

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
PETITION NO. E034 OF 2024

**IN THE MATTER OF ARTICLES 1, 2, 20, 21, 22, 23, 27, 28, 31, 40, 46, 48, 258 & 259 OF
THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF THE DISTRESS FOR RENT ACT

AND

IN THE MATTER OF THE VALUE ADDED TAX, 2013

AND

**IN THE MATTER OF SECTION 71 OF THE ENGLISH TRIBUNALS, COURT AND
ENFORCEMENT ACT 2007**

AND

**IN THE MATTER OF THE ENGLISH TRIBUNALS COURT AND ENFORCEMENT
ACT 2007 (COMMENCEMENT NO 11) ORDER 2014**

BETWEEN

ANYTIME LIMITED.....PETITIONER

VERSUS

MOHIB TEHERALI ABDUL HUSSEIN.....1ST RESPONDENT

**KENNEDY SHIKUKU T/A ESHIKHONI AUCTIONEERS.....2ND
RESPONDENT**

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

KENYA REVENUE AUTHORITY.....INTERESTED PARTY

JUDGMENT

1. I delivered a Ruling in this matter on 28/03/2025 on a Preliminary Objection, in which Ruling I rejected some points of Objection raised and deferred others for determination after the full hearing of the Petition. In the Ruling, I gave a brief description of the Petition filed herein, and set out the prayers made therein as follows:

“2. The background of the matter is that the Petitioner vide the Petition dated 3/12/2024 and filed on 6/12/2024 through Messrs K. Michuki Law Advocates, sought the following lengthy list of prayers:

(a) A declaration that the right to distress for rent ceased to exist or accrue in Kenya on 19th March, 2014 upon commencement of Section 71 of the English Tribunals, Courts and Enforcement Act 2007;

- (b)** *A declaration that the Distress for Rent Act is invalid in so far as it lacks a foundational basis following the repeal of the common law right to distress for rent in England;*
- (c)** *A declaration that the Distress for Rent Act is invalid in so far as it denies, violates, infringes and threatens a tenant's rights to; (i) equality and freedom from discrimination, (ii) human dignity, (iii) privacy, (iv) property, (v) consumer rights, and (vi) access justice*
- (d)** *A declaration that impounding and carting away of the Petitioner's assets by the Respondents was a violation to its rights to; (i) equality and freedom from discrimination, (ii) human dignity, (iii) privacy, (iv) property, (v) consumer rights, and (vi) access justice;*
- (e)** *A declaration that the impounding and carting away of the Petitioner's assets by the Respondents was null and void ab initio;*
- (f)** *A mandatory injunction does issue directing the Respondents to immediately release to the Petitioner; (i) motor vehicle registration number KCH 130B, (ii) motor vehicle registration number KCJ 036T, (iii) 71 containers of 20 litres cooking oil and (iv) goods being ferried in the motor vehicle registration number KCJ 036T worth Kshs.164,435/;*
- (g)** *The Court be pleased to grant compensation in the sum of Kenya Shillings Nine Hundred and Fifty-Seven Two Hundred and Eighty Shillings (Kshs. 957,280/-) for hire of transport;*
- (h)** *The Court be pleased to grant interest on (g) above from the date of filing the suit till payment in full;*
- (i)** *Further to (b) the Court be pleased to grant the Petitioner general, constitutional and aggravated damages for the impounding of its assets;*
- (j)** *A declaration that under the provision of the Value Added Tax Act, 2013, a tax invoice for commercial rent must be issued at the time of the taxable supply, namely; the issuance of the rent invoice;*

- (k)** *A declaration that the 1st Respondent violated the Petitioner's rights to; (i) human dignity, (ii) property and (iii) consumer rights by failing to issue it with tax invoices for the period February, 2022 to date;*
- (l)** *Further to (g) the Petitioner be granted general, constitutional and aggravated damages for the violation of its rights*
- (m)** *A declaration that monies currently held in ABC bank account no. 007243001000793 as rent be utilized, upon payment of the current value added tax, to pay any outstanding value added tax arrears owed to the interested party in relation to rent paid for the period February, 2022 to October, 2023 with a tax invoice being issued to the Petitioner;*
- (n)** *The Petitioner be granted cost of the Petition;*
- (o)** *The Court be pleased to issue any other order it deems fit in the circumstances of the case."*

2. I then summarized the contents of the Affidavit filed in support of the Petition as follows:

“3. The Petition is supported by the Supporting Affidavit sworn by one Ashok Madala who described himself as a Director and Shareholder of the Petitioner. He deponed that the Petitioner has let a Go-Down from the 1st Respondent within Eldoret at a monthly rent of Kshs 240,000/- that is presently paid into a joint account held by the Advocates of the Landlord and the Petitioner, respectively at ABC Bank, the Petitioner has been diligently paying rent since the year 2016 by cheques until the year 2023 when the 1st Respondent instructed the Petitioner to pay Kshs 80,000/- via cheque drawn in his favour and Kshs 160,000/- via Mpesa to mobile number owed by one Khadija Mohib Teherali. He deponed further that in or about the year 2022, the Landlord stopped issuing invoices with ETR Receipts despite the Petitioner's requests, and which are necessary to enable the Petitioner file necessary tax returns.

4. He deponed further that in November 2023, given the impasse regarding the issuance of ETRs, the Petitioner decided to withhold the payment of Kshs 160,000/- that was being paid via mobile money until issuance of the ETR Receipts, that the 1st Respondent, in response, instead of issuing the ETR Receipts as required by law, procured the services of the 2nd Respondent (Auctioneers) who duly proceeded

to proclaim the Petitioner's assets in an attempt to distrain for rent. He deponed that the Petitioner moved to the Business Premises Rent Tribunal and filed the Eldoret Reference No. E012 of 2024 against the 1st Respondent, which was concluded vide the Ruling delivered on 29/08/2024 which, inter alia, prohibited the 1st Respondent/Landlord from distraining for rent and ordered that the ETR Receipts be issued to the Petitioner.

- 5. He deponed further that during the subsistence of the Reference before the said Tribunal and while rent was being paid to the joint account as per order of the Tribunal, the 1st Respondent instructed the 2nd Respondent to impound and cart away the Petitioner's property. He claimed that at the time of the Proclamation, there was an order that the Petitioner was entitled to quiet possession of the premises and no rent was owing as it had been duly paid into the joint account as ordered by the Tribunal.*
 - 6. He contended that the right to distress for rent does not exist in Kenya following the abolition of the common law right to distrain for rent in England by the provisions of Section 71 of the Tribunals, Courts and Enforcement Act as at 19/03/2014, that the 1st Respondent, in carting away the said property in alleged distress for rent acted illegally and violated the Petitioner's constitutional rights to equality and freedom from discrimination, human dignity, privacy, property, consumer rights and access to justice, and that without a statutory basis for the right to distrain for rent, the actions of the 1st Respondent were a nullity and their curtailment of the Petitioner's rights was without legal basis. He deponed further that even if such a right to distress was deemed to exist, the fact that rent had been duly paid to the joint account meant that there was no rent owing upon which the right to distress could arise particularly when regard was had to the order of the Tribunal stipulating the Petitioner's quiet possession of the premises, and that the actions of the 1st Respondent to refuse to issue the ETR invoices as and when rent fell due was contrary to the provisions of the Value Added Tax, 2013 and a violation of the Petitioner's consumer rights and right to human dignity.*
 - 7. He further contended that it is necessary that the 1st Respondent do account for VAT for the period February 2022 to date, and that the rent being collected in the account held at ABC Bank should be utilized for the purpose of settling outstanding tax arrears. He averred that as a result of the detention of the Petitioner's motor vehicles by the Respondents, the Petitioner was forced to*
- Eldoret High Court Constitutional Petition No. E034 of 2024**

procure transport services from third parties and whose cost has to date risen to the sum of Kshs 957,280/-. In conclusion, he deponed that the actions of the Respondent have severely affected the Petitioner's operations and given the grievous nature of the violations of the Petitioner's rights, it is imperative that the Court grants the Petitioner damages."

3. I also set out contents of the said Preliminary Objection filed by the 1st Respondent, dated 11/01/2025, and filed through **Messrs Kariuki Mwaniki & Co. Advocates**. By the consent of the parties, the Preliminary Objection was dealt with first, as already pointed out above. I set out the contents of the Preliminary Objection as follows

- "i) The Petition fails to disclose with precision and particularity any constitutional violations by the Respondents. No material or fact disclosing a violation denial or infringement of a fundamental right as envisaged under the Constitution of Kenya, 2010 is contained in the Petition.*
- ii) The reliefs sought, that is, mandatory injunction and compensation are of a commercial nature obtained under civil law and not a Constitutional Petition.*
- iii) The Petition offends the doctrine of ripeness and constitutional avoidance.*
- iv) The issues raised are res-judicata having been raised and determined at the Business Premises Rent Tribunal.*
- v) The Petition acts like an appeal against the decision of the Business Premises Rent Tribunal."*

4. To put the matter in full context, I also set out the orders I made in my said Ruling dated 28/03/2025, as follows:

"46. In premises, I order and rule as follows:

- "i) I find that the Petition herein, to the acceptable standards, discloses with precision and particularity the constitutional violations or infringements alleged therein.*
- ii) The Petitioner, being a limited liability company, I find nothing that would exclude, or bar it, from enjoying the nature of the constitutional rights alleged to have been infringed or violated herein, namely, right to privacy,*

right to property, consumer rights, right to access to justice, right to equality, and freedom against discrimination.

iii) The rest of the issues raised in the 1st Respondent's Notice of the Preliminary Objection dated 11/01/2025 will however only be determined upon full hearing of the Petition as they would require consideration of rival factual matters.

iv) However, before the Petition is heard, the parties will first be given the opportunity to address the Court on whether this action should be retained in this Court for hearing and determination, or whether it should be transferred to the Environment and Land Court.

v) Costs shall be in the Cause.”

5. Regarding the issue whether this matter should be transferred to the **Environment and Land Court (ELC)**, **Mr. Michuki**, Counsel for the Petitioner, informed me subsequently, that the issue does not arise because this matter had initially indeed been filed at the **ELC** as **Nairobi ELC Petition No. E083 of 2024**, but was struck out by way of the Ruling delivered by **Ogutu-Mboya J.** I directed Counsel to supply the Court with a copy of the Ruling but he does not seem to have so complied as I have not come across the copy. I have however, on my own, conducted a search in the **Kenya Law Reports** portal and indeed, I have come across such Ruling delivered by the Judge on 31/12/2024. The issue whether this matter should have been filed at the **ELC** is now therefore laid to rest.

6. Having set out the above, the Preliminary Objection having now been dealt with, and the parties having agreed that the Court now deals with the Petition and renders one Judgment that will subsume all other matters arising, including giving directions on payment of the Auctioneer's costs arising from the distress for rent levied, I will now recount the responses filed against the Petition.

1st Respondent's Replying Affidavit

7. The 1st Respondent, **Mohib Teherali Abdul Hussein**, relied on the Replying Affidavit he swore on 11/01/2025, filed through **Messrs Kariuki Mwaniki & Co. Advocates**.

8. He deponed that the Petition and the facts therein are similar to what was canvassed in **Business Premises Rent Tribunal in Eldoret BPRT Case No. E012 of 2024** between the same parties, a determination made and no Appeal preferred. According to him therefore, the Petition is an Appeal against determination of the **BPRT**. He deponed further that the **BPRT Eldoret High Court Constitutional Petition No. E034 of 2024**

ordered that the rent arrears which amounted to Kshs 800,000/- be deposited in a joint escrow account within 7 days pending determination of rent owing and parties exchange of statement of accounts in 14 days, and **ETR (Electronic Tax Register)** Receipts. He urged further that thereafter on 3/04/2024, a consent was adopted that the amount in the joint account be released to the Landlord who was to issue **ETR** Receipts upon payment of rent in cleared funds within 5 days. He added that the **BPRT** rendered its determination on 29/08/2024 whereof it allowed both parties' respective Applications partially, to the effect that the consent order dated 3/04/2024 was set aside, the Landlord was repossessed from levying distress for rent, the rent arrears in the escrow account was ordered to be released to the Landlord who was to, within 7 days, issue **ETR** Receipts, failure upon which the Tenant would be at liberty to withhold further rent payment and apply for further directions, and that lastly, each party was to bear his own costs. He denied any knowledge of the allegation that the 3rd Respondent carted away a motor vehicle and goods belonging to the Petitioner, however after the said Ruling delivered on 29/08/2024, he asked the Petitioner to collect whatever property the Auctioneer had and to settle the storage charges. He also denied that any order existed requiring quiet possession however the failure by the Petitioner to pay rent as directed by the **BPRT** means that the Petitioner was in contempt of the said orders and the 1st Respondent therefore had a right to levy distress, which right under the **Distress for Rent Act, Cap. 293**, is not unconstitutional.

9. He reiterated that if the Petitioner were aggrieved by the decision of the **BPRT**, then his recourse was to file an appeal, otherwise the issues raised herein are *Res Judicata*. He contended further that after the said Ruling of the **BPRT**, the Petitioner filed an Application seeking release of the motor vehicle and other goods held by the Auctioneer, which prayers are similar to those now being sought in the instant Petition, and which Application was dismissed for want of prosecution, and that it is surprising that more than 2 years later, the Petitioner decided to file the present Petition in the same issues which were at the **BPRT**. He urged further that the Petitioner, notwithstanding being a company has camouflaged these issues which were addressed by the **BPRT** to be constitutional issues of human rights which however belong only to individual humans, and not a company such as the Petitioner. He asserted that what is contained in the Petition is a commercial dispute which is the purview of a Civil Court, and also that the Petition does not disclose with precision and particularity, the alleged constitutional violations. He also denied that he had declined to issue **ETR** Receipts and claimed that he in fact issued one deposited in the joint escrow account. He also pointed out that no tax demand from the Interested Party, **Kenya Revenue Authority (KRA)**, has been exhibited to demonstrate that the Petition is genuine and has not been

simply filed to deny the 1st Respondent his rent. In the end, he implored the Court to invoke the doctrine of “**ripeness**” and “**constitutional avoidance**” to ensure that the constitutional jurisdiction of the Court is not misused.

3rd Respondent’s Grounds of Opposition

10. On its part, the 3rd Respondent, **Attorney General**, through **Principal State Counsel, Winnie Cheruiyot**, filed the Grounds of Opposition dated 16/09/2025. Counsel denied that **Section 3** of the **Distress for Rent Act** is in violation of **Article 24** of the **Constitution**, or the various constitutional rights alleged in the Petition. She pointed out that there is a general presumption that that statutes are constitutional and it is the onus of the Petitioner to establish that the **Act** is unconstitutional. She also asserted that **Section 3** of the **Distress for Rent Act** stipulates that the right to distress for rent is subject to the **Act** and any other laws, and that therefore, as such, it is not only the common law that gives it life. She also asserted that Landlords have a right to enjoy their property under **Article 40** of the **Constitution** and as such, that right extends to the right to enjoy rental income therefrom, and thus the right to distrain for rent.

Interlocutory Consent Orders recorded

11. I may also state that two Interlocutory Applications were settled by way of the consent dated 4/01/2025 whereof it was basically agreed that the rent arrears held in the escrow account be released to the 1st Respondent as Landlord, and in exchange, the Auctioneer, 1st Respondent, do release the distrained goods to the Petitioner upon the Petitioner settling the storage fees of Kshs 210,000/-. It was also agreed that payment of the Auctioneer’s costs do await final determination of the Petition, and that if the Petitioner is successful, then the 1st Respondent shall refund the storage fees paid by the Petitioner.

Written Submissions

12. I then gave the parties leave to file written Submissions. However, only the Petitioners filed the Submissions dated 17/10/2025, while the 1st Respondent’s and the 3rd Respondent’s, both filed respective Submissions dated 15/02/2025. I have not come across any response or Submissions filed by the Interested Party, **Kenya Revenue Authority (KRA)**, although **Ms. Nyakundi**, its Counsel, appeared in several Court sessions and informed the Court that she will not be participating in the matter as the dispute does not concern the Interested Party.

Petitioner’s Submissions

13. **Mr. Michuki**, the Petitioner's Counsel submitted that the **Distress for Rent Act** is a colonial statute that imported to Kenya the common law right to distress as it existed in England, which right no longer exists as it was abolished under **Section 71 of the English Tribunals, Courts and Enforcement Act, 2007**, which Act came into effect in April 2014. He urged that corresponding abolishment is a matter of implication, and cited several authorities. He contended that a law that permits landlords to seize goods without judicial oversight violates the right to property under **Article 40 of the Constitution**, right to fair administrative action under **Article 47**, and right to consumer rights under **Article 46**. He urged further that even if the 1st Respondent had a right to distrain, that right had not accrued since at the time that it was exercised the Petitioner had complied with the **BPRT's** orders to deposit funds into a joint account. The rest of the matters he submitted are restatements of those already recounted.

1st Respondent's Submissions

14. The 1st Respondent's Counsel, **Mr. Kariuki Mwaniki**, began by submitting that the Ruling delivered herein in respect to the Preliminary Objection has fortified the points of law that had been raised by the 1st Respondent. He thus reiterated the contention that this Court lacks jurisdiction to entertain this Petition since just as a Court cannot assume jurisdiction not granted by law, a Kenyan statute cannot also be invalidated by legal developments in a foreign jurisdiction. He also contended that the Ruling affirmed the 1st Respondent's contention that the dispute herein is a commercial landlord-tenant matter, not a constitutional dispute, which is not a first-resort mechanism for settling private contractual disputes. He also reiterated that the parties herein had already availed themselves of statutory tribunals (**BPRT**) and most conclusively entered into a binding consent order that effectively resolved the underlying debt. According to him therefore, the Petition represents an unwarranted attempt to use constitutional litigation as a collateral appeal from a settled outcome. He also submitted that the Ruling affirmed the observation that the Petition fails to demonstrate with precision any alleged violation of the **Constitution** as set out in the **Anarita Karimi Njeru v R case**. Counsel submitted further that by complying with the initial requirements of the consent order recorded at the **BPRT**, whereof the Petitioner released the first batch of funds, the Petitioner's conduct constituted an unequivocal admission of the debt due and now acts as an estoppel against the Petitioner's current denial of the debt. He thus submitted that any complications that may have arisen subsequently, are a direct result of the Petitioner's failure to fully comply with the consent order. Regarding the Petitioner's contention that the **Distress for Rent Act** is no longer applicable in Kenya, Counsel termed that contention as a profound legal fallacy that fundamentally misconceives the doctrine of received law and

constitutes a direct attack on the sovereignty of Parliament, considering that the **Reception Clause** in **Section 3(1)(c) of the Judicate Act** was a one-time historical event and as such, the **Distress for Rent Act**, having been incorporated and subsequently enacted, domesticated and amended by the Kenyan Parliament is now a purely domestic law in respect to which any subsequent legislative change, amendment, or outright repeal in its country of origin has absolutely no legal effect, validity or applicability. He cited **Article 94** of the Constitution.

15. He stated further that in any event, **Section 3(1)** of the **Distress for Rent Act** is clear that the **Act** derives its validity from the historic common law only to the extent preserved by Kenyan statute. On affirmation by Kenyan Courts that the **Distress for Rent Act** is valid in Kenya, he cited the case of **Omondi v Kassam & Another (Civil Appeal E018 of 2024)**. He then echoed the **Attorney General's** contention that there is a general presumption that statutes are constitutional, and it is thus the onus of the Petitioner to establish that the Act is unconstitutional, which onus, according to him, the Petitioner has not discharged. He, too, tied the Landlord's right to distress for rent to the Landlord's right under **Article 40** of the **Constitution** to property and to enjoy his rental income. Counsel submitted that further that further proof that the Act has its own subsisting validity and operational framework is the fact that at **Section 15**, it contains its own in-built remedy mechanisms in instances where distress for rent has been unlawfully or irregularly levied, and which remedy is limited to a claim for damages. In response to the allegation that the right to distress for rent had not yet accrued, Counsel reiterated that by authorizing release of the escrowed funds as stipulated in the consent order recorded at the **BPRT**, the Petitioner admitted that those funds constituted outstanding rent due and is now estopped from denying such accrual of rent arrears. He cited the case of **Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR**, and submitted that the Petitioner cannot approbate and reprobate. He also criticized the Petitioner's attempt to rely on an alleged **VAT (Value Added Tax)/ETR** dispute to justify non-payment of rent urging that there exists no statutory provision subordinating the Landlord's right to distress for rent to compliance with tax documentation, the two being independent covenants. He submitted further that even if any irregularities in the process of distress were to be demonstrated, any grievances arising therefrom ought to be directed to the Auctioneer who is independent, and for whose acts the Landlord is not vicariously liable. The rest of the matters he submitted are also basically repetitions of matters already recounted.

3rd Respondent's Submissions

16. For the 3rd Respondent (the **Attorney General**), **State Counsel Ms. Cheruiyot**, too, refuted the contention that the **Distress for Rent Act** is no longer applicable in Kenya because of repeal of the **Distress for Rent Act** of England. She raised arguments more or less similar to those raised by the 1st Respondent. She, too, submitted that the Kenyan Act can only be repealed by the Kenyan Parliament, and contended that the Petitioner has a right, under the provisions of **Article 119** of the **Constitution** to petition Parliament to re-look at the Act. She, too, submitted that the Petition offends the doctrine of “*ripeness*” which dictates that a party ought to demonstrate that there is imminent danger, and not just an illusion if the Court’s intervention is sought. He cited the case of **Katiba Institute & 4 Others v Attorney General & 3 Others: Inuka Kenya ni Sisi & Another (Interested Parties) (Petition E234 of 2025 [2025] KEHC 12779 (KLR) (Constitutional and Human Rights) (18 September 2025) (Ruling)**. She again cited the provisions of **Section 3(1)** of the **Distress for Rent Act**, which, she reiterated, subjected the **Distress for Rent Act** to other written laws, which according to her, includes the **Constitution**, and statutes such as the **Auctioneers Act**, the **Fair Administrative Actions Act**, and the **Law of Contracts**, among others. She urged the Court to uphold the spirit of separation of powers and let Parliament have the chance to undertake legislative procedure on the **Act**. Counsel also submitted that under the provisions of **Article 156** of the **Constitution** and the **Office of the Attorney General Act**, the role of the 3rd Respondent does not include repealing, enacting or amending of statutes, and as such, it is Parliament that ought to have been sued, and given a hearing as required under the rules of natural justice enshrined in **Article 47** of the **Constitution**. According to her therefore, the failure to join Parliament in this matter is fatal to the Petition.

Determination

17. The issues that arise for determination in this matter, include some of those that were placed before me as points of Preliminary Objection, some which I dealt with but which have again found their way back, and some which I deferred for determination after full hearing. At the moment therefore, I can summarize the issues as follows:

- i) **Whether the issues raised in the Petition are *Res Judicata* having been determined the Business Premises Tribunal.**
- ii) **Whether the Petition is therefore an Appeal in disguise.**
- iii) **Whether the Petition offends the doctrine of ripeness and constitutional avoidance.**

- iv) Whether the failure to join Parliament in this Petition is fatal to the Petition.
- v) Whether the Petitioner, being a limited liability company, can enjoy or claim the nature of constitutional rights alleged to have been infringed herein.
- vi) Whether the reliefs sought in the Petitioner are civil in nature, and thus not constitutional.
- vii) Whether the Petition discloses with precision and particularity the constitutional violations alleged.
- viii) Whether the Kenyan Distress for Rent Act is no longer applicable in Kenya owing to repeal in England of the similar statute from which the Kenyan Act was adopted.
- ix) Which party should pay the Auctioneer's costs arising from the distress for rent levied?

18. As far as the facts of this case are concerned, the first 3 issues are closely intertwined and I will deal with them together.

19. In my said Ruling delivered on 28/03/2025, while dealing with the issue whether the Petition offends the doctrine of "*ripeness*" and "*constitutional avoidance*", I cited the case of **Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others Pet. 14A, 14B & 14C of 2014 of [2014] eKLR** in which the Supreme Court remarked as follows:

"[105]. We shall now turn to the Constitutional-Avoidance Doctrine. The doctrine is at times referred to as the Constitutional-Avoidance Rule. Black's Law Dictionary, 10th Edition at page 377 defines it as:

"The doctrine that a case should not be resolved by deciding a constitutional question if it can be resolved in some other fashion"

20. I also cited the case of **KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling)**, in which Mativo J (as he then was), also made the following comments:

“32. The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in *Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others* (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis. In the South African case of *S v Mhlungu* (supra) Kentridge AJ, stated in the dissenting opinion respecting the principle of avoidance (at paragraph 59), that he would lay down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed

21. Another statement I cited was that made by Lenaola J (as he then was), in the case of *Uhuru Muigai Kenyatta vs Nairobi Star Publication Limited* (2013) eKLR that:

“Where there is a remedy in civil law, a party should pursue that remedy and I say so well aware of the decision of *Haco Industries* where the converse may have been expressed as the position. My mind is clear however that not every ill in the society should attract a constitutional sanction as stated in *AG v Dutambala Criminal Appeal No 37 of 1991* (Tanzania Court of Appeal) such sanctions should be reserved for appropriate and really serious occasions ...”

22. I then remarked that the doctrine of “*constitutional avoidance*” does not absolve the Court of its authority to consider and rule on constitutional Petitions. It only prohibits the Court from hearing and making a decision when there is another suitable forum that is capable of doing so.

23. Regarding the issue whether the matters raised in the Petition are *Res judicata* having been determined by the **Business Premises Rent Tribunal (BPRT)**, I stated in the said Ruling that *Res judicata* is a doctrine that bars or denies authority to the Court to deal with a matter that has already been dealt with and determined by another competent Court or Tribunal. It is therefore a jurisdictional doctrine. The purpose of the doctrine is to bar multiple or repeat litigation over the same matter by same persons/litigants. A party seeking to invoke *Res judicata* must therefore establish that the issue now raised in dispute was the same issue in the previous suit, that the issue was determined, that the parties were the same or litigating

under the same parties, and that the determining Court or Tribunal had the appropriate jurisdiction. I then cited **Section 7** of the **Civil Procedure Act** which provides that:

“No Court shall try any suit or issue in which the matter directly or substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such Court ..”

24. I also cited the Court of Appeal case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR**, in which the following remarks were made:

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

25. It is clear that the major litigants in the disputing constating this matter are the Petitioner and the 1st Respondent and the main bone of contention was the 1st Respondent’s move, as Landlord, to levy distress for rent against the Petitioner, its tenant. This is the crux of the matter. It is not in dispute that the said dispute then found its way to the **BPRT** at Eldoret where the Petitioner filed it as **BPRT Case No. E012 of 2024** and was eventually fully and determined.

26. It is not in dispute that in the course of the **BPRT** litigation, the parties on 19/02/2024, recorded an interim consent order which I reproduce as follows:

“i) That parties’ Advocates do open a joint interest earning account in seven (7) days to deposit rent of Kshs 800,000/- pending determination of rent owing and issuance of ETR Receipts.

- ii) That parties to exchange statements of accounts in fourteen (14) days and ETR Receipts.
- iii) That pending inter partes hearing of the Application a temporary injunction is hereby issued restraining the Landlord, Eshikhoni Auctioneers, their agents, servants, and/or personal representatives from levying distress in the Tenant on the basis of the Distress made on 8th February 2024
- iv) That hearing on the 20.03.2024”

27. It is also not in dispute that the BPRT subsequently gave its final determination of the matter by way of its Ruling delivered on 29/08/2024, again reproduced verbatim as follows:

- “a) The consent order dated 3rd April 2024 is hereby set aside.
- b) The Landlord is hereby repossessed from levying distress for rent.
- c) The rent arrears in the escrow account shall be released to the Landlord who shall, within 7 days, issue ETR Receipts failure to which the Tenant shall be at liberty to withhold further rent payment and apply for further directions.
- d) The Tennat shall continue paying rent on or before the 5th of every month and ETR shall follow within 5 days failure to which the Tennat shall be at liberty to withhold further rent payment and apply for further directions: and
- e) Each party was to bear their own costs.”

28. It is also not in dispute that after the said final determination of the **BPRT**, the Petitioner filed an Application seeking release of his motor vehicle and other goods seized by the Auctioneer during the levy of distress for rent, which prayers are also similar to some of those now being sought in the instant Petition, and which Application was dismissed for want of prosecution on 23/09/2024,

29. Having carefully considered the pleadings filed at the **BPRT**, the nature of the dispute litigated, the prayers made, and the final determination made by the **BPRT** as set out above, I am constrained to agree with the 1st Respondent that, save for the newly introduced issue of validity or constitutionality of the **Distress for Rent Act**, the issues and even prayers raised in the instant Petition are the same and/or similar to those that were canvassed between the

Petitioner and the 1st Respondent in the proceedings conducted at the **BPRT**, a full and final determination made and no Appeal preferred. There is therefore ample merit in the 1st Respondent's Counsel's contention that the instant Petition appears to be a disguised Appeal against the determinations made by the **BPRT**.

30. Mr. Kariuki Mwaniki, Counsel for the 1st Respondent, is indeed right in submitting that if the Petitioner were aggrieved by the decision of the **BPRT**, then his recourse was to file an appeal, otherwise the raising of the same issues raised herein appears to be an attempt for a second bite at the cherry through a different forum cleverly disguised as a constitutional dispute. The Court cannot be taken in by the introduction of the alleged new issue that the **Distress for Rent Act** is no longer applicable in Kenya or is unconstitutional. The question is, why did the Petitioner not directly approach the Constitutional Court at the time when the dispute arose? Why choose to go to the **BPRT** and only upon the outcome not going the way the Petitioner hoped, then now belatedly resort to the Constitutional Court? The clever introduction of the one new alleged constitutional issue challenging the validity of the **Distress for Rent Act**, and the introduction of new parties, cannot cure the clear fact that the issues raised herein were fully determined by the **BPRT** and thus constitute a clear case of *Res Judicata*.

31. Even if the matters raised were to be deemed as not being not *Res Judicata* within the strict meaning of that term, they would still be caught up by the closely related principle of *Issue estoppel*. This principle was explained by the House of Lords in the case of *Arnold & Others v National Westminster Bank PLC (1991) 2 A.C* in the following terms:

“Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue.”

32. This *Issue estoppel* principle therefore prevents a party from re-litigating an issue of fact or law that has already been determined in earlier proceedings between the same parties or their privies, or which ought to have been brought or raised at the same time with the rest, even if the subsequent proceedings involve a different cause of action. Like *Res Judicata* therefore, *Issue estoppel* bars a party from asserting a fact that is contrary to a previous determination made by the Court.

33. Although therefore the issue whether the **Distress for Rent Act** is invalid in Kenya following repeal of the common law right to distress for rent in England is obviously a constitutional issue for determination and would be properly placed before this Court as such, as is the question whether the Act is invalid on the ground that it denies, violates, infringes or threatens a tenant's rights to equality, freedom from discrimination, human dignity, privacy, property, consumer rights, and access justice, the manner in which or the avenue through which the Petitioner has placed those issues before this Court cannot be permitted as doing so will be to undermine the proceedings already conducted and concluded before the **BPRT**. Allowing the said avenue will also undermine the express avenue of Appeal stipulated in law.
34. In view of the foregoing, I find merit in **Mr. Kariuki Mwaniki's** argument that the Petitioner had already invoked and subjected himself to a statutory recognized tribunal, namely the **BPRT**, which finally and conclusively determined its grievances on the issue of the distress for rent levying against it. I agree with the 1st Respondent that the Petition represents an unwarranted attempt to use constitutional litigation as a collateral appeal from a settled outcome. The Petitioner cannot therefore be entertained and is clearly for dismissal. Although therefore question whether the Distress for
35. Having found as above, this Petition comes to a screeching halt at this juncture, and it is no longer necessary for me to determine the rest of the issues raised.
36. Regarding the issue of who shall bear the costs of the distress for rent levied by the 2nd Respondent, **Kennedy Shikuku trading as Eshikhoni Auctioneer**, it follows that with the Petition herein now declined, the distress for rent levied remains unimpeached, and its legality unquestioned. As such, the Petitioner cannot escape bearing the costs of the distress for rent levied.

Final Orders

37. In premises, the Petition dated 23/12/2024 is hereby dismissed with costs to the 1st Respondent (Anytime Limited), and 3rd Respondent (**The Hon. Attorney General**) only, the 2nd Respondent not being an integral party and the Interested Party (**Kenya Revenue Authority**) not having filed any response.
38. In view of the above, it is the Petitioner who has to bear the costs of the levy of distress for rent the subject hereof, including the costs of the Auctioneer, the 2nd Respondent. As such,

the issue of refund of fees paid by the Petitioner as storage fees in accordance with the consent order dated 4/01/2025 no longer arises.

39. The Auctioneers fees may therefore be negotiated and agreed upon or in the alternative, the Auctioneer is at liberty to file his Bill of Costs for taxation in the normal manner.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF APRIL 2026

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WANANDA JOHN R. ANURO
JUDGE

Delivered in the presence of:

Mr. Mburu h/b for Michuki for the Petitioner

N/A for other Respondents or Interested Party

Court Assistant: Brian Kimathi