



**Rashid t/a Melodica v Elimu Investments Ltd & another (Environment and Land Appeal E112 of 2022) [2023] KEELC 19333 (KLR) (10 August 2023) (Judgment)**

Neutral citation: [2023] KEELC 19333 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E112 OF 2022**

**JO MBOYA, J  
AUGUST 10, 2023**

**BETWEEN**

**ABDULKARIM RASHID T/A MELODICA ..... APPELLANT**

**AND**

**ELIMU INVESTMENTS LTD ..... 1<sup>ST</sup> RESPONDENT**

**SALIMIRWA TRADING CO LTD ..... 2<sup>ND</sup> RESPONDENT**

*(Being an Appeal from the Ruling and Directions of the Honourable Hon. Cyprian Mugambi Nguthari (Chairman); delivered on the 14th day of November, 2022; in the Nairobi Business Premises Rent Tribunal at View Park Towers 7th & 8th Floor) in TRIBUNAL CASE NO. 464 OF 2016 (NAIROBI)*

**JUDGMENT**

**Introduction and Background**

1. The Dispute at the foot of the instant Appeal pits the Appellant, (who is a tenant) as against the Respondents herein, (who are the Landlords), over and in respect of the premises situate and/or located within the City of Nairobi; and who had hitherto issued and served a Notice to Terminate Tenancy upon the Appellant herein in the year 2016.
2. Following the issuance of the impugned Notice to Terminate Tenancy, the Appellant herein proceeded to and took out References, wherein same challenged the propriety and/or validity of the Notice to Terminate Tenancy which was issue and served by the Respondents.
3. Furthermore, in the course of the proceedings before the Tribunal, the Appellant herein filed and mounted an Application dated the 27<sup>th</sup> June 2022; and in respect of which same sought for a plethora of reliefs and in particular; an order to the effect that the main suit be adjourned pending the hearing



and determination of the Contempt proceedings before the High Court, to wit, Misc. Application No 646 of 2019 and 733 of 2019, respectively.

4. Additionally, the Application under reference was canvassed before the Business Premises Rent Tribunal and thereafter same was disposed of vide Ruling rendered on the 14<sup>th</sup> November 2022; wherein the Chairperson of the Tribunal granted certain reliefs at the foot of the Application, whilst on the other hand, dismissing the rest of the prayers/ Reliefs sought for at the foot of the Application. In particular, the Learned Chairperson of the Tribunal declined/dismissed the prayer which (sic) sought for the adjournment of the main suit pending the hearing and determination of the Contempt Proceedings by the High Court.
5. Arising from the delivery of the Ruling, which was rendered on the 14<sup>th</sup> November 2022, the Appellant herein felt aggrieved and or dissatisfied and thereafter same filed a Memorandum of Appeal dated the 16<sup>th</sup> November 2022; and in respect of which the Appellant has enumerated a whopping 26 Grounds of appeal; some of which touched on and/or concerned issues which were neither canvassed before the Learned chairperson nor determined vide the impugned Ruling.
6. Other than the Memorandum of appeal, (whose details have been alluded to in the preceding paragraphs), the Appellant herein also filed an Application dated the 16<sup>th</sup> November 2022; wherein same sought for various reliefs, *inter-alia*, an order that the Ruling of the Chairperson of the Tribunal rendered on the 14<sup>th</sup> November 2022; be set aside and or vacated pending the hearing of the Application; the appeal and the Contempt Proceedings before the Honorable High Court.
7. First forward, it is imperative to observe that the impugned Application was heard and disposed of vide Ruling rendered by this Honorable Court on the 16<sup>th</sup> March 2023, whereupon the Application under reference was dismissed for want/ lack of merits.
8. Be that as it may, the instant Appeal came up for Directions on the 16<sup>th</sup> March 2023, whereupon the Honourable court issued directions pertaining to and or concerning the hearing and disposal of the Appeal. For good measure, the court directed that the Appeal be canvassed and disposed of by way of written submissions to be filed and exchanged by the Parties within set timelines.
9. Notably, the Appellant proceeded to and indeed filed written submissions dated the 3<sup>rd</sup> June 2023, whereas the Respondent filed written submissions dated the 5<sup>th</sup> June 2023; respectively. Instructively, the written submissions filed by the Parties forms part and parcel of the record of the Honourable court.

## **Submissions By The Parties**

### **a. Appellant's Submissions:**

10. The Appellant herein filed written submissions dated the 3<sup>rd</sup> June 2023; and in respect of which same has canvassed, highlighted and ventilated three (3) pertinent issues for consideration and ultimate determination by the Honourable court.
11. Firstly, Learned counsel for the Appellant has submitted that the Learned chairperson of the tribunal erred in law in failing to grant the adjournment which was sought at the foot of the Application dated the 27<sup>th</sup> June 2022, to enable the Appellant to prosecute and dispose of the Contempt proceedings which were/are pending before the High Court.
12. Furthermore, Learned counsel for the Appellant has submitted that at the time when the Appellant filed and or mounted the Application dated the 27<sup>th</sup> June 2022; wherein same sought for, *inter-alia*,



- the order of adjournment of the main suit, there were pending Contempt Proceedings, namely, High Court Misc. Application No 646 of 2019 and 733 of 2019, respectively.
13. On the other hand, Learned counsel for the Appellant has also submitted that the Learned chairperson of the tribunal failed to appreciate that Contempt proceedings take precedence over and in respect of all other proceedings and therefore, it was incumbent upon the Learned chairperson of the tribunal to grant the adjournment as pertains to the main suit to await the determination of the Contempt Proceedings before the High Court.
  14. Secondly, Learned counsel for the Appellant has submitted that in declining to grant the adjournment of the main suit, the Learned chairperson of the tribunal misunderstood the Basic and Elementary Principles that govern Contempt Proceedings; and in any event, created a situation where the orders of the Honorable High Court are likely to be brought into conflict with the orders of the Tribunal; which Learned counsel contended should have been averted if the Learned Chairperson of the Tribunal had granted the Application dated the 27<sup>th</sup> June 2022.
  15. Thirdly, Learned counsel for the Appellant has also submitted that the Learned chairperson of the Tribunal also failed to appreciate and to apply the correct Principles of the law pertaining to and concerning the grant of an adjournment in respect of proceedings before the Court. In this regard, Learned counsel contended that in failing to grant the adjournment which was sought at the foot of the impugned Application, the Learned chairperson of the tribunal prejudiced and or infringed upon the Appellant's Rights to Fair Hearing and Fair Trial as entrenched in Article 50(1) and (2) of the Constitution 2010.
  16. Additionally, Learned counsel has contended that the failure and/or refusal to grant an adjournment which was sought by the Applicant in terms of the Application dated the 27<sup>th</sup> June 2022, has occasioned a grave injustice to the Appellant herein, who would be and is bound to be denied and deprived of the requisite opportunity to prepare his case and to place all the requisite documentation before the Honourable Tribunal/court.
  17. In support of the submissions touching on and or concerning the Principles governing the grant of adjournments, Learned counsel for the Appellant has cited, *inter-alia*, the case of Japheth Pasi Kilonga & 8 others v Mombasa Autocare Ltd (2015)eKLR, Famons Cycle Agencies Ltd & others v Masuk Halal Ramji Karia (1995) Kampala Laws Reports (KLR) 100 and Teleposta Pension Scheme Registered Trustees v Said Hemed & 3 others (2020), respectively.
  18. Lastly, Learned counsel for the Appellant has submitted that the Learned Chairperson of the Tribunal failed to appreciate and or comprehend the true history pertaining to and concerning the Dispute beforehand. In this respect, Learned counsel submitted that the Learned Chairperson has failed to appreciate that the Tribunal case number 464 of 2016, had been consolidated with other cases, albeit without the involvement of the Appellant; and hence it was important to allow the Appellant herein sufficient latitude and or opportunity to appraise the totality of the documents, contained in the various files and thereafter be ready to prosecute the matter before the tribunal.
  19. Arising from the foregoing, Learned counsel for the Appellant has thereafter contended that the manner in which the Chairperson of the tribunal handled and/or dealt with the Application dated the 27<sup>th</sup> June 2022; exhibits barbarity and want of the requisite diligence and has thus granted the Respondents herein the opportunity to run roughshod over the Appellant, without regard to the Due process of the law.



20. Based on the foregoing, Learned counsel for the Appellant has therefore implored this Honourable Court to consider the Appeal beforehand favorably and to avert the tyrannical Landlord from disregarding lawful court orders, which have hitherto been granted by the tribunal.
21. In a nutshell, Learned counsel for the Appellant has thus contended that the appeal beforehand is meritorious and thus ought to be granted in terms of the numerous reliefs which have been alluded to at the foot of the Memorandum of Appeal dated the 16<sup>th</sup> November 2022.

**b. Respondents' Submissions:**

22. The Respondents herein filed written submissions dated the 5<sup>th</sup> June 2023; and in respect of which same have highlighted and canvassed two very brief issues for consideration by the Honourable court.
23. Firstly, Learned counsel for the Respondents has submitted that the Application dated the 27<sup>th</sup> June 2022; and in respect of which the Appellant herein had sought for adjournment of the main suit pending (sic) the hearing and disposal of Contempt proceedings before the Honorable High Court, was lawfully dismissed by the chairperson of the tribunal for want of merits.
24. Furthermore, Learned counsel for the Respondents has submitted that the question of adjournment, which was the subject of the application before the Chairperson of the tribunal was an issue of discretion; to be exercised by the chairperson, albeit taking into account the obtaining circumstances and the antecedent conduct of the Parties, the Appellant, not excepted.
25. Secondly, Learned counsel for the Respondents has submitted that the Doctrine of *lis pendens* which the Appellant herein adverted to and ventilated before the tribunal is irrelevant and in applicable, insofar as there is no property which is liable to be alienated and/or disposed of, during the pendency of the subject appeal or otherwise.
26. For good measure, Learned counsel for the Respondents has pointed out that the Dispute before the Tribunal touches on and or concerns the validity of the Notice to Terminate Tenancy; which was issued by the Respondents pursuant to and in accordance with the provisions of the *Landlord & Tenants (Shops, Hotels & Catering Establishment) Act*, Chapter 301 Laws of Kenya.
27. Having highlighted the foregoing submissions, Learned counsel for the Respondents has thereafter invited the Honourable court to take into account the ruling which was rendered by the court on the 16<sup>th</sup> March 2023; which Learned counsel contends bears serious implications on the current Appeal, insofar as this court had found that no stay of proceedings can be issued pending determination of proceedings which are before the Honorable High Court.
28. Finally, Learned counsel for the Respondents has submitted that the Appeal beforehand is not only misconceived, but same is similarly devoid of merits and same ought to be dismissed with costs to the Respondents.

**Issues for determination**

29. Having reviewed the Memorandum of Appeal, the ruling of the chairperson of the tribunal and the entire record of appeal comprising of more than 4573 pages and upon taking into account the elaborate written submissions filed on behalf of the Appellant and the Rejoinder submissions by the Respondents; the following issues do arise and are thus germane for determination by the Honourable court;



- i. Whether the Memorandum of appeal dated the 16<sup>th</sup> November 2022 and filed by the Appellant herein satisfies the prescribed threshold pertaining to and relating to the crafting of the Grounds of appeal.
- ii. Whether the chairperson of the tribunal erred in law in declining to adjourn the main suit pending (*sic*) the hearing and determination of Contempt proceedings which were pending before the High Court.
- iii. Whether the failure and or refusal to adjourn the main suit pending the hearing of the contempt proceedings has breached, violated and/or infringed upon the Appellant's Right to Fair Hearing and Fair Trial or otherwise.
- iv. Whether the Doctrine of *lis pendens* applies to and in respect of the dispute before the Tribunal and by extension the Appeal herein.

### **Analysis and Determination**

#### **Issue Number 1 - Whether the Memorandum of Appeal dated the 16<sup>th</sup> November 2022; and filed by the Appellant herein satisfies the prescribed threshold pertaining to and relating to the crafting of the Grounds of Appeal.**

30. Before venturing to address and/or deal with the other issues which have been highlighted elsewhere hereinbefore, it is important to observe that the Appellant herein has filed a Memorandum of Appeal containing a total of 26 grounds of appeal, which are directed to and are seeking to impugn the Ruling rendered by the Chairperson of the tribunal over and in respect of an interlocutory Application.
31. Further and in addition, the Appellant herein has thereafter proceeded to and enumerated a total of 8 reliefs, which are being sought at the foot of the Memorandum of Appeal; some of which are curiously worded, *inter-alia*; that the proceedings in tribunal case number 464 of 2016 be stayed and or adjourned pending the hearing and determination of (*sic*) the Application, the Appeal and the Contempt Proceedings before the High Court in Misc. Application No 646 of 2019 and 733 of 2019, respectively.
32. Having made the foregoing observation, it is imperative to state and underscore that it behooves counsel who are crafting the memorandum of appeal to generate precise and concise grounds of appeal, which are devoid of ambiguity and arguments. In addition, the grounds of appeal should not relate to and or concern issues which were never canvassed and or disposed of before the trial court.
33. On the other hand and for good measure, the Grounds of Appeal also do not need to be prolix and verbose, so as to camouflage the true perspective of the Issues being canvassed in the Appeal, in the manner presented before this Honorable court.
34. Clearly, Learned counsel for the Appellant needed to relook at the Memorandum of appeal; and perhaps, reconsider the manner of crafting the Grounds of appeal; the next time round.
35. Additionally, it is also important to remark that the appeal beforehand which touches on a Ruling arising out of the interlocutory Application was accompanied by 10 huge volumes of documents comprising of a total of 4573 pages; which this Honourable court was called upon to, and indeed perused prior to and before crafting the subject Judgment.
36. Whereas in appropriate cases, Learned counsel for the Parties can file and lodge huge volumes before the court, it is important to point out that the Record of Appeal should also be confined to the Pleadings,



Affidavits, Documents filed by and on behalf of the respective Parties, the Record of proceedings; and finally the Ruling/Judgment sought to be appealed against.

37. For good measure and for the sake of proper and efficacious usage of Judicial time, which is the only resource(s) available to Judges and by extension, Judicial Officers; the Record of appeal should exclude such other unnecessary documents, which merely serve to create unnecessary volume, not relevant for the proper determination of the Appeal.
38. Before departing from the issues beforehand, namely, the manner of crafting of grounds of appeal, it is imperative to draw some lessons from the dictum of the Court of Appeal in the case of *Belgo Holdings Ltd v Lakeview Development Ltd & another* (Civil Appeal E044 of 2022) [2022] KECA 1291 (KLR) (18 November 2022) (Judgment), where the Honorable court stated and held thus

“Although what is before us is an interlocutory appeal challenging the exercise of discretion by the trial court in granting an interim prohibitory injunction, that has not deterred the appellant from presenting a memorandum of appeal containing a whopping 49 grounds of appeal and 55 sub grounds. Whether that is a “shock and awe” strategy or something else, it does not require rocket science to surmise that at the heart of such a surfeit of grounds of appeal, lies nothing but unnecessary overkill, duplicity and repetition. It bears emphasizing that rule 88(1) of the *Court of Appeal Rules, 2022* demands that the memorandum of appeal must be concise and without argument and narrative. A memorandum of appeal such as is before us cannot, by any stretch of imagination, be described as concise, particularly when it is borne in mind that in determining the application from which the appeal arises, the trial court was only required to consider whether the 1st respondent had presented a prima facie case, not an ironclad one.”

39. Consequently and in my humble view, Learned counsel for the Appellant herein, needs to pay keen attention to the words of the Honorable Court of Appeal; and thereafter to extract the requisite lesson therefrom, as pertains to the crafting of Grounds of appeal.

**Issue Number 2 - Whether the chairperson of the tribunal erred in law in declining to adjourn the main suit pending (sic) the hearing and determination of contempt proceedings which were pending before the High Court.**

40. The Appellant herein filed and or lodged an application dated the 27<sup>th</sup> June 2022 and in respect of which same sought for a plethora of reliefs. However, the key prayer at the foot of the named Application related to adjournment of the main suit pending the hearing and determination of (sic) Contempt proceedings which were pending before the High Court.
41. For coherence, it is the said Application which was heard and eventually disposed of by the Learned chairperson of the tribunal vide ruling rendered on the 14<sup>th</sup> November 2022, which has provoked and precipitated the filing of the instant appeal.
42. Nevertheless, from the body of the Ruling which was rendered by the chairperson of the Tribunal, it is evident and apparent that the chairperson of the Tribunal duly appreciated the distinction between what was pending before the tribunal; and on the other hand, what was pending before the Honorable High Court.
43. Further and in addition, the Learned chairperson of the tribunal was alive to and indeed underscored that the Jurisdiction and mandate of the Business Premises Rent Tribunal is different and distinct from the Jurisdiction of the Honorable High Court. In this regard, the Learned chairperson pointed



out that what was before the High Court was Contempt proceedings which could be gone into and determined; without prejudice to the proceedings before the Tribunal.

44. Additionally, the Learned chairperson of the tribunal also appreciated that the continuation of proceedings before the tribunal would not create and/or generate any conflict with the proceedings and the outcome of the matter pending before the High Court. Instructively, the chairperson pointed out that the Contempt proceedings, if successful, would culminate into appropriate punishment of the Respondents, in accordance with the Law, either by imprisonment, Fine and/ or sequestration.
45. Having made the various observations, (whose details have been enumerated in the preceding paragraphs), the Learned chairperson of the tribunal then found and held that the proceedings before the tribunal should proceed, taking into account that the suit before the Tribunal was filed in the year 2016.
46. In my humble view, the Learned chairperson of the tribunal duly appraised and took cognizance of all the relevant facts and issues, surrounding the dispute beforehand and thereafter arrived at a conscientious decision, whose import and tenor, was calculated to fast-track the hearing and determination of the proceedings before the tribunal.
47. Further and in addition, there is no gainsaying that the Chairman of the tribunal correctly understood the extent and scope of the mandate/Jurisdiction of the tribunal vis a vis the Jurisdiction of the High Court, the latter, which could only deal with the question of Contempt subject to Section 5 of the [Judicature Act](#), Chapter 8 Laws of Kenya.
48. For good measure, the High Court is not conferred and or vested with the mandate/Jurisdiction to interrogate and or entertain any proceedings pertaining to and or concerning the validity and/or propriety of a Notice to Terminate Tenancy issued pursuant to Section 4(2) of the [Landlord & Tenants \(Shops, Hotels & Catering Establishment\) Act](#).
49. To the extent that the mandate and or Jurisdiction of the tribunal is separate and distinct from that of the High Court; there is no way that the outcome emanating from the Honorable High Court, while dealing with the Contempt proceedings would affect the proceedings before the Tribunal.
50. For the avoidance of doubt, if the High court were to find and hold (*sic*) that the Respondents had disobeyed the lawful orders of the tribunal; then what would ensue would be the requisite order of punishment, whether by way of a fine , imprisonment, sequestration; or both.
51. Notwithstanding the foregoing, I beg to point out and highlight that I have extreme reservations as to whether the High court has the requisite Jurisdiction to entertain a matter and/or dispute arising from the Business Premises Rent Tribunal, including, a dispute pertaining to Contempt Proceedings, or at all. In this regard, Learned counsel for the Appellant may have to relook at and re-appraise the import and tenor of Section 15 of the [Landlord & Tenants \(Shops, Hotels & Catering Establishment\) Act](#), Chapter 301, Laws of Kenya; as read together with Section 7 of the Sixth Schedule of the [Constitution](#), 2010.
52. Be that as it may, I must point out that the question of whether or not the Honorable High Court would has Jurisdiction to deal with and/or determine the Contempt Application vide High Court Misc. Application No's 646 of 2019 and 733 of 2019, respectively, was never canvassed before me. Consequently, the observation made in the preceding paragraphs constitutes an obiter, but which deserves due consideration by Learned counsel for the Appellant.
53. Back to the question of adjournment. I have found and held that the Learned chairperson of the tribunal indeed considered and took into account the relevant and pertinent facts/circumstances, *inter-*



*alia* the fact that the Appellant herein had previously mounted a near similar application dated the 17<sup>th</sup> January 2020; and also the age of the proceedings before the tribunal.

54. Consequently and in view of the foregoing, I come to the conclusion that the refusal to adjourn the hearing of the main suit; which for good measure, was not coming up on the named date, constituted proper and efficacious exercise of Judicial discretion.
55. In my humble, albeit considered view, I have not discerned any error and/or inappropriate exercise of discretion by the chairperson of the tribunal to warrant interference with his discretion in declining to (*sic*) grant the adjournment of the main suit.
56. Further and in any event, it is not lost on this Honourable court that an Appellate Court can only interfere and/or disturb the exercise of discretion by the court of first instance, the Tribunal not excepted, on limited albeit circumscribed grounds; which must no doubt be established and proved to the requisite standard of balance of probabilities.
57. To anchor the foregoing observations and essentially the circumstances under which the Discretion of the court of first instance can be interfered with, it is appropriate to take cognizance of the dictum in the case of *Mbogo v Shah* [1968] EA 93, at page 95, where the court succinctly observed thus;

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.

It would be wrong for this Court to interfere with the exercise of the trial Judge’s discretion merely because this Court’s decision have been different.

58. To surmise, it is my finding and holding that the Learned chairperson of the tribunal correctly exercised his discretion and indeed appropriately declined to fall into the trap set by the Appellant herein; whose import was merely calculated to delay, obstruct and or otherwise defeat the effective hearing and disposal of the dispute before the tribunal.
59. In short, the complaint by the Appellant pertaining to and or concerning the refusal to adjourn the main suit; which application was technically one for stay of proceedings and not otherwise; is devoid of merits.

**Issue Number 3 - Whether the failure and or refusal to adjourn the main suit pending the hearing of the Contempt Proceedings has breached, violated and/or infringed upon the Appellants Right to Fair Hearing and Fair trial or otherwise.**

60. Other than the complaint by the Appellant that the Learned chairperson of the tribunal improperly exercised his discretion in declining to grant the adjournment; the Appellant has also complained that the failure to grant the adjournment has also occasioned breach, violation and/or infringement of his rights to fair hearing and trial, as entrenched in Article 50(1) and (2) of the [Constitution](#) 2010.
61. Furthermore, Learned counsel for the Appellant has also submitted that the right to fair hearing and fair trial are so fundamental and important in judicial proceedings and that it behooves the court at all times to ensure that the Parties are afforded Fair Hearing and Fair trial, without any blemish.
62. Notably, Learned counsel for the Appellant has thereafter proceeded to and cited, *inter-alia*, the case of [General Medical Council v Spackman](#) (1943) 2 ALL AR 337; [Ridge Baldwin](#) (1963) 2 ALL ER 66



and *Mbaki & others v Macharia & another* (2005) 2 EA 206; to anchor the significance of the Right to Fair Hearing.

63. Nevertheless, it is important to recall and reiterate that the hearing of the main suit, which was pending before the tribunal was neither scheduled for the date when the Application was filed, nor the date when the Ruling in question was rendered.
64. Further and in addition, it is appropriate to state and underline that the Application which the Chairperson of the Tribunal dealt with; was technically an application which was calculated to attract an order of stay of proceedings, pending the hearing of the Contempt proceedings before the High Court, but which was disguised as an Application for adjournment of the main suit.
65. Quite clearly, the Learned chairperson of the tribunal understood the character and the dynamics of the Application that was before him and indeed made pertinent findings arising thereto.
66. Instructively, the Chairperson of the tribunal pointed out that the main suit was not scheduled for hearing and that when the substantive hearing will be set down (which was indeed set down after the delivery of the ruling), the Appellant herein was reminded that same would have the right to object to any documents in accordance with the provisions of the *Evidence Act*; seek and obtain witness summons in respect of witnesses of choice and also to summon and bring fourth all witnesses, with a view to propagating his case.
67. To my mind, the chairperson of the tribunal indeed reminded the Appellant and his counsel that their Right to Fair Hearing and Fair Trial remained intact and would be appropriated by the Appellant, albeit at the opportune time, namely, during the hearing of the dispute beforehand.
68. For good measure, the Learned chairperson of the tribunal made very elaborate findings and exposition of the law at the foot of Paragraph Number 10 of the impugned Ruling; wherein same underscored the Appellant's Right to Fair Hearing and Fair Trial.
69. Surely and to my mind, it is difficult to understand the gravamen and the bona fides of the complaint by the Appellant herein that his rights to Fair Hearing and Fair Trial; have been breached and or are likely to be violated/infringed upon, whatsoever and howsoever.
70. Lastly, it is imperative to point out that the impugned ruling by the Learned chairperson of the tribunal has not only espoused the Right to Fair Hearing and Trial; but has also highlighted the salient tenets that underpin the provisions of Article 50 of the *Constitution*, 2010.
71. Invariably, the observation and findings of the chairperson of the tribunal in terms of Paragraph 10 of the impugned ruling accords with the exposition of the law and the dictum of the Court of Appeal in the case of the *Speaker, Kisumu County Assembly & another v The Clerk, Kisumu County Assembly Service Board* (2015)eKLR, where the court stated and observed thus:
  72. Due process is a fundamental aspect of the rule of law. Due process is the right to a fair hearing. The right to a fair hearing encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice, is not a privilege to be graciously accorded by courts or any quasi-judicial body to parties before them. As is clear from Articles 47 and 50 of our Constitution, it is a constitutional imperative.
  73. Whereas the right to a fair hearing varies from one case to another depending on the subject of the matter in issue, its irreducible minimum is now well settled. In granting that right, the court or the administrative body or person concerned should not make it a charade by taking perfunctory actions for the sake of running through the motions to be seen to have complied with it. The person charged is entitled to what, in legal parlance is referred to as



the right to “notice and hearing.” That means he must be given written notice which must contain substantial information with sufficient details to enable him ascertain the nature of the allegations against him. The notice must also allow sufficient time to interrogate the allegations and seek legal counsel where necessary. In the epigram of the indomitable Lord Denning in *Kanda v Government of Malaya*

“If the right to be heard is to be a real right which is worthy anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”

74. What amounts to sufficient notice also varies from case to case. But as stated, the notice must contain substantial information with sufficient details to enable the person charged to ascertain the nature of the allegations made against him. The notice must also comply with any statutory requirements where the same are provided.
72. In a nutshell, I do not discern any scintilla and or iota of evidence pertaining to and concerning any breach, violation and/or infringement of the Appellant’s Rights to Fair Hearing and Fair Trial, either as alleged or at all.
73. Consequently and in the premises, the complaints touching on and or concerning the breach, violation and/or infringement of the Appellant’s Rights and Fundamental Freedoms, have been made and ventilated in vacuum.

**Issue Number 4 - Whether the Doctrine of *lis pendens* applies to and in respect of the dispute before the tribunal and by extension the appeal herein.**

74. The Appellant herein had raised and canvassed a plethora of grounds of appeal, *inter-alia*, the contention that the proceedings before the Tribunal will be in contravention of the Judicial Principle of *lis pendens*.
75. For good measure, Ground number three of the Memorandum of Appeal states as hereunder;
- That the learned Honourable Chairman erred in law and in fact in failing to appreciate that the Tribunal’s proceedings will be in contravention of the judicial principle of *lis pendens*.
76. From the contents of the named ground of appeal, it is evident that the Appellant herein is contending that as a result of the refusal to grant (sic) the adjournment of the main suit; the continuation of the proceedings before the tribunal will be in contravention of the Doctrine of *lis pendens*.
77. However, it is worthy and important to underscore that the dispute between the Appellant on one hand and the Respondents on the other hand; does not concern ownership/title to the suit property. In any event, there is no dispute pertaining to the alienation, sale, transfer and/or disposal of the suit property, albeit during the pendency of the proceedings.
78. To the contrary, what is before the tribunal relates to the determination of whether or not the Notice to terminate tenancy which was issued and served by the Respondents in the year 2016; is valid and accords with the provisions of the *Landlord & Tenants (Shops, Hotels and Catering Establishment) Act* Chapter 301 Laws of Kenya.
79. Consequently and in the premises, I am unable to appreciate the foundation and/ or fulcrum upon which the Doctrine of *lis pendens*, has been invoked and applied by Learned counsel for the Appellant.



80. Be that as it may, the relevance and legal implication of the Doctrine of *lis pendens* was elaborated upon by the Court of Appeal in the case of [Naftali Rutbi Kinyua v Patrick Thuita Gachure & another](#) [2015] eKLR, where the court stated and held as hereunder;

“[Black’s Law Dictionary](#) 9<sup>th</sup> edition, defines *lis pendens* as the jurisdictional, power or control acquired by a court over property while a legal action is pending.

*lis pendens* is a common law principle that was enacted into statute by section 52 [Indian Transfer of Property Act](#) (ITPA)-now repealed. While addressing the purpose of the principle of *lis pendens*, Turner L. J, in *Bellamy v Sabine* [1857] 1 De J 566 held as follows:-

“It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings.”

In the case of *Mawji v US International University & another* [1976] KLR 185, Madan, J.A. stated thus:-

“The doctrine of *lis pendens* under section 52 of [TPA](#) is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of *lis pendens* is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the [RTA](#) and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

81. Furthermore, the application of the Doctrine of *lis pendens* was re-visited by the Court of Appeal in the case of [Cooperative Bank of Kenya Ltd v Patrick Kang’ethe & another](#) (2017)eKLR, where the court stated thus;

“51. Our previous land legislation regime expressly embraced the doctrine under Section 52 of the repealed [\(Indian\) Transfer of Property Act](#) (ITPA) 1882 by stipulating that:

“During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.” Emphasis added.

52. Do courts still recognize the doctrine? The [ITPA](#) was repealed by the [Land Registration Act](#) (LRA) Number 3 of 2013; whose Section 107 (1) of the [LRA](#)



provides for the saving and transitional provisions of the Act, and provides that:-

“Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

53. Presently, the *LRA* does not prohibit the application of the doctrine of *lis pendens*; nor does any law for that matter. For this reason and in view of Section 107 aforesaid, this Court has previously held that the doctrine of *lis pendens* is still applicable to this day, albeit under common law (see. *Naftali Rutbi Kinyua v Patrick Thuita Gachure & another* [2015] eKLR)
82. Whereas the Doctrine of *lis pendens* is still recognized and applicable in the Kenyan Legal System by virtue of being a Doctrine of common law, it is imperative to underscore that the said Doctrine applies where the suit property is likely to be alienated, wasted, sold and/or otherwise disposed of pendete lite.
83. Unfortunately, the circumstances obtaining and pertaining to the proceedings before the Business Premises Rent Tribunal, do not warrant the invocation and application of the Doctrine of *lis pendens*, either in the manner adverted to by the Appellant or at all.
84. Simply put, I come to the conclusion that the Ground of Appeal, which espouses the Doctrine of *lis pendens*, is similarly misconceived, just like the other grounds, which have been interrogated and canvassed elsewhere hereinbefore.

#### **Final Disposition:**

85. The gravamen/ substratum of the appeal before this Honourable court has been duly canvassed and interrogated in terms of the preceding paragraphs. Nevertheless, it must have become evident and apparent that the entire appeal mounted by and on behalf of the Appellant is indeed bereft and devoid of merits.
86. Consequently and in the premises, I come to the conclusion that the Appeal beforehand merits/courts dismissal. Invariably and in this respect, same be and is hereby Dismissed with costs to the Respondents.
87. For good measure, the Costs of the Appeal shall be agreed upon; and in default, same to be taxed and certified by the Taxing officer of the Environment and Land Court, in the usual manner of Taxation of Bills of Costs.
88. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10<sup>TH</sup> DAY OF AUGUST 2023.**

**OGUTTU MBOYA,**

**JUDGE.**

In the presence of:

Benson - Court Assistant.

Mr. Kevin Ndoho Macharia for the Appellant.



Mr. Murimi Murango for the Respondents.

