

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT VOI**

**ELC APPEAL NO. E015 OF 2025**

**JUDITH WABOSHA MWAMBURI**

**T/A KADDY FASHION AND SUPPLIES.....**

**.....APPELLANT**

**=VERSUS=**

**MBOLOLO USHIRIKA COMPANY LTD .....**

**RESPONDENT**

***(Being an appeal from the Judgment of the Business Premises Rent Tribunal at Mombasa in Reference No. E057 of 2022 delivered by Hon. Gakuhi Chege on 4th July 2025)***

**JUDGMENT**

1. This is an appeal arising from the judgment of the Business Premises Rent Tribunal hereinafter referred to as the Tribunal delivered on 4th July 2025 in Reference No. E057 of 2022. By that judgment, the Tribunal dismissed the Appellant's amended reference dated 24th January 2023 with costs to the Respondent.

2. The Appellant is a tenant at the Respondent's premises situated on Plot No. LR 1956/31, Voi. She operates her business under the name and style Kaddy Fashion and Supplies. On or about 10th November 2021, the Respondent, through its authorised auctioneers Messrs Murphy Merchants Auctioneers, levied distress for rent upon the Appellant's goods at the suit premises. The Appellant contended before the Tribunal that the distress was unlawful on two main grounds: first, that she was not in rent arrears; and second, that she was not a party to or named in the court order issued by the Chief Magistrate's Court at Voi in RMCC Miscellaneous Civil Application No. E011 of 2021 dated 4th August 2021, which had ordered police assistance to the auctioneers in respect of other named tenants.

3. In her amended reference, the Appellant sought special damages of Kshs. 9.4 million broken down as follows: Kshs. 4.5 million for loss of valuable properties; Kshs. 1.4 million for loss of business revenue/profit; and Kshs. 3.5 million for a loan allegedly secured to keep the business afloat. She

further prayed for general damages, loss of goodwill and costs.

4. The Tribunal, after considering the evidence adduced by both parties, held that the Appellant had failed to prove that she was not in rent arrears for the material period, that the distress was lawful, and that the Tribunal lacked jurisdiction under the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301) to award the damages claimed. The Tribunal further found that, even if it had jurisdiction, the Appellant had not strictly proved her special damages.
5. The appeal was canvassed by way of written submissions pursuant to the directions of this Court. The Appellant's Memorandum of Appeal is dated 14th July 2025. The Appellant filed written submissions dated 8<sup>th</sup> April 2026 in support of the appeal. The Respondent filed its written submissions dated 24th April 2026.
6. The Appellant's case, as pleaded in the amended reference and amplified in her witness statement and evidence of her witnesses TW1 - the Appellant herself, TW2 - Pauline Muthoni, and TW3 - the auditor, was that the levy of

distress was wrongful and that she suffered substantial loss as a consequence.

7. In her Memorandum of Appeal dated 14th July 2025 and written submissions dated 8th April 2026, the Appellant distilled the grounds of appeal into four main issues:

- (i) whether she was in rent arrears;
- (ii) whether the distress was legal/warranted;
- (iii) whether she was entitled to compensation for wrongful distress;
- (iv) who should bear the costs of the appeal.

8. She relied on the evidential burden of proof principles enunciated in **Raila Amolo Odinga & Another v IEBC & 2 Others (2017) eKLR and Mbuthia Macharia v Annah Mutua & Another [2017] eKLR**, the provisions of **Section 3 of the Distress for Rent Act (Cap 293)**, and various authorities on compensation for unlawful distress.

9. The Respondent, in its written submissions dated 24th April 2025, opposed the appeal in its entirety. It submitted that the distress was lawful under Section 3 of Cap 293 and did not require a court order; the police assistance order of 4th August 2021 was limited to providing security

where necessary and did not confer or limit the right of distress.

10. The Respondent maintained that the Appellant had failed to produce rent receipts for the period March 2017 to January 2020 despite the rent increase notice of 10th August 2016, and that the onus lay on the tenant to prove payment.

11. On jurisdiction, the Respondent relied on Section 12 of Cap 301 and the decisions in **Muthoni v Home Business Sacco & Another [2025] KEHC 3057 (KLR) and Njue & Another v Thiuri [2026] KEELC 2162 (KLR)** to argue that the Tribunal has no power to award general or special damages outside the narrow confines of compensation for goodwill or improvements upon termination of a controlled tenancy

12. Finally, the Respondent contended that the Appellant had not strictly proved any of the heads of special damages, citing the case of **Simon Ndungu Mungai & Another v Overcomers Christian Centre & Another [2019] KECA 914 (KLR) and Mary Nyaboke Sagini & Another v Mary Kerubo Mainye [2020] eKLR.**

13. From the Memorandum of Appeal, the written submissions of both parties and the record of appeal, the following issues crystallise for determination:

**i. Whether the Tribunal erred in law and fact in holding that the Appellant was in rent arrears and that the distress for rent was lawful.**

**ii. Whether the Tribunal had jurisdiction under Cap 301 to grant and assess the damages claimed by the Appellant.**

**iii. If the answer to (ii) is in the affirmative, whether the Appellant proved her claim for special and general damages to the required standard.**

**iv. What orders should the Court make on costs and otherwise?**

14. Section 3(1) of the Distress for Rent Act (Cap 293) provides that a landlord having rent in arrear and due may exercise the common law remedy of distress without the need for a court order. As correctly observed by the Respondent and affirmed in **Royal Gardens Hospital v Ebrahim Omenyi Ambwere & Another [2018] KEHC 4891 (KLR)**, the right to distress is extra-judicial and is

founded on the existence of rent arrears. The court order of 4th August 2021 merely directed police assistance to the auctioneers pursuant to Rule 9 of the Auctioneers Rules where resistance or breach of the peace was anticipated. It did not constitute the legal basis for the distress itself, nor did it limit distress to only named tenants.

15. The Appellant's contention that her non-inclusion in that order rendered the distress unlawful is therefore misconceived.

16. On the question of rent arrears, the Tribunal correctly placed the evidential burden on the Appellant to prove payment of rent for the disputed periods, particularly after the rent increase notice dated 10th August 2016 took effect on 1st November 2016 (Section 10 of Cap 301). The Tribunal expressly found at paras 58-59 and 62 of its judgment (pp. 327-328 ROA) that the Appellant failed to produce rent receipts covering the period March 2017 to January 2020 despite the Respondent's demand notice of 18th January 2017.

17. This Court, upon re-evaluation of the evidence in line with the first appellate duty articulated in **Kenya Ports Authority v Kuston (Kenya) Limited (2009) 2 EA 212**, agrees with the Tribunal's finding. The Respondent's evidence, including the unchallenged rent increase notice and demand letter, was sufficient to shift the evidential burden, which the Appellant did not discharge.
18. The Tribunal did not err. The Appellant was in rent arrears for the material period, and the levy of distress was lawful and regular. This ground of appeal fails.
19. The jurisdiction of the Business Premises Rent Tribunal is circumscribed by Section 12 of the Landlord and Tenant (Shops, Hotels and Catering Establishments) Act (Cap 301). The Tribunal's powers are limited to matters relating to rent, controlled tenancies, termination, and specific statutory compensation for goodwill or improvements upon termination (Section 12(1)(l)). It does not extend to the assessment or award of general or special damages for alleged wrongful distress or other tortious claims. This position was authoritatively settled in **Muthoni v Home Business Sacco & Another [2025]**

**KEHC 3057 (KLR) and Njue & Another v Thiuri [2026]**

**KEELC 2162 (KLR)**. Any claim for damages arising from an alleged unlawful distress lies before a court of competent civil jurisdiction and not the specialised Tribunal. The Tribunal correctly so held.

20. The Tribunal correctly held that it lacked jurisdiction to grant the damages sought by the Appellant. This Court, sitting in its appellate jurisdiction, equally cannot confer upon itself jurisdiction that the Tribunal did not possess. This ground of appeal must fail.

21. Even if the Tribunal had jurisdiction, the Appellant's claim for special damages would still fail for want of strict proof. Special damages must be specifically pleaded and strictly proved. See the case of **Hann v Singh (1985) KLR 716**. The inventory/list of goods (Tenant Exhibit 7), the sales book (Tenant Exhibit 8), and the loan documents were all prepared by the Appellant herself or derived from data she supplied. None were corroborated by invoices, receipts, supplier statements, or independent evidence of purchase, valuation, or actual loss. The auditor (TW3) conceded that the accounts were based solely on the

Appellant's data and were undated. The loan of Kshs. 3.5 million (November 2021) post-dated the distress and was not shown to be causally linked to it.

22. The Court of Appeal decisions in **Simon Ndungu Mungai & Another [2019] KECA 914 (KLR) and Mary Nyaboke Sagini & Another [2020] eKLR** as relied upon by both the Tribunal and the Respondent are directly on point and were correctly applied.

23. The claim for general damages and loss of goodwill similarly lacks a statutory or evidentiary basis under Cap 301 in the context of a non-terminated tenancy.

24. The Appellant failed to prove her damages to the required standard. This ground equally fails.

25. Although the Respondent has substantially succeeded in this appeal, this Court is of the considered view that each party should bear its own costs.

26. In the exercise of its discretion under Section 27 of the Civil Procedure Act (Cap 21), and taking into account the nature of the landlord-tenant dispute and the broader interests of justice, the Court directs that each party shall bear its own costs of the appeal.

27. In conclusion, it is the finding of this Court that the Appeal is unmerited and the same is dismissed in its entirety. Each party to bear own costs of the appeal.

**Dated, Signed and Delivered Virtually at Voi this 30<sup>th</sup> day of April, 2026.**

**E. K. WABWOTO  
JUDGE**

**In the presence of: -**

**Mr. Motuka for the Appellant.**

**Mr. Hussein h/b for Ms. Ali for the Respondent.**

**Court Assistant: Mary Ngoira.**