



**Andrew Muma | Charles Kanjama**  
 I&M Bank House, 4th Floor  
 2nd Ngong Avenue  
 P. O. Box 528-00100, Nairobi, Kenya  
 Tel: +254-20-2716548, 2716549  
 Email: info@mumakanjama.com  
 VAT NO: 0157487E | PIN NO: P051183409Q

## MK'S HOT FROM THE BENCH!

**ON THIS WEEK'S SEGMENT WE ASK: Should members of the Business Premises Rent Tribunal (BPRT) be appointed in the same manner as judicial officers?**



While the process of appointment of judges and magistrates is well known, there has previously been a lack of clarity when it comes to the process of appointment and the appointing authority of members of tribunals.

In June 2020, the Cabinet Secretary for industrialization appointed members of the BPRT to serve for a term of three (3) years. However in the case [Cyprian Mugambi Ngutari & 4 Others V Bernard Odero & 7 Others, E345 Of 2020](#), these appointments were challenged. The main issue in the case was whether members of the BPRT should be appointed in the same manner as judicial officers.

The Employment and Labour Relations Court (ELRC) held that:

1. Local tribunals are subordinate Courts under Article 169 (1) (d) of the Constitution. According to the Court, since the BPRT is deemed to be a subordinate court, its members are equated to judicial officers. Therefore, similar to the appointment of judicial officers, their appointment ought to be done in an open, merit-based, inclusive and competitiveness process. Accordingly, the court found that the appointees were never interviewed for the positions.
2. The ELRC also found that the composition of the tribunal was not gender sensitive stating that out of the 5 members, only one was female and therefore the court voided the appointments.

Aggrieved by the decision of the ELRC, the Respondent made an Application in the Court of Appeal for stay of the decision of the ELRC.

The Court of Appeal stayed the decision of the ELRC and observed that affirming the decision of the ELRC would cripple the continuity of the judicial business at the BPRT. Therefore, on 25th January 2021, the appointees to the BPRT took up their roles at the Tribunal pending the hearing and determination of the appeal.

While alive to the fact that the case is still live, it is worth noting the novel issues that this case brings to the fore.

1. First, some statutes provide for the appointment procedure for tribunals. The Employment Court had disregarded this procedure based on constitutional interpretation without finding the statute unconstitutional.
2. Secondly, most statutes that provide for the appointments of members of a tribunal by the Minister do not set out the procedure for appointment.
3. Additionally, several other judicial bodies have not strictly satisfied the two-thirds constitutional requirement. The decision of the Court of Appeal in the appeal will definitely set a precedent on the appointment of members of tribunals and the composition of judicial bodies.

Our robust Dispute Resolution team had the privilege of representing the Applicants in the case. At Muma & Kanjama Advocates, we are ready to advise, guide and assist you in all aspects of dispute resolution. Reach out to us. We shall be happy to hear from you.

**By: Mathew Muoki,**  
 A dispute resolution lawyer  
 Tel: +254 726328120  
 Email: [mmuoki@mumakanjama.com](mailto:mmuoki@mumakanjama.com)

**Sylvia Muiruri,**  
 A dispute resolution lawyer  
 Tel: +254 715777434  
 Email: [snyathira@mumakanjama.com](mailto:snyathira@mumakanjama.com)

**Antony Simiyu,**  
 A dispute resolution lawyer  
 Tel: +254 719421909  
 Email: [asimiyu@mumakanjama.com](mailto:asimiyu@mumakanjama.com)

**Charles Kanjama,**  
 The Managing Partner  
 Tel: +254 721481296  
 Email: [cnkanjama@yahoo.com](mailto:cnkanjama@yahoo.com)