



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**COMMERCIAL APPEAL NO. E008 OF 2024**

**JAMES BURURE GINONO.....**

**.....APPELLANT**

**VERSUS**

**CHANDRAAKANT DEVRAJ SHAH..... 1<sup>ST</sup>**

**RESPONDENT**

**LEAD PACKAGING LIMITED..... 2<sup>ND</sup>**

**RESPONDENT**

**RUTH NZIOKA  
T/A RUOL AUCTIONEER..... 3<sup>RD</sup>**

**RESPONDENT**

**ROBERT KAHIU..... 4<sup>TH</sup>**

**RESPONDENT**

*(Being an appeal from the judgment and decree delivered on  
28<sup>th</sup> of June 2024 in Mavoko Chief Magistrates Court by Hon B.  
Ojoo in Civil Suit No 449 of 2020*

**JUDGMENT**

1. By Amended Plaintiff dated 16<sup>th</sup> August 2021 the Appellant herein sued the Respondents jointly and severally for a declaration that one set of LM25-200-1000 roofing sheet forming machine, one set of LM-18-76-988 Roofing sheet

forming machine and six (6) rolls of PPGI steel coils HC Code 72107010 (13,371 metres long) belong to the Plaintiff, special damages as interest incurred on account of a loan and loss of business & mesne profits, General damages, interests and costs.

2.It was averred that the Appellant temporarily stored his goods which he had imported from China in a warehouse belonging to the 2<sup>nd</sup> Respondent, located at Dinku Furnitures Godowns next to Astrol Petrol Station, Syokimau as he was searching for a suitable location for a factory and when he did, he used motor vehicle registration number KBS 023V ZD 5800 to transport the goods but the same was seized by the 1<sup>st</sup> Respondent as lien for rent owed by the 1<sup>st</sup> Respondent. The Appellant contended that despite documentary evidence that the goods did not belong to the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent refused to release the goods.

3.He then reported the matter to Mlolongo police station vide OB 46/20/6/2020 and in the company of four policemen, pleaded with the 1<sup>st</sup> Respondent to release the goods but he still refused. It was further contended that the 1<sup>st</sup> and 3<sup>rd</sup> Respondent filed Misc Application no 33 of 2020 before this court seeking to levy distress and obtained an order on 20/08/2020 which they have used to fraudulently auction the Appellants goods despite there being a pending case before this court HCCA No 52 of 2020 between the same parties.

4. In their Statement of amended Defence dated 15/09/2021, the 1<sup>st</sup> and 3<sup>rd</sup> Respondents denied most averments in the Amended Plaint and averred that he was familiar with the 2<sup>nd</sup> Defendant by virtue of him being tenant via a lease agreement entered into on 21<sup>st</sup> March 2016 for Godown Number 17 and 18 at a total monthly rent of Kshs 40,000 for 5 years and 3 months from 1<sup>st</sup> April 2016 to 30<sup>th</sup> June 2021. That the Appellant has been frustrating the process of levying distress and even filed 2 suits which were dismissed. He indicated that when they were informed that the 2<sup>nd</sup> Respondent was illegally removing goods from the go down without clearing rent, they stopped and seized the motor vehicle registration number KBS 023 V ZD5800 with the goods on it. He indicated that he was not aware that the factory had been leased as the agreement between him and the 2<sup>nd</sup> Respondent disallowed subletting and if such an arrangement was made then it was illegal ab initio. It was his position that the 2<sup>nd</sup> Respondent traded in the same goods and the alleged goods were in the go down for 1 year, the year in which rent was not paid by the 2<sup>nd</sup> Respondent. The court was urged to dismiss the Appeal with costs.

5. It appears as if the 2<sup>nd</sup> Respondent did not file a defence but relied on his affidavit dated 07/07/2020 as his evidence.

6.The interested party filed statement of Defence dated 27/04/2022 in which he vehemently denied the contents of the Plaint.

7.After hearing of three witnesses for the Appellant's case, three witnesses for the Respondent and evaluating the evidence adduced by the parties, the learned magistrate found that the Plaintiff was a stranger to the premises and the case had no enforceable right against the Landlord. The case was dismissed and each party directed to bear their own costs.

8.Being aggrieved, the Appellant preferred this appeal seeking to have the Judgment of the Magistrate Court set aside and be substituted with an order allowing the Appellant's Amended Plaint in its entirety plus costs of the Appeal. The appeal is premised on the following grounds:-

***a. That the learned Adjudicator misdirected herself in law and in fact by failing to hold the Appellant as owner of one set of LM-18-760888 roofing sheet forming machines and six (6) rolls of PPGI steel coils HC Code 72107010 (13371 metres long).***

***b. That the learned Magistrate erred in law and in fact by holding that LM 25-200-1000 roofing sheet forming machine, one set of LM-18-760888 roofing sheet forming machines and six***

**(6) rolls of PPGI steel coils were in control of the 2<sup>nd</sup> Respondent**

- c. That the learned Magistrate misdirected herself by holding that the distress of rent effected against the Appellant's one set of LM-25-200-1000 roofing sheet forming machines, one set of LM 18-760988 roofing sheet forming machines, and six (6) rolls of PPGI steel coils was proper and lawful.**
- d. THAT the magistrate erred in law and fact by failing to find fraud, conversion, alienation, illegal proclamation and illegal disposal of the Appellants' KM25-200-1000 roofing sheet forming machine, one set of LM-18-760988 roofing sheet forming machine and six (6) rolls of PPGU steel coils against the Respondents, in spite of cogent evidence**
- e. THAT the Learned Trial Magistrate erred in law and fact by blatantly disregarding clear provisions of the Distress for Rent Act and Common law which limited the powers of the 1<sup>st</sup> Respondent as a landlord over the properties and/or goods of third parties found in leased premises and that the Distress for Rent Act and the Common Law protected the rights and property of the Appellant as a third party who**

**had stored his goods at the 2<sup>nd</sup> Respondent's go-down**

- f. THAT the learned Trial Magistrate erred in law and fact by blatantly disregarding clear provisions of sections 19 and 20 of the Distress for Rent Act and that the Plaintiff as a third party owner of the goods stored his goods at the 2<sup>nd</sup> Respondent's Go-down, he had given the 1<sup>st</sup> Respondent, his employee an/or agent, appropriate declaration that the goods and/or property on question belonged to him, and the Appellant's declarations duly proved that he owns the said goods**
- g. THAT the Magistrate Court erred in law and fact by failing to award the Appellant orders of compensation, general damages, special damages, loss of business and Mesne Profits despite proving loss of his goods through fraud, conversion, alienation, illegal proclamation, unlawful distress and illegal disposal by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents.**
- h. THAT the Magistrate court ignores the Appellant's robust evidence and submissions.**
- i. THAT the Learned Trial Magistrate erred in law in misconstruing the cited authorities before her.**

***j. THAT learned Trial Magistrate erred in law and fact by dismissing the Appellant's entire claim against the Respondent's without affording persuasive reasons thereof.***

9. The Counsel for the parties consented to canvassing the appeal by way of written submissions. The 2<sup>nd</sup> Respondent did not file submissions.

10. In submissions dated 17/05/2025, the Appellant contended that the conduct of the trial court aroused curiosity and despite of the Appellant suffering losses he was accorded no remedy at all. Worse, the 2<sup>nd</sup> Respondent's suit was undefended as no Defence was filed but it was not allowed as prayed. Ultimately, the court's decision was rife with bias and grave miscarriage of justice. He raised three issues in his submissions. First, that the Appellant submitted that he is the owner of the property on account of his part of the Appellant, he maintained he was the rightful owner of the property on account of the original documentation he produced, including but not limited to invoices and receipts from the manufacturers in China, a certificate of origin of the property, a KEBS pre-shipment inspection certificate, a bill of lading, an import declaration form, Kenya Revenue Authority Tax Invoices and Receipts in his name, Kenya Ports Authority invoices and payments,, and invoices and

receipts paid to local transporters to transport goods from the port to the 2nd Respondent's godown.

11. In addition, he also said the evidence of PW2 was that he was present when the goods were brought by the Appellant and they remained unpacked and uninstalled, testimony of PW3 and DW3 who maintained that the property belonged to the Appellant. He also submitted that the testimony by Evans Kirwa and Sylvester Kimani was that they were hired by the Appellant to clear the property from customs. That the 1<sup>st</sup> Respondent's argument that the Appellant was importing the property on behalf of the 2<sup>nd</sup> Respondent is unfounded and an epitome of clutching at straws. In support of this position, reliance was placed on the cases of ***Giddie v Bhatti & 2 others; Msanaka Investments Ltd (Objector); Mbeki Auctioneers (Respondent) [2022] KEHC 15889 (KLR), Mao Advocates LLP v Zadok Furniture Systems Limited; Swanya and Company Advocates (Objector) [2023] KEHC 18942 (KLR).***

12. Second that the 1<sup>st</sup> Respondent was aware of the ownership of the property by the Appellant. It was admitted that there was no sublease between the Appellant and the 2nd Respondent and at the time of moving the property by the Appellant the lease between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent was operational as it was set

to lapse on the 13th of June 2021. That according to testimony of PW2 and PW3, the 2nd Respondent was engaged in the manufacture of HDV pipes for irrigation while the Appellants property remained unpackaged and stored in the warehouse where the Appellant would go to periodically lubricate it. He submitted that the 1<sup>st</sup> Respondent was aware of the ownership as he had seen the bill of lading as well as the ownership documents. Further reliance in support of this position was placed on the following cases; **John Amena Amendi T/A Amena Amendi J. & Co Advocates v Edith Nyaboke Amoro & 2 others [2008] eKLR, Paradise Lost Properties (Pty) Ltd v Standard Bank of SA (Pty) Ltd 44 135, Eight Kaya Sands v Valley Irrigation Equipment 2003 (2) SA 495, First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Service 2002(4) SA 768 (CC)**. Lastly, the Appellant contended that he was entitled to the orders sought in the amended Plaintiff and prayed for costs of the Appeal.

13. The 1<sup>st</sup> and 3<sup>rd</sup> Respondent filed joint submissions dated 16/05/2025 and raised four (4) issues. First, that the 2nd respondent having lost all his applications in Milimani Civil Suit No 7912 of 2018, was employing other tactics to frustrate the process of levying distress by bringing in the appellant who will in turn be used to claim the goods which the 2nd respondent was trading on. The 3<sup>rd</sup>

Respondent subsequently obtained orders issued on 20/08/2020, vide Mavoko Miscellaneous application No.23 of 2020 where she obtained police assistance to enter and issue notification of sale on the assets to be found in the rented warehouse by the 2nd respondent at LR.No.12715/216 for accrued rent arrears of Kshs.4, 999, 650/= for sale by public auction in recovery of the arrears plus attachment charges. It was contended that the proclaimed goods could not belong to the Appellant as it is evident that the attached goods were old and in use by the 2nd respondent in the course of his business. It is clear that the goods attached by the 3rd respondent were the 2nd respondent's tools of trade.

14. Secondly, it was submitted that there was no relationship between the Appellant and the 1<sup>st</sup> Respondent as the lease was between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent who was not allowed to sublet the premises. Further, that he did not consent to the goods being kept in the premises of the 2<sup>nd</sup> Respondent. Thirdly, it was contended that the 1<sup>st</sup> Respondent had a right to distress for rent and that despite refusal by the 1st respondent to release the proclaimed goods up until when the accrued rent arrears had been paid, the 2nd respondent did not make any effort to clear the same despite Court Orders being in place.

15. He gave the 3<sup>rd</sup> Respondent instructions to distress for rent. The the 3<sup>rd</sup> Respondent proceeded to file Mavoko

miscellaneous application No. 23 of 2020 where she obtained orders for the police assistance to enter, carry out an inventory and to issue notification of sale on the assets found in the rented warehouse. Despite service, the 2<sup>nd</sup> Respondent failed to respond to the application and the court granted the orders sought. Lastly, it was contended that the Appeal should not be allowed. Reliance was placed on the cases of ***National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd [2002] e KLR and Christine Mwigina Akonya v Samuel Kairu Chege [2017] eKLR.***

16. In submissions dated 18/06/2025, the 4<sup>th</sup> Respondent submitted that the Trial Court erred in dismissing the 4<sup>th</sup> Respondent's claim Demurrage and Loss of User as against the Appellant herein who had leased his Motor Vehicle Reg. No. KBS 023V/ZD 5800 for commercial purposes of transporting his goods and could not return it as agreed which he had sought in the counter claim. That it had a contractual agreement on 20/06/2020 for Kshs 40,000 per day as consideration for its commercial use in transporting goods with the Appellant herein and not the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent herein. The court was urged to find that the Appellant herein ought to reimburse the 4<sup>th</sup> Respondent a total sum of Kenya Shillings Nineteen Million Eight Hundred Thousand (Ksh. 19,800,000/=) as damages being the accrued amount. Reliance was placed on the case of ***Jackson Mwabili v Peterson Mateli [2020] eKLR and Nyaga v***

**Attorney General (On Behalf of the Ministry of Environment, Water and Natural Resources) (Civil Appeal E019 of 2023) [2023] KEHC 26484 (KLR).**

**Determination and Analysis**

17.As the first appellate court, the court had considered the rival submissions of the learned counsel for the parties, the cases cited and the law. The court is also guided by the holding of the Court of Appeal for East Africa in **Peters -vs- Sunday Post Limited [1958] EA 424** where Sir Kenneth O'Connor stated as follows:-

***“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in Watt -vs- Thomas (1), [1947] A.C. 484. “My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to***

***appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”***

18. The court has reevaluated and re-analyzed the Trial Court record, the Memorandum of Appeal as well as submissions of the parties and what is not disputed that there was a lease

agreement dated 21/03/2017 between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent for Godown number 17 and 18 for a monthly rent of Kshs 400,000. The 1<sup>st</sup> Respondent and the Appellant all agree that on 20/02/2022 as the Appellant was removing his goods, the 1<sup>st</sup> Respondent's property manager who was DW1 blocked motor vehicle registration number KBV 468F ZC 4012 which belonged to the 4<sup>th</sup> Respondent from leaving the premises and now the court has learnt that the said motor vehicle belonged to the interested party. The question before this court is thus;

- a. Whether the Appellant proved that he was the owner of the goods and who was in control of them***
- b. Whether the distress for rent was lawful***
- c. Whether the Appellant is entitled to the orders sought***

19. **Section 107 (1) of the Evidence Act** provides that;

***Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.***

20. Evidential burden of proof which is provided for under **Sections 109 and 112 of the Evidence Act** which state as follows:

***109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is***

***provided by any law that the proof of the fact shall lie on any particular person.***

***112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.***

21. In this case, the legal and evidentiary burden lay on the Appellant who was also the Plaintiff in the Trial court then thereafter would shift to the various Respondents in various capacities. It is also important to note that this court can only consider that which was placed before the Trial court and not matters that are introduced on Appeal as this would be unfair. Unfair in the sense that the Trial court will not have gotten the chance to examine the said evidence. I am guided by the finding of the court in the case of **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] KECA 3 (KLR)** where the court rendered itself as follows;

***"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-***

***examination in the ordinary way". (Sellers, L.J. (supra)).As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right."***

22. That brings me to the question, how is evidence produced?

This question was answered by the case of **Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] KECA 334 (KLR)** where the court of Appeal rendered itself thus;

***"18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or***

***disproved when the court applies its judicial mind to determine the relevance and veracity of the contents - this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.***

***19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.***

***20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.***

**21. In Des Raj Sharma -v- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.**

**22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.”**

23. From the record, the bundle of documents that had been filed by the Appellant herein were admitted after an application on 18/08/2022 but were never produced or referred to in the proceedings. The manner of production of documents is very clear and this was not done. This mistake cost the Appellants case as no tangible evidence was

produced. Even when testifying, the Appellants witnesses referred to the documents produced by the 1<sup>st</sup> Respondent's bundle of documents. How then would the court consider that which is not produced in accordance with the evidence Act as much as it was filed? That being the case, then the Appellant had a strong case going by the submissions placed before this court but failure to produce the vital documents he makes reference to has cost him the Appeal. Even so, as stated earlier, this court cannot consider documents that the Trial did not have a chance to consider.

24. As to Whether the Appellant proved that he was the owner of the goods and who was in control of them. The Appellant stated that he was the owner of the goods but did not produce any evidence and the invoices he mentioned in his submissions before this court have not been produced or adopted into evidence thus leaving a question on the ownership. However, none of the Respondents have disputed this fact or produced contrary evidence. The oral testimony of the Appellant is corroborated by that of DW2 who stated that the goods were not his and belonged to the Appellant. The Trial court found that the Appellant could not have had any reasonable expectation to be considered as the owner of the goods. I agree with the statement but I must add that the Appellant ought to have supported this contention with evidence. The failure to produce the documents alluded to in the submissions was so detrimental that even Article 159 (2) of the Constitution of Kenya cannot be of help.

25. On the issue of control, the Trial court found that the Appellant and the 1<sup>st</sup> Respondent had no relationship and I am inclined to agree. The goods that are said to have been in the go down were in the hands of the 2<sup>nd</sup> Respondent. I note that the Appellant also admitted that there was no agreement between him and the 2<sup>nd</sup> Respondent for him to keep the goods and for how long. If liability were to be apportioned, then the 2<sup>nd</sup> Respondent would be responsible for the goods. On the other hand, the assumption that the 2<sup>nd</sup> Respondent had leased the premises to the Appellant was baseless as there was no such evidence. I therefore find that the goods were in control of the 2<sup>nd</sup> Respondent and it was liable for any loss, damage, sale or auction.

26. The second issue is whether the distress for rent was lawful. The Trial court found that it was lawful and gave reasons for its finding. Section 19 (1) of the Distress for Rent Act provides as follows;

***“(1) If a superior landlord levies, or authorizes to be levied, a distress on any furniture, goods or chattels of—***

***(a) an under-tenant liable to pay by equal instalments not less often than every quarter of a year a rent which would return in any whole year the full annual value of the premises or of such part thereof as is comprised in the under-tenancy; or***  
***(b) a lodger; or***

**(c) any other person not being a tenant of the premises or of any part thereof, and not having any beneficial interest in any tenancy of the premises or of any part thereof,**

**for arrears of rent due to the superior landlord by his immediate tenant, the under-tenant, lodger or other person may serve the superior landlord, or the licensed auctioneer or other agent employed by him to levy distress, with a declaration in writing made by the under-tenant, lodger or other person, stating that the immediate tenant has no right of property or beneficial interest in the furniture, goods or chattels so distrained or threatened to be distrained upon, and that the furniture, goods or chattels are the property of or in the lawful possession of the under-tenant, lodger or other person, and are not goods or livestock to which this section is expressed not to apply; and also, in the case of an undertenant or lodger, stating the amount of rent (if any) then due to his immediate landlord, and the times at which future instalments of rent will become due, and the amount thereof, and containing an undertaking to pay to the superior landlord any rent so due or to become due to his immediate landlord, until the arrears of rent in respect of which the distress was levied or authorized to be levied have been paid off.”**

27. The 2<sup>nd</sup> Respondent did not object to the auction on the grounds he raises herein. Even so, what led to distress was a case before court and that decision still stands, it has not

been appealed and that is not what is before this court. To scrutinize how the proclamation and auction was done is not within the purview of this court at this time. There are procedures and jurisdictional issues that arise.

28. It is not in dispute that the Appellant was not a tenant of the 1<sup>st</sup> Appellant and that the 3<sup>rd</sup> Respondent distressed for rent in accordance with the law. The Appellant only had to object to the proceedings in accordance with section 19 above but he failed to do so. Further, the appellant contends that the distress for rent was unlawful, fraudulent, there was conversion, alienation and illegal proclamation but has not provided any evidence of the same. As such, this ground fails.

29. The last question is whether the Appellant is entitled to the orders sought. As regards the orders against the 1<sup>st</sup> and 3<sup>rd</sup> Respondent who strongly objected to the Plaintiff and proved their case on a balance of probabilities, I find that they had a stronger case and thus the Appellant's claim against them fails.

30. As regards the orders against the 2<sup>nd</sup> Respondent, the Appellant has raised the issue of the failure of the 2<sup>nd</sup> Defendant to file a defence was raised before the court on 27/09/2023 and the Trial Court proceeded to make a ruling to wit that the Replying affidavit will suffice in place of a witness statement. The court stated as follows;

***“ That even without a defence on record, the use of an affidavit in place of a witness statement does not prejudice the 1<sup>st</sup> Defendant or any other party in any way.***

***Suffice it to state that the court is also minded of its duty under Article 159 of the Constitution to exercise judicial authority and administer justice without undue regard to procedural technicalities”***

31.This cannot stand as order 7 rule 1 is couched in mandatory terms. It provides as follows;

***“Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.”***

32.Failure to file a defence cannot be a procedural technicality as it goes to the root of the claim. Filing a defence is not optional and that is why the Civil Procedure Rules 2010 were drafted. I therefore find that the Trial Court did err on this finding. I also find that the case against the 2<sup>nd</sup> Respondent was proven and because of his failure to pay rent, there was a proclamation and consequently, the Appellants goods which were under his care were taken. Thus, he ought to compensate the Appellant.

33.As regards the 4<sup>th</sup> Respondent herein who was the Interested party, I find the finding of the Trial court in order in as far as he ought to have pursued a suit for the compensation he seeks for consideration. The Interested party has gone ahead to defend his claim in this court yet his submissions have no legs to stand on, there was no cross appeal or suit in the first place. His claim therefore fails.

34.In the end, the Appeal partially succeeds and I find as follows;

- a. **The claim against the 1<sup>st</sup> and 3<sup>rd</sup> Respondent is dismissed.**
- b. **The 2<sup>nd</sup> Respondent is found liable to compensate the Appellant for general damages.**

Orders accordingly.

**Judgment signed, dated and delivered virtually this 4<sup>th</sup> December, 2025.**

**E. N. MAINA**  
**JUDGE**

**IN THE PRESENCE OF:**

Mr. Ndingi for the Appellant

Ms Narosoi for Sang for 1<sup>st</sup> and 3<sup>rd</sup> Respondents

Mr. Simiyu for 4<sup>th</sup> Respondent

ORIGINAL