicable jurisdiction precisely for cases of regulatory inaction/complicity in the face of manifest EMCA violations.

- i. That the Tribunal erred in law by directing the Appellant to pursue judicial review despite the availability of a specialized statutory appeal under Sections 129(2) and (3)(b) of EMCA, in direct violation of the doctrine of exhaustion of statutory remedies;**
- j. That the Tribunal failed to appreciate that the Appellant's claims encompassed live and continuing violations of EMCA by the 2nd Respondent to date and the 1st Respondent's persistent refusal to enforce the law/Act - matters falling squarely within the Tribunal's mandate and requiring comprehensive enforcement remedies unavailable in ordinary judicial review proceedings;**
- k. That the Tribunal further erred in holding that judicial review could**

sufficiently remedy live and ongoing breaches of EMCA and Article 42 of the Constitution, including the issuance of stop orders and restoration directives, when Parliament through EMCA has expressly vested the Tribunal with exclusive jurisdiction to grant such sweeping and specialized environmental reliefs against both Respondents;

I. That the Tribunal erred in law by finding that no appealable decision existed, despite clear and undisputed evidence on record of:

a. The issuance of an environmental improvement notice;

b. The submission, consideration and approval of an EIA project report; and

c. The issuance of an EIA Licence dated 7th April 2025, all in manifest contravention of Section 58 of EMCA (rendering

them null and void ab initio under Article 2 (4) of the Constitution) and admitted on oath by the 2nd Respondent;

m. That in so holding, the Tribunal impermissibly imported and elevated extraneous procedural hurdles not contemplated by the EMCA statute over substantive constitutional environmental rights under Articles 42, 69 and 70, thereby undermining the overriding protective object and preventive principles of the Environmental Management and Coordination Act.

n. That the Tribunal grossly misdirected itself in law and fact by dismissing the appeal as premature, thereby condoning the 1st Respondent's manifest complicity in its persistent refusal to act in the face of the 2nd Respondent's continuing EMCA violations and defeating:

a. The precautionary and preventive principles

enshrined in Section 3 of EMCA;

b. The Appellant's right to access environmental information under Section 3A of EMCA; and

c. The constitutional imperative to prevent environmental degradation/harm under Articles 42, 69, and 70 of the Constitution;

o. That this erroneous finding unlawfully endorses ongoing environmental harm, exposes the community to irreversible risks, and establishes a perilous and skewed precedent antithetical to Kenya's national and international environmental obligations.

6. The Appellant/Respondent seeks for the following orders;

a. An Order allowing this Appeal in its entirety;

b. An Order setting aside the Ruling and Orders of the National Environment Tribunal delivered on 25th November,

2025 in respect of the 1st Respondent's Notice of Preliminary Objection dated 4 April, 2025 delivered by Hon. Winnie Tsuma on 25th November, 2025, in NET Appeal No. E005 of 2025;

c. A finding that the Appellant duly, properly and lawfully invoked the jurisdiction of the National Environment Tribunal in NET Appeal No. E005 of 2025, and that the Tribunal erred in declining to assume jurisdiction;

d. A declaration that the National Environment Tribunal had jurisdiction Under Sections 129(2) and 129(3)(b) of the Environmental Management and Co-ordination Act, and that its refusal to exercise that jurisdiction was unlawful;

e. An order remitting NET Appeal No. E005 of 2025 to the National Environment Tribunal for a full hearing on the merits, or, alternatively, that this Honourable Court hear and determine the

substantive dispute pursuant to the provisions of the Environmental Management and Coordination Act;

f. An Order to maintain the status quo ante prior to the Tribunal's ruling delivered on 25th November, 2025 in respect to the 1st Respondent's Notice of Preliminary Objection dated 4th April, 2025 pending the full hearing and determination on the merits of NET Appeal No. E005 of 2025 by the National Environment Tribunal or, alternatively, by this Honourable Court pursuant to the provisions of the Environmental Management and Co-ordination Act;

g. Costs of this Appeal and the proceedings below be awarded to the Appellant.

7. The Appellant/Respondent also filed a Notice of Motion application dated 23rd December, 2025 where he seeks the following prayers;

- a. This Application be certified urgent and heard ex parte in the first instance during the current Court recess.**
- b. Pending inter partes hearing of this Application and further pending hearing and determination of the Appeal, interim statutory conservatory orders be granted restraining the Respondents (by themselves, their servants, agents, contractors or workmen) from undertaking or continuing any construction, erection, installation, commissioning or operational activities in respect of the telecommunications tower on Plot No. Kericho/Chemoiben/457, including stay of implementation, enforcement or operationalisation of the Ruling delivered by Hon. Winnie Tsuma on 25th November, 2025 in respect of the 1st Respondent's Notice of Preliminary Objection dated 4th April, 2025 in National Environment Tribunal Appeal No. E005 of 2025 pursuant to Section 130 (2) of the Environmental Management and Co-Ordination Act (EMCA).**

c. Pending hearing and determination of the Appeal, statutory conservatory orders and/or statutory stay be granted as in prayer 2 above, including stay of implementation, enforcement or operationalisation of the Ruling delivered by Hon. Winnie Tsuma on 25 November, 2025 in respect of the 1st Respondent's Notice of Preliminary Objection dated 4th April, 2025 in National Environment Tribunal Appeal No. E005 of 2025 pursuant to Section 130 (2) of the Environmental Management and Co-Ordination Act (EMCA).

d. The status quo prevailing prior to the Tribunal's Ruling dated 25th November 2025 be maintained pursuant to Section 130 (2) of the Environmental Management and Co-Ordination Act (EMCA) pending hearing and determination of the Appeal.

e. The Officer Commanding Litein Police Station (or the nearest police station) be directed to enforce the Court's orders, secure the site, halt any further construction activities, and maintain law

and order aft the project site pending hearing and determination of the Appeal.

f. The above orders be additionally enforced by the County Commissioner Kericho County or any designated enforcement authority as circumstances may require.

g. The costs of this Application be provided for in the Appeal.

8. The application dated 23rd December, 2025 came up for hearing on 5th January, 2026 when the Court issued the following directions;

1. The prayer for leave to be heard during vacation is granted.

2. I am not persuaded as to the urgency of the application.

3. The Applicant shall serve the application upon the Respondents within 7 days of the date hereof and file an affidavit of service.

4. The Respondents shall file their responses within 14 days upon service.

5. I have noted that on the 25th November, 2025, the National Environment Tribunal granted a stay of 30 days to the Applicant pending the filing of this appeal.

6. I hereby order that the status quo obtaining as at the date hereof shall be maintained until the date set for inter partes hearing of this application. Parties are at liberty to apply for extension and/or vacation on the said date.

7. The application shall be heard inter partes on 4th March, 2026.

- 9.** The application under consideration first came up for hearing on 19th January, 2026. The Court issued directions that it be served upon the Respondents.
- 10.** On 26th January, 2026 the Court issued directions that the application under consideration be served upon the 1st Respondent.

- 11.** The hearing of the application was adjourned to 2nd February, 2026 when Counsel for the 1st Respondent informed the Court that they will not be opposing the application. The Court then issues directions that the application be canvassed by way of written submissions.
- 12.** Parties filed their submissions which submissions were highlighted orally on 16th February, 2026 and the application reserved for ruling.

The 2nd Respondent/Applicant's Contention.

- 13.** The affidavit in support of the application is sworn by **Lee Gachari**, the 2nd Respondent/Applicant's Legal Manager.
- 14.** He contends that the Appellant/Respondent filed the application dated 23rd December, 2025. He goes on to state that in the said application, the Appellant/Respondent contends that if the Court does not grant any conservatory relief, the pending project will be completed causing irreversible environmental harm and potential health risks.

- 15.** He also contends that the Appellant/Respondent contends that public interest will be defeated and the harm likely to be caused cannot be compensated by an award of damages.
- 16.** He further contends that based on the said averments, the Court issued ex parte *status quo* orders on 5th January, 2026. He goes on to state that the said *status quo* orders were to subsist until 4th March, 2026 when the said application was scheduled for hearing.
- 17.** It is his contention that the Appellant/Respondent procured the said orders through concealment of material facts from the Court.
- 18.** It is also his contention that the Appellant/Respondent contended that the 2nd Respondent/Applicant's construction of the telecommunication towers was non-compliant with the relevant provisions of the law.

19. It is further his contention that the 2nd Respondent/Applicant has been designated as a critical infrastructure owner under the Computer Misuse and Cyber Crimes Act, 2018. He goes on to state that this designation effectively recognizes that its assets are essential to the security and economic wellbeing of communities.

20. He contends that in February, 2025, the 2nd Respondent/Applicant constructed telecommunication towers on land parcel No. **Kericho/Chemoiben/457** to improve telecommunication connectivity within the area.

21. He also contends that the 2nd Respondent/Applicant sought for and obtained the requisite approvals from the Kenya Civil Aviation Authority and the County Government of Kericho before commencement of the project.

22. He further contends that the 2nd Respondent/Applicant conducted a thorough assessment of the project through its appointed Environmental Impact Assessment experts and

prepared an Environmental Impact Assessment Project Report dated 17th March, 2025.

23. It is his contention that the report dated 17th March, 2025 was submitted to the 1st Respondent and the 2nd Respondent/Applicant was granted an EIA license dated 7th April, 2025.

24. It is also his contention that the World Health Organization and the International Council on Non-Ionizing Radiation Protection have both concluded that there is no conclusive evidence that exposure from the base stations have adverse effects.

25. It is further his contention that the Appellant/Respondent filed an appeal before the National Environment Tribunal.

26. He contends that on 25th November, 2025, the tribunal dismissed the Appellant/Respondent's appeal which dismissal constituted a negative order. He adds that the

tribunal also dismissed the Appellant/Respondent's application for injunction.

- 27.** He also contends that following the ruling delivered on 25th November, 2025 the 2nd Respondent/Applicant concluded the construction of the telecommunication tower.
- 28.** He further contends that given the dismissal orders of the tribunal, the Appellant/Respondent ought to have filed a formal application for an Erinford injunction.
- 29.** It is his contention that the *status quo* order continues to cause the 2nd Respondent/Applicant great economic hardship, inconvenience and financial loss.
- 30.** It is also his contention that the *status quo* orders have the practical effect of granting the Appellant/Respondent the very injunctive relief that was dismissed.

- 31.** It is further his contention that he is advised by the 2nd Respondent/Applicant's Counsel on record that this Court has discretion to discharge and/or set aside the *status quo* order obtained by means of concealment of material facts.
- 32.** He ends his deposition by stating that the integrity of the judicial process must be protected at all times. He goes on to state that the justice of this suit demands that the Court grants the orders sought.

The Appellant/Respondent's Response.

- 33.** In response to the 2nd Respondent/Applicant's application, the Appellant/Respondent filed a Replying Affidavit sworn on 22nd January, 2026.
- 34.** He deposes that he is advised by his Counsel on record that the orders issued on 5th January, 2026 were obtained regularly and lawfully.
- 35.** He deposes that the 2nd Respondent/Applicant violated the provisions of the Environmental Management and

Coordination Act. He goes on to state that he filed an appeal before the 1st Respondent who failed to make a decision.

36. He also deposes that consequently, he filed a Notice of Appeal and an application dated 11th March, 2025 before the National Environmental Tribunal.

37. He further deposes that the said appeal invoked the jurisdiction of the tribunal under **Section 129 (3)(b)** of the Environmental Management and Co-ordination Act, **Rules 2, 3 and 4** of the National Environmental Tribunal Procedure Rules which rules refer to **Sections 129 (1) and (2)** of the Environmental Management and Coordination Act. He goes on to state that this was based on the 1st Respondent's failure to make a decision.

38. It is his deposition that the 2nd Respondent/Applicant filed a preliminary objection stating that the 1st Respondent had not made a decision under **Section 129(1)** of the Environmental Management and Coordination Act. He goes

on to state that the National Environmental Tribunal heard the preliminary objection and dismissed his appeal.

- 39.** It is his deposition that he is advised by his advocates on record that the Supreme Court in **Nicholus vs Attorney General & 7 Others [2023] KESC 113 (KLR)** addressed an issue similar to his appeal before the National Environment Tribunal.
- 40.** It is also his deposition that the Supreme Court held that the 1st Respondent's failure to make a decision forms subject of an appeal that can be filed under **Sections 129 (2) and (3)** of the Environmental Management and Coordination Act to the National Environment Tribunal.
- 41.** It is further his deposition that the National Environment Tribunal therefore erred in dismissing his appeal dated 11th March, 2025 in light of the Supreme Court decision and the provisions of **Section 129 (3)(b)** of the Environmental Management and Co-ordination Act, **Rules 2, 3 and 4** of the

National Environmental Tribunal Procedure Rules which rules refer to **Sections 129 (1) and (2)** of the Environmental Management and Coordination Act.

- 42.** It is further his deposition that this Court has jurisdiction to hear and determine the present appeal after the National Environment Tribunal declined to hear him. He goes on to state that he has sought a prayer to that effect under prayer No. (e) on the Memorandum of Appeal dated 23rd December, 2025.
- 43.** He further deposes that the tribunal erred in dismissing his appeal as it was contrary to the decision of the Supreme Court.
- 44.** It is his deposition that after the National Environment Tribunal dismissed his appeal, his Counsel sought for and was granted thirty days stay of the ruling pending appeal. He goes on to state that the said orders of stay were granted

pursuant to **Section 165 (5)** of the Environmental Management and Co-ordination Act.

45. It is also his deposition that Counsel for the 2nd Respondent/Applicant was present when the said orders were issued and he did not oppose their issuance.

46. It is further his deposition that despite Counsel for the 2nd Respondent/Applicant being present when the stay orders were issued, his advocates on record extracted the said orders and had them served upon the 2nd Respondent/Applicant.

47. He deposes that the said orders of stay were neither appealed from nor stayed and they were therefore binding and enforceable.

48. He also deposes that on 30th April, 2025 the National Environment Tribunal issued prohibitory orders. He goes on to state that the stay orders issued on 25th November, 2025

had the effect of ensuring that the prohibitory orders stayed in force.

49. He further deposes that despite the issuance of the said orders, the 2nd Respondent/Applicant resumed construction of the cell tower. He goes on to state that he then filed an application for contempt of the tribunal orders dated 10th December, 2025.

50. It is his deposition that the application for contempt is still pending before the Tribunal.

51. He deposes that the 2nd Respondent/Applicant's contention that he (Appellant/Respondent) ought to have filed an application for an Erinford Injunction is erroneous and aimed at misleading the Court.

52. He also deposes that neither the Environmental Management and Co-ordination Act nor the National

Environmental Tribunal Procedure Rules require that he seeks for an Erinford injunction.

- 53.** It is his deposition that the National Environment Tribunal has power to regulate its proceedings under **Section 126(5)** of the Environmental Management and Co-ordination Act.
- 54.** It is also his deposition that **Section 130(2)** of the Environmental Management and Co-ordination Act provides that an order of the tribunal shall not be enforced until the time for lodging an appeal has expired.
- 55.** It is further his deposition that the application under consideration is a disguised appeal which is aimed at varying the 30 days stay order issued by the Tribunal.
- 56.** He then denies the averments in the 2nd Respondent/Applicant's affidavit in support of the application and deposes that he has not concealed any material facts.

57. He also deposes that the orders of 5th January, 2026 were regularly issued pursuant to **Section 130(2)** of the Environmental Management and Co-ordination Act and Part 1 **Rule 3(1)** and **(2)** High Court (Practice and Procedure) Rules (sic).

58. He further deposes that this Court lacks jurisdiction to entertain the 2nd Respondent/Applicant's Grounds of Opposition as they are indirectly appealing against the stay orders issued by the Tribunal under **Section 130(2)** of the Environmental Management and Co-ordination Act.

59. It is his deposition that the 2nd Respondent/Applicant has in ground (b) in support of the application admitted to completing construction of the cell tower.

60. It is also his deposition this is in contempt of the orders of stay issued by the Tribunal. He goes on to state that the Court should not countenance such open defiance and it should invoke its inherent powers and cite the 2nd

Respondent/Applicant for contempt and impose appropriate punitive sanctions.

61. It is further his deposition that he is advised by his advocates on record that **Articles 42, 69** and **70** of the Constitution and **Section 3** of the Environmental Management and Coordination Act impose an imperative duty for immediate judicial intervention to avert the environmental violations by the 1st and 2nd Respondents.

62. He ends his deposition by urging the Court to dismiss the 2nd Respondent/Applicant's application and issue the following orders;

a. An order directing the demolition and/or removal of the unlawfully constructed cell tower erected in defiance of the Tribunal's Stay Orders;

b. An order suspending all operations, transmission, and commercial use of the said tower pending full compliance with the Tribunal's orders and determination of the dispute; and

c. The personal citation for contempt and attachment of personal liability against the directors, officers, or agents of the 2nd Respondent who authorized, supervised, or condoned the continuation and completion of construction in wilful disobedience of the Court's orders, as this Honourable Court shall deem just and expedient to vindicate the rule of law.

Issues for Determination.

- 63.** The 2nd Respondent/Applicant filed submissions on 4th February, 2026 while the Appellant/Respondent filed his submissions on 11th February, 2026.
- 64.** The 2nd Respondent/Applicant submits on whether this Court should set aside the *status quo* orders.
- 65.** The 2nd Respondent/Applicant relies on **Order 40 Rule 7** of the Civil Procedure Rules, the judicial decision of

D.Chandulal K. Vora & Company Limited vs M'oriental Bank Limited & another [2025]eKLR and submits that a party seeking that an injunction order be set aside must demonstrate that there is a sufficient reason for the Court to exercise its discretion in setting aside and/or discharging the said orders.

- 66.** The 2nd Respondent/Applicant relies on the judicial decision of **Bank of Africa Limited vs Time Trucks Limited & 2 Others [2024] eKLR** and submits that non-disclosure of material facts is a valid ground for discharging an *ex parte* order.
- 67.** The 2nd Respondent/Applicant also relies on the judicial decision of **Signature Tours and Travel Limited vs National bank of Kenya Limited [2017] eKLR** and submits that the Appellant/Respondent obtained the *status quo* orders after firstly contending that it (2nd Respondent/Applicant) commenced construction of the telecommunication mast without first obtaining the relevant regulatory approvals.

68. The 2nd Respondent/Applicant reiterates its averments in the affidavit in support of the application and submits that it obtained all the relevant approvals before commencing construction.
69. It is the 2nd Respondent/Applicant's submissions that secondly, the Appellant/Respondent failed to disclose that the impugned ruling upon which the Court issued *status quo* orders was a negative order.
70. It is also the 2nd Respondent/Applicant's submissions that the negative orders were incapable of being stayed, preserved and/or enforced.
71. The 2nd Respondent/Applicant relies on the judicial decision of **Sonolux Limited & another vs Barclays Bank of Kenya & 2 Others [2008] eKLR** and reiterates that the Appellant/Respondent ought to have sought for an Erinford Injunction if he needed interim protection pending appeal.

The 2nd Respondent/Applicant relies on the judicial decision of **Harrison Wangoro Mwangi vs Family Bank Limited [2015] eKLR** in support of its submissions.

72. The 2nd Respondent/Applicant submits that thirdly, the Appellant/Respondent failed to disclose that the telecommunication tower that is subject to these proceedings is fully constructed.
73. The 2nd Respondent/Applicant also submits that the Court would have therefore taken into consideration commercial and public interest and not curtailed the utilization of an asset that is intended to promote easy access to essential services.
74. The 2nd Respondent/Applicant relies on the judicial decision of **St. Patricks' Hill School Ltd vs Bank of Africa Kenya Limited [2018] eKLR** and submits that it is in the interest of justice that the *status quo* orders be set aside.

75. The 2nd Respondent/Applicant also submits that firstly, the said orders were issued *ex parte* and it was not given an opportunity to be heard as the said orders substantially affect its proprietary and commercial interests.
76. The 2nd Respondent/Applicant relies on the judicial decisions of **Shollei vs Judicial Service Commission & another [2022]eKLR, Judith Anyango Elizabeth Oyugi vs Independent Elctoral & Boundaries Commission [2017] eKLR, Kenya Commercial Bank Ltd vs Kipsang Sawe Sisei [2005]eKLR** and submits that it invested a significant amount of capital in constructing the telecommunications tower after receiving statutory approvals.
77. The 2nd Respondent/Applicant also submits that it continues to incur security, maintenance and opportunity costs on an asset that cannot generate revenue.

78. The 2nd Respondent/Applicant further submits that its losses continue to accrue daily with no guarantee that it will recover from the said losses.
79. The 2nd Respondent/Applicant concludes its submissions by urging the Court to allow its application and set aside the *status quo* orders.
80. The Appellant/Respondent submits on the following issues;
- a. ***Whether the Appellant/Respondent is entitled to the automatic stay and preservation of the Ex parte orders dated 5th January, 2026 under Section 130(2) of EMCA.***
 - b. ***Whether the Appellant/Respondent concealed material facts sufficient to disturb the Ex parte orders dated 5th January, 2026.***
 - c. ***Whether the 2nd Respondent/Applicant is entitled to setting aside of the ex parte orders issued on 5th January, 2026.***

d. Whether the ends of justice demand that the status quo be upheld.

- 81.** The Appellant/Respondent submits that the 2nd Respondent/Applicant constructed a telecommunication mast on land parcel No. **Kericho/Chemoiben/457** without prior environmental authorization.
- 82.** The Appellant/Respondent also submits that the said construction commenced on 16th February, 2025 and it is in close proximity to Chemoiben Kindergarten, Chemoiben Primary School, Chemoiben Secondary School, Chemoiben Secondary School, Chemoiben African Inland Church and residential homes.
- 83.** The Appellant/Respondent further submits that there was no prior public participation before the said construction commenced and when he visited the Kericho NEMA offices, he was informed that they had not authorized the said project.

- 84.** It is the Appellant/Respondent's submissions that he made a formal compliant vide the letter dated 27th February, 2025 but the NEMA offices did not take any step.
- 85.** It is also the Appellant/Respondent's submissions that he lodged NET Appeal No. E005 of 2025 under **Sections 129(2)** and **129(3)(b)** of the Environmental Management and Co-ordination Act.
- 86.** It is further the Appellant/Respondent's submissions that the tribunal delivered a ruling on 30th April, 2025 and found that the 2nd Respondent/Applicant obtained the approvals after commencement of the project.
- 87.** The Appellant/Respondent also submits that in a ruling delivered on 21st July, 2025, the tribunal confirmed that it had jurisdiction only for it to deliver a ruling on 25th November, 2025 that allowed the 2nd Respondent/Applicant's Preliminary Objection.

88. On the first issue, the Appellant/Respondent relies on **Section 130(2)** the Environmental Management and Co-ordination Act, the judicial decision of **Riunga vs Director General, National Environment Management Authority & Another [2022] KEELC 13274 (KLR), Mutanga Tea & Coffee Company Limited vs Shikara Limited & another (Civil Appeal 54 of 2014) [2015] KECA 469 (KLR) (31 July 2015) (Judgement)** and while reiterating the averments in his Replying Affidavit submits that his appeal has merit.

89. The Appellant/Respondent also submits that his appeal has high chances of success as per the tribunal's earlier findings of 30th April, 2025 and 21st July, 2025 which confirmed the illegality of the project.

90. The Appellant/Respondent relies on the judicial decision of **Nicholus vs Attorney General & 7 others [2023] KESC 113 (KLR), Kibos Distillers Limited & 4 Others vs**

Benson Ambui Adegga & 3 Others [2020] KECA 875 (KLR), Galaxy Paints Co. Ltd vs Falcon Guards Ltd [2000] 2EA 385 as was cited in **Central Bank of Kenya vs Davies Kivieko Muteti [2009] KECA 367 (KLR)** and reiterates that the Tribunal's ruling delivered on 25th November, 2025 went against the pleadings filed, the express statutory framework and the jurisprudence established by the Supreme Court and Court of Appeal.

- 91.** On the second issue, the Appellant/Respondent submits that the 2nd Respondent/Applicant contends that it concealed material facts from the Court.
- 92.** The Appellant/Respondent also submits that it attached all the documents that the 2nd Respondent/Applicant is contending were concealed and the record does not therefore support the contention of material non-disclosure.
- 93.** The Appellant/Respondent further submits that the approvals the 2nd Respondent/Applicant is relying on were issued irregularly.

- 94.** On the third issue, the Appellant/Respondent relies on **Section 130(2)** of the Environmental Management and Co-ordination Act, the judicial decision of **Rianga vs Director General, National Environment Management Authority & another [2022] KEELC 13274 (KLR)** where the Court upheld the judicial decision of **Rodgers Muema Nzioka & 2 Others vs Tiomin Kenya Limited [2001] eKLR** and submits that the 2nd Respondent/Applicant's application is intended to circumvent **Section 130(2)** of the Environmental Management and Co-ordination Act.
- 95.** On the fourth issue, the Appellant/Respondent submits that environmental cases attract a modified approach to injunctive reliefs.
- 96.** The Appellant/Respondent also submits that **Section 130(2)** of the Environmental Management and Co-ordination Act provides for automatic stay which is intended to preserve the subject matter of the appeal.

97. The Appellant/Respondent relies on the judicial decision of **Director General National Environment Management Authority (NEMA) vs African Network for Animal Welfare suing through its Executive Director, Josephat Ngonyo & 4 Others [2019] KEELC 4460 (KLR), Mombasa Gas Terminal Ltd vs National Environment and Management Authority & 4 Others (Environment and Land Appeal E0140 of 2022) [2024] KEELC 4061 (KLR) (8 May 2024) (Judgement)** in support of his submissions.

98. The Appellant/Respondent concludes his submissions by urging the Court to issue the following orders;

a. Uphold this Honourable Court's orders dated 5th January, 2026 pursuant to Section 130 (1) and (2) of the Environmental Management and Coordination Act;

b. Dismiss the 2nd Respondent's Grounds of Opposition and Application dated 15th

January, 2026 with costs to the Appellant;

c. An order directing the demolition and/or removal of the unlawfully constructed cell tower erected in defiance of the Tribunal's Stay Orders of 25th November, 2025 read with Section 130 (2) EMCA.

d. An order suspending all operations, transmission, and commercial use of the said cell tower pending full compliance with the Tribunal's orders and determination of the Appellant's Appeal; and

e. The personal citation for contempt and attachment of personal liability against the directors, officers, or agents of the 1st and 2nd Respondents who authorized, supervised, oversaw, or condoned the continuation and completion of construction in wilful disobedience of the Court's orders, as this Honourable Court shall deem just and expedient to vindicate the rule of law.

99. During highlighting of submissions, Counsel for the 2nd Respondent/Applicant informed the Court that she submitted on annexure **SR-1** at paragraphs **5, 15 to 19** of their submissions dated 4th February, 2026.

100. Counsel then excused herself as she had a hearing starting at 11 am before the High Court in Nairobi.

101. Counsel for the Appellant/Respondent submitted that annexure **SR-1** attached to the affidavit in support of the application dated 23rd December, 2025 contained two documents.

102. Counsel also submitted that the said documents were a Certified copy of the ruling delivered by **Hon. Winnie Tsuma** and a request for certified copies of proceedings.

103. Counsel further submitted that the said documents have a bearing on the appeal and the application under consideration.

104. It was his submissions that the Appellant/Respondent also attached a copy of the order staying the Tribunal's decision as **SR-2** to his affidavit in support of the application dated 23rd December, 2025.

105. It was Counsel's submissions that the 2nd Respondent/Applicant contends that the Appellant/Respondent failed to disclose material facts.

106. It was also Counsel's submissions that the only way for the Appellant/Respondent to be vindicated, is for the Tribunal file to be brought before this Court.

107. It was further Counsel's submissions that he relies on the doctrine of ripeness in support of his submissions. It was his submissions that for the 2nd Respondent/Applicant's application to be rendered ripe, the record of appeal must be availed.

108. Counsel submitted that he relies on the doctrine of judicial notice.

109. Counsel also submitted that he applied for copies of proceedings of the Tribunal through the CTS on 25th November, 2025 at 10:38 PM but they are yet to be supplied.

110. Counsel further submitted that the record of appeal is not ready and reiterated that the issues raised by the 2nd Respondent/Applicant could only be resolved upon the filing of the record of Appeal.

111. It was Counsel's submissions that he was relying on the doctrine of preservation of substratum.

112. It was further Counsel's submissions that the Court cannot vary the *status quo* orders as it would have the effect of defeating **Section 130(2)** of Environmental Management and Co-ordination Act, it will affect the Appellant/Respondent's Constitutional rights and the integrity of the Appellate process would also be defeated.

113. It was also Counsel's submissions that the Tribunal issued stay orders pending the filing of the appeal as per the provisions of **Section 130(2)** of Environmental Management and Co-ordination Act.

114. Counsel submitted that **Section 130(2)** of Environmental Management and Co-ordination Act provides for statutory stay.

115. Counsel also submitted that the said section issues the requirement that no decision of the tribunal shall be enforced until any appeal filed is determined.

116. Counsel also submitted that the allegations of concealment must be assessed against the complete and certified proceedings and not on conjecture.

Analysis and Determination.

117. I have considered the 2nd Respondent/Applicant's application, the response thereto and the rival submissions.

It is my view that the following issues arise for determination;

- a. Whether the status quo orders issued on 5th January, 2026 should be set aside pending the hearing and determination of the appeal.**
- b. Whether the Appellant/ Respondent is entitled to any orders.**
- c. Who should bear costs of the application.**

A. Whether the status quo orders issued on 5th January, 2026 should be set aside pending the hearing and determination of the appeal.

118. The 2nd Respondent/Applicant seeks that the Court sets aside the *status quo* orders issued on 5th January, 2026 on the ground that the Appellant/Respondent did not disclose material facts when he sought the said orders.

119. The 2nd Respondent/Applicant submits that the Appellant/Respondent contended that it (2nd Respondent/Applicant) did not obtain the requisite approvals before constructing the communication mast which was not true.

120. The 2nd Respondent/Applicant also submits that the impugned ruling which was the basis upon which the *status quo* orders were issued was a negative order and that at the time of the issuance of the *status quo* orders, the communication mast had been fully constructed.

121. The 2nd Respondent/Applicant further submits that the Court should therefore set aside the said orders as it is incurring losses from non-use of the communication mast.

122. The Appellant/Respondent on the other hand denies that he concealed material facts.

123. The Appellant/Respondent submits that the approvals that were given to the 2nd Respondent/Applicant were irregularly issued.

124. The Appellant/Respondent also submits that the completion of the construction of the telecommunication mast was done during the subsistence of the stay orders that were issued by the National Environment Tribunal.

125. The Appellant/Respondent further submits that in order for the Court to determine the application under consideration, it must look at the proceedings before the Tribunal.

126. A perusal of the Court record shows that on 5th January, 2026, the Court issued directions on the application dated 23rd December, 2025. The Court at directions No. 5, 6 and 7 held as follows;

“5. I have noted that on the 25th November, 2025, the National

Environment Tribunal granted a stay of 30 days to the Applicant pending the filing of this appeal.

6. I hereby order that the status quo obtaining as at the date hereof shall be maintained until the date set for inter partes hearing of this application. Parties are at liberty to apply for extension and/or vacation on the said date.

7. The application shall be heard inter partes on 4th March, 2026.”

(Emphasis mine)

127. It is this order of status quo that the 2nd Respondent/Applicant is seeking to set aside.

128. In the judicial decision of **Thugi River Estate Limited & another v National Bank of Kenya Limited & 3 others [2015] KEHC 5204 (KLR)** the Court held as follows;

“21...The 4th Defendant seeks to vary and or have vacated an order for preservation of status quo. As I understand it, orders for status quo

preservation are issued by the court in one of two forms.

22. Firstly, an order of status quo will issue through a judicial process. Where the Court in exercise of its general or statutory jurisdiction grants orders for maintenance in situ of a particular state or set of facts. This is achieved through the issuance of formal prohibitory injunctive orders or through conservatory orders or stay orders. Such status quo orders do not extend to future circumstances however unlikely. "Status quo" in this respect, as maintained by an injunctive or conservatory or stay order, is the then existing state of affairs. Often the order is very specific and descriptive in such instances and parties are expected, nay bound, to observe the order. The order will often be issued after a balance of all the factors and circumstances. As was stated by Lord Diplock in

**American Cyanid Co.-v- Ethicon
[1975] 1 All ER 504 at 511**

“where factors appear to be evenly balanced, it is a counsel of prudence to take such measures as are calculated to preserve the status quo.....”

23. The second or alternative order for status quo is the one issued by the Court as a case management strategy. It is issued to provide assistance to the case. It also maintains a particular state of affairs or set of facts. Unlike a conservatory order or injunctive order it is not descriptive. It is originated either by the Court or by the consent of the parties. Often the Court would not have been moved by either party. The Court then expects an existing state of affairs or facts be preserved until a particular occurrence or until the Courts’ further orders. It is intended to also freeze the state of affairs...

26. In land matters the maintenance of status quo order is now literally synonymous with the proceedings. As was held by the Court of Appeal in the case of Mugah -v- Kunga [1988] KLR 748, in land matters status quo orders should always be issued for purposes of preserving the subject matter. This Court's practice directions vide Gazette Notice No. 5178/2014 have followed suit. Practice direction No. 28(k) is relatively clear. It gives the Court the leeway and discretion to make an order for status quo to be maintained until determination of the case.
(Emphasis mine)

129. In Sabatia Farmers Co-operative Society v Baringo District Co-operative Society [2025] KEHC 17472 (KLR) the Court cited the judicial decision of Republic v National Environment Tribunal, Ex - Parte Palm Homes Limited & Another [2013] eKLR where the Court held as follows;

“When a Court of law orders or a statute ordains that the status quo be maintained, it is expected that the circumstances as at the time when the order is made or the statute takes effect must be maintained. An order maintaining status quo is meant to preserve the existing state of affairs...Status quo must therefore be interpreted with respect to existing factual scenario...” (Emphasis mine)

130. In the above cited judicial decisions, the Court held that *status quo* orders are meant to preserve the existing state of affairs.

131. In the present matter, the Appellant/Respondent filed the application dated 23rd December, 2025 seeking various orders that have been set out in the preceding paragraphs.

132. Attached to the affidavit in support of the said application is an order marked as “**SR-1**” issued by the National

Environment Tribunal in Tribunal Appeal No. NET E005 of 2025 on 25th November, 2025 granting the Appellant/Respondent thirty days stay pending the filing of the appeal.

133. It is on this basis that this Court issued orders of *status quo* on 5th January, 2026.

134. Essentially, this Court issued orders of *status quo* as a case management tool and for purposes of preserving the subject matter of the appeal.

135. It is important to note that the *status quo* orders were issued **pending inter partes hearing** of the application dated 23rd December, 2025.

136. The said application is still pending hearing and determination.

137. It is worth mentioning that the 2nd Respondent/Applicant is seeking that the Court sets aside the ***status quo orders pending the hearing and determination of the appeal.***

138. It is evident that the 2nd Respondent/Applicant misapprehended the said orders of *status quo*, as they were not issued pending the hearing and determination of the appeal but pending hearing and determination of the application dated 23rd December, 2025.

139. It is also my view that the question whether or not the ruling delivered by the Tribunal on 25th November, 2025 was in the nature of a negative order plus the question whether or not the construction of the telecommunications mast is complete will be best addressed during the hearing and determination of the application dated 23rd December, 2025.

B. Whether the Appellant/ Respondent is entitled to any orders

140.I note that the Appellant/Respondent and the 2nd Respondent/Applicant have extensively submitted on the following issues;

- a. Whether or not the 2nd Respondent/Applicant obtained the relevant regulatory approvals before commencement of construction of the telecommunication mast.**
- b. Whether the ruling delivered by the Tribunal on 25th November, 2025 was in the nature of a negative order.**
- c. Whether at the time of issuance of the status quo orders, the construction of the telecommunications mast was complete.**

141.It is my view that the issue whether or not the 2nd Respondent/Applicant obtained the relevant approvals before commencement of the construction of the telecommunication mast cannot be addressed at this preliminary stage of the proceedings. These are matters for determination during the hearing of the appeal.

142. The Appellant/Respondent has substantively submitted on the provisions of **Section 130(2)** of the Environmental Management and Conservation Act. It provides as follows;

“(2) No decision or order of the Tribunal shall be enforced until the time for lodging an appeal has expired or, where the appeal has been commenced, until the appeal has been determined.”

143. The application dated 23rd December, 2025 seeks, among other orders, orders of stay of enforcement of the ruling delivered on 25th November, 2025 by the National Environment Tribunal. It is my view that the **Provisions** of **Section 130(2)** of the Environmental Management and Conservation Act will aid the Court in determining whether or not to grant the said orders.

144. I note that the Appellant/Respondent has set out prayers in both his Replying Affidavit and submissions that seek inter

alia orders for demolition of the telecommunications tower and the citation of contempt of the Directors of the Respondents who authorized the alleged completion of the construction of the telecommunications mast. Seeking substantive prayers in a Replying Affidavit is unheard of!

145. It is worth mentioning that the Appellant/Respondent admits to have filed an application for contempt before the National Environment Tribunal. It follows that the Appellant/Respondent ought to prosecute the said application instead of seeking similar orders before this court.

146. In the judicial decision of **Kimani & 3 others v Wangora [2025] KEELC 8202 (KLR)** the Court held as follows;

“...This Court cannot determine an issue as raised in submissions. Courts have made pronouncements on the fact that submissions are not pleadings but marketing tools which cannot be used in place

of pleadings. In Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR) the Court of Appeal held: "... submissions are generally parties' "marketing language" [Emphasis Mine]

147. In **Badri v Mbarak [2025] KEELC 1491 (KLR)** the Court also held as follows;

"95. It is trite law that submissions cannot introduce new issues. The Learned Counsel was guided by the case of "Republic v Chairman Public Procurement Administrative Review Board & another ex parte Zapkass Consulting and Training Limited & another [2014] eKLR" in which the Court held that:-

"The Applicant, the Respondents, and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no

evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored. [Emphasis Mine]

148. In the above cited judicial decisions, the Court held that new issues cannot be raised in submissions. The Court also held that any new issues raised in submissions are best ignored. Therefore, I shall not consider the prayers sought by the Appellant/Respondent in his submissions.

C. Who should bear costs of the application.

149. The general rule is that costs follow the event. This is in accordance with the **Provisions of Section 27 of the Civil Procedure Act. (Cap 21)**. A successful party should ordinarily be awarded costs of an action unless the Court, for good reason directs otherwise.

Disposition.

150.As things remain and as clarified in the preceding paragraphs, there subsists orders of status *quo* issued by this Court. They were issued on 5th January, 2026 at the Court's discretion and as mandated by direction 28(k) of the Practice directions on proceedings relating to the Environment and the use and occupation of, and title to Land and further, as a case management tool. It also worth emphasizing that these orders were issued pending the hearing and determination of the application dated 23rd December, 2025.

151.Therefore, it is prudent that the *status quo* orders as issued by this Court remain in force until the said application dated 23rd December, 2025 is heard and determined on its merit.

152.In the result, I find that the 2nd Respondent/Applicant's application dated 15th January, 2026 lacks merit and it is hereby dismissed with costs.

153.It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO
THIS 19TH DAY OF MARCH, 2026.**

**L.A. OMOLLO
JUDGE.**

In the presence of:

Mr. Sang for Mr. Kiprono for the Appellant.

Mr. Wameyo for the 1st Respondent.

Mr. Karimu for the 1st Respondent/Respondent.

Court Assistant; Mr. Joseph Makori.