



Anytime Limited v Hussein & 2 others; Kenya Revenue Authority (Interested Party) (Petition E034 of 2024) [2025] KEHC 3944 (KLR) (28 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3944 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
PETITION E034 OF 2024**

JRA WANANDA, J

MARCH 28, 2025

**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

AND

MOHIB TEHERALI ABDUL HUSSEIN 1ST RESPONDENT

KENNEDY SHIKUKU T/A ESHIKHONI AUCTIONEER 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

KENYA REVENUE AUTHORITY INTERESTED PARTY

RULING

1. This Ruling is in respect to a Preliminary Objection.



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.



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 distraint 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 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.



8. In response to the Petition, the 1st Respondent, through Messrs Kariuki Mwaniki & Co. Advocates, filed the Replying Affidavit sworn 11/01/2025 together with the Preliminary Objection of the same date. By the consent of the parties, it was agreed that the Preliminary Objection be heard and determined first.
9. The Preliminary Objection is framed 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.

Hearing of the Preliminary Objection

10. The Preliminary Objection was heard by way of written Submissions. The 1st Respondent filed the Submissions dated 28/01/2025 while the Petitioner filed the Submissions dated 4/02/2025.
11. On her part, Ms. Nyakundi, who appeared for the Interested Party, Kenya Revenue Authority, informed the Court that the Interested Party is not a party to the dispute herein and thus would not be filing any response or Submissions. On the part of the 2nd Respondent (Auctioneer), there is indication that Messrs Njuguna & Co. Advocates is on record for him but the law firm, too, did not file any response or Submissions. The 3rd Respondent (Hon. Attorney General) does not seem to have participated in this matter at all so far.

1st Respondent's Submissions

12. Counsel for the 1st Respondent submitted that the threshold of what constitutes a constitutional Petition is as per the principle established in the case of Anarita Karimi Njeru v The Republic [1979] and restated by the Court of Appeal in the case of Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others, namely, that a constitutional Petition should set out with a degree of precision the Petitioners complaint, the provision infringed and the manner in which they are alleged to be infringed.
13. He pointed out that the Petitioner recognizes that Section 3 of the *Distress for Rent Act* provides for distress for rent where there are arrears but does not state what constitutional rights were infringed, and that the Petitioner has failed to state what precise Article of *the Constitution* conferring a particular right of the Petitioner has been infringed. He further urged that the Petitioner is a limited liability company and cannot therefore enjoy constitutional rights which are for humans, such as human dignity, privacy, and consumer rights. He also submitted that the mere assertion that the 1st and 2nd Respondents impounded and carted away the Petitioner's property does not make the act unconstitutional. He then pointed out that the Petition seeks in prayers (f) (g) and (h), a mandatory injunction, and compensation of Kshs 957,280/- which according to Counsel, are issues that are res judicata having been dealt with



by the Business Premises Rent Tribunal in BPRT Case No. E012 of 2024, and that some prayers in the Petition are an appeal from the decision of the Tribunal made on 29/08/2024.

14. Counsel added that in the Reference before the Tribunal, the Petitioner requested the Tribunal to declare the distress of rent undertaken by the 2nd Respondent illegal, and that a further Application was made on 11/09/2024 seeking similar orders as in the Petition. He contended that these issues were determined by the Tribunal which can also determine the issue of the compensation flowing therefrom which is not an issue of a constitutional Court being civil in nature. He cited the case of Damian Beltonte versus Attorney General of Trinidad And Tobago Ca 84 of 2014. According to him, the Petition bears no special feature and that if it is the question of declaring the *Distress for Rent Act* ultra vires *the Constitution*, the parties involved would be the Petitioner and the Attorney General as the representative of the State, and that neither the 1st or 2nd Respondent nor the interested parties should be involved since they have no interest in declaring the Act illegal. He urged further that the Petition offends the doctrine of constitutional ripeness and avoidance, and cited the case of Brookside Dairy Limited v Mohamed & Another (Constitutional Petition E339 of 2022) [2022] KEHC 13627 (KLR). In conclusion, he urged that the Petition does not address any constitutional question even if the reliefs sought are similar to those under Article 23(3) of the Constitution.

Petitioner's Submissions

15. On his part, Counsel for the Petitioner submitted that it is a well-established principle that a Preliminary Objection must be based purely on law and must not require further inquiry into factual matters. He cited the locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 and also the case of Aviation & Allied Workers Union of Kenya v Kenya Airways Ltd & Others [2015] eKLR.
16. In respect to the Objection that the Petition fails to disclose with precision and particularity the constitutional violations complained of, he submitted that from its very nature, it is apparent that for the Court to consider the precise and particular nature of the violations it must consider the facts in support of the Petition which is outside the scope of this Court's mandate when considering a Preliminary Objection. In respect to the objection that the reliefs sought in the Petition are commercial in nature and not obtainable through a constitutional Petition, he urged that a cursory glance at Article 23(3) of *the Constitution* of Kenya, 2010 illustrates that injunctions and compensation are some of the appropriate relief that are specifically set out and therefore, it is abundantly clear that a Court exercising its jurisdiction under Article 22 may grant a mandatory injunction or order compensation and as such the demurrer raised by the 1st Respondent must fail. Regarding the objection that the Petition offends the doctrine of "ripeness" and "constitutional avoidance", Counsel maintained that this is an issue that would require factual deposition to establish the same and also to establish whether or what alternative forum the Petitioner is alleged to be avoiding in lodging the Petition before this Court.
17. Regarding the objections that the matters raised herein are res judicata having been determined at the Business Premises Rent Tribunal (BPRT), and that the Petition acts like an Appeal against the decision of the BPRT, Counsel submitted that the same shall be handled concurrently given that they are mutually exclusive in their nature although flowing from the same root. According to him, for this Court to delve into and make a determination as to whether the matter is res judicata or an appeal from the decision of the Tribunal it would need to be furnished with and consider facts which would extricate the matter from the realm of pure law thereby barring its reliance as a Preliminary Objection. In conclusion, Counsel submitted that the grounds raised in the Preliminary Objection require analysis of evidence, which is beyond the scope of a Preliminary Objection. He cited the case of Oraro v. Mbaja [2005] eKLR.



Determination

18. The issues that arise for determination herein are evidently the following:
- i. Whether the challenges raised by the 1st Respondent meet the threshold for a Preliminary Objection.
 - ii. Whether the Petitioner, being a limited liability company, can enjoy the nature of constitutional rights alleged to have been infringed herein.
 - iii. Whether the Petition discloses with precision and particularity the constitutional violations alleged.
 - iv. Whether the reliefs sought in the Petitioner are civil in nature, and thus not constitutional.
 - v. Whether the Petition offends the doctrine of ripeness and constitutional avoidance.
 - vi. Whether the issues raised in the Petition are Res Judicata having been determined the Business Premises Tribunal.
 - vii. Whether the Petition is an Appeal in disguise.
19. Regarding the description of what a Preliminary Objection constitutes, the Supreme Court, in the case of *Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others*, while following the oft-cited decision of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696*, restated the following:
- “a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.
20. The Supreme Court, further in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR*, guided the following:
- “... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”
21. It is therefore evident from the foregoing that as was further held by Ojwang, J (as he then was) in the case of *Oraro v. Mbaja [2005] 1 KLR 141*, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary point, may dispose of the action. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a plea of Res Judicata. A Preliminary Objection therefore raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are



correct, and cannot be raised if any fact is to be ascertained, or if what is sought is the exercise of judicial discretion.

22. Considering the different and/or distinct nature of the challenges raised, it cannot be determined by one blanket verdict whether or not they all qualify as appropriate issues to be raised as Preliminary Objections. While some may meet the threshold, some may not. While some may require the Court to make a determination on two sets of rival facts that are in dispute, some may not. For this reason, I will analyze each issue separately and give a separate verdict on each.

ii. Whether the Petitioner, being a limited liability company, can enjoy the nature of constitutional rights alleged to have been infringed herein

23. This is a pure point of law. Although not included in the Preliminary Objection, the 1st Respondent's Counsel alluded that the Petitioner, being a limited liability company, cannot enjoy constitutional rights which are for human beings. However, upon perusing the Petition, I am satisfied that the nature of the constitutional violations alleged by the Petitioner, namely, right to privacy, right to property, consumer rights, right to access to justice, right to equality and freedom against discrimination, are all available to a limited liability company in the same way as to an individual human being. Indeed, Article 260 of *the Constitution* defines "person" to include "a company, association or other body or persons whether incorporated or unincorporated".
24. For my above view, I find support in the decision of H. Ongudi J in the case of *Brookside Dairy Limited v Mohamed & another* (Constitutional Petition E339 of 2022) [2022] KEHC 13627 (KLR) (Commercial and Tax) (13 October 2022) (Ruling), the decision of E.C. Mwita J in the case of *Kenya Human Rights Commission & another v Non-Governmental Organizations Co-ordination Board & another* [2018] eKLR, and also the decision of Lenaola J (as he then was), in the case of *Al Yusra Restaurant Ltd v Kenya Conference of Catholic Bishops & another* [2017] eKLR.
25. I am no doubt aware of the Court of Appeal case of *Meru County Government v Ethics & Anti-Corruption Commission* [2018] eKLR which could be interpreted to have advanced a contrary finding but I quickly also add that the said authority is distinguishable in that it addressed a situation that is distinct from the one herein, namely, a state organ suing another state organ for alleged constitutional violations, and may thus not therefore apply herein.

iii. Whether the Petition discloses with precision and particularity the constitutional violations alleged

26. I also do not find any difficulty in resolving this issue as a Preliminary matter since all it will require me to do is to simply to peruse and analyze the Petition as drafted.
27. In doing so, I may state that it has been well settled over time that it is a requirement that a Constitutional Petition must set out with a degree of precision the Petitioner's complaint, the provisions infringed, and the manner in which they are alleged to be or to have been infringed.
28. The said principle was enunciated in the leading case in these matters, namely, *Anarita Karimi Njeru v The Republic* [1979] eKLR. The same has been restated in numerous cases, most notably, in the Court of Appeal case of *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR in which the following was stated:

“(39) The issue was raised that the 1st respondent had omitted to frame their case or complaint with precision as required under the High Court's pronouncement in *Anarita Karimi Njeru v The Republic* (1976-1980) KLR



1272. Counsel for the appellant submitted that the petition failed the requirement as it did not state the alleged constitutional provisions violated and the acts or omissions complained of with reasonable precision. Apart from citing omnibus provisions of *the Constitution*, the petition provided neither particulars of the alleged complaints, the manner of alleged infringements or the jurisdictional basis of the action before the court. He maintained that such failure to draft the petition with precision had prejudiced the appellant and the other respondents.

.....

(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the Petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the Petition so as to provide sufficient particulars to which the Respondents could reply. Viewed thus, the Petition fell short of the very substantive test to which the High Court made reference to.”

29. Further at paragraph 87(3) in the same Judgment, the Court stated as follows:

“It is our finding that the Petition before the High Court was not pleaded with precision as required in Constitutional Petitions. Having reviewed the Petition and supporting affidavit we have concluded, that they did not provide adequate particulars of the claims relating to the alleged violations of *the Constitution* of Kenya and the *Ethics and Anti-corruption Commission Act*, 2011, accordingly the Petition did not meet the standard enunciated in the Anarita Karimi Njeru case.”

30. A perusal of the Petition herein reveals that the Petitioner has cited and outlined a number of constitutional provisions which it alleges to have been infringed and/or violated. The facts alleged to support the Petition have also been clearly outlined under part F of the Petition. In view thereof, I am satisfied that the Petition meets the threshold for a Constitutional Petition.

iv. Whether the reliefs sought in the Petitioner are civil in nature, and thus not constitutional

31. It is not in doubt that Article 23(3) of *the Constitution* of Kenya 2010, empowers the Court to grant any “appropriate relief” in any proceedings brought under Article 22 of *the Constitution*. Mativo J (as he then was), in the case of EWA and 2 others v. Director of Immigration and Registration of Persons & another (2018) eKLR , in describing the phrase “appropriate relief”, as used in *the Constitution*, followed the definition adopted by the South African Constitutional Court in the case of Minister of Health & Others v Treatment Action Campaign & Others (2002) 5 LRC 216. In that case, appropriate relief” was defined as as a “relief that is required to protect and enforce *the Constitution*”.

32. Further, Article 23(2) of *the Constitution* provides that:

“In any proceedings brought under Article 22, a court may grant appropriate relief, including

—

- a. a declaration of rights;
- b. an injunction;
- c. a conservatory order;



- d. a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- e. an order for compensation; and
- f. an order of judicial review.”

33. Based on the above therefore, it is evident that the reliefs sought in the Petition are perfectly within the Court’s power to grant in a Constitutional Petition. However, as to whether the facts alleged in support of the prayers justify the Court entertaining the same within this Constitutional Petition, or whether they would be more appropriately determined in an ordinary civil suit, that cannot only be determined after a full hearing of the Petition as it will require consideration and/or interrogation of further material, including factual matters.

v. Whether the Petition offends the doctrine of ripeness and constitutional avoidance

34. Regarding the doctrine of “constitutional avoidance”, the Supreme Court, in 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 stated 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”

35. On the same issue, in the case of KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling), Mativo J (as he then was), remarked as follows:

“ 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

36. Similarly, in the case of Uhuru Muigai Kenyatta v Nairobi Star Publication Limited (2013) eKLR, Lenaola J (as he then was) stated 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 ...”

37. It should be noted that the doctrine of “constitutional avoidance” does not absolve this 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. For a proper determination of this issue, this Court will have to analyze the facts and evidence before it in order to determine it. It is therefore not a pure point of law and it, too, can only be fairly determined after a full hearing of the Petition.

vi. Whether the issues raised in the Petition are Res judicata having been determined by the Business Premises Rent Tribunal

38. 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.

39. The doctrine is entrenched in 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 ..”

40. In respect thereto, the Court of Appeal, in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR, restated the following principles:

“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.”

41. According to the 1st Respondent, the issues raised in the instant Petition were dealt with by the Business Premises Rent Tribunal in BPRT Case No. E012 of 2024. However, apart from merely making sweeping and bare allegations, the Petitioner did not sufficiently attempt to demonstrate which are these issues or matters that were determined by the BPRT. It seems the 1st Respondent, in its wisdom, opted to leave it to the Court to “rummage through” the Pleadings filed before the BPRT and the Ruling(s) emanating therefrom and make a determination on its own. This, the Court will not do for the 1st Respondent.



42. Be that as it may, looking at the prayers and issues raised herein, it is clear that the substantive determination sought herein by the Petitioner is a declaration that the *Distress for Rent Act* is no longer applicable in Kenya owing to the alleged repeal in England, of the common law right to distress for rent, and that it is also generally invalid because it infringes or violates the cited constitutional rights of a Tenant. The other substantive declaration sought is that the 1st Respondent violated the Petitioner's cited constitutional rights by failing to issue it with tax invoices. The rest of the prayers made, flow directly, or are dependent on the successful determination of these specific prayers in favour of the Petitioner. It has not been sufficiently demonstrated that the BPRT made any determination on these prayers.
43. While the claims raised herein, including the issue of ETR Receipts for purposes of the Value Added Tax (VAT) are clearly "related" to the matters raised and determined before the BPRT, it cannot right away be said, without further consideration of factual matters, that the same claims were determined by the BPRT. This is because, while the dispute before the BPRT arose from the 1st Respondent's exercise, as a Landlord, of its right to distress for rent under the *Distress for Rent Act*, unlike herein, the applicability of that Act in Kenya was not in issue, and in any case, the BPRT would not even have the jurisdiction to determine such issue. While it may be argued that the Petitioner is attempting to avail to itself "a second bite at the cherry" before a different forum, my view is that this determination, and also the determination on whether the matters raised herein are Res Judicata, would, again, be only fairly determined after hearing the parties on the full Petition.

vii. Whether the Petition is an Appeal in disguise

44. As in the above Objection on Res Judicata, for this issue, too, apart from merely making a bare allegation, the Petitioner did not make any attempt to demonstrate which are these issues or matters that were determined by the BPRT and which the Petitioner ought to have appealed against, rather than filing this Constitutional Petition. As before, again, the 1st Respondent seems to have opted to leave it to the Court to "search through" the Pleadings and make a determination on its own. Again, my view is that this issue can only be determined after a full hearing of the Petition.

Whether the substantive action should be heard and determined by this Court or whether it should be transferred to the Environment and Land Court (ELC)

45. Before I pen off, I have suo motu raised this issue in light of the provisions of Articles 162(2)(b), and Article 165(5) of *the Constitution*, and also Section 13 of the *Environment and Land Court Act*, but I have chosen not to determine it at this stage. It may not really be an issue of "jurisdiction" but perhaps an issue of whether the matters raised herein, insofar as they arise from matters of collection of rent and Landlord-Tenant relationship, would be more appropriately handled by the specialized Court possessed of the mandate to deal with such matters. Since however neither of the parties raised or addressed this issue, in the spirit of obeying the constitutional principle of the right to be heard, I will first grant the parties the opportunity to address the Court before I make a determination thereon.

Final Orders

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 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.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 28TH DAY OF MARCH 2025

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WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Michuki for the Petitioner

Mr. Kariuki Mwaniki for the 1st Respondent

N/A for other Respondents and Interested Party

Court Assistant: Brian Kimathi

